



**Rage v Director of Public Prosecutions & 2 others (Miscellaneous Criminal Application E022 of 2023) [2023] KEHC 21121 (KLR) (3 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21121 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
MISCELLANEOUS CRIMINAL APPLICATION E022 OF 2023**

**PM MULWA, J  
AUGUST 3, 2023**

**BETWEEN**

**AHMED ABDI RAGE ..... APPLICANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 2<sup>ND</sup> RESPONDENT**

**DIRECTOR, INTERNAL AFFAIRS UNIT ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The application before the court for determination is dated April 24, 2023, brought under Articles 49 (1), 244 (c) and 159 (2) of the *Constitution*. It seeks the following orders:
  - i. Spent
  - ii. An order for stay the execution of the warrant of arrest issued against the applicant by Hon. Boaz Maura Ombewa at the Chief Magistrate’s Court in Kahawa in Misc Criminal App No E083 of 2023 pending the hearing and determination of the application.
  - iii. An order restraining the respondents or any person under their instructions from executing an arrest against the applicant pending the determination and hearing of the application.
  - iv. An order lifting and or setting aside the warrant of arrest issued against the applicant.
  - v. An order restraining the respondents or any person under the instructions from executing an arrest against the applicant.
  - vi. An order granting anticipatory bail pending the conclusion of investigations, charge and or arraignment in court by the respondents.



- vii. An order to call for, examine, and review the Kahawa Misc. file/record in Criminal App No E086 of 2023.
- viii. Any further orders that the court may consider appropriate.
2. The gist of the application is that the applicant is a police officer attached to the Directorate of Criminal Investigations in Embu; he is a husband to Faiza Bashir Adan who has been charged with the offence of giving false information to a person employed in the public service contrary to section 129 (a) of the [Penal Code](#) and obtaining false registration by false pretence contrary to section 320 of the [Penal Code](#); the charge preferred against the applicant is that of colluding with his wife; an arrest warrant against him has been issued by Kahawa Law Courts; that the summons was not served upon him as he had proceeded on leave and the same was sent to the Embu region in the form of a Memo; that the applicant was informed of the warrants of arrest by his brother and wife after the court attendance on April 4, 2023; that he is willing to cooperate with the police and/or the respondent and that the applicant has no intention to escape arrest.
3. The application is supported by the annexed affidavit of Ahmed Abdi Rage, the applicant herein sworn on April 24, 2023 in which he reiterates the grounds of the application.
4. In opposing the application, the prosecution counsel filed a Replying Affidavit sworn on May 4, 2023 by Senior Sergeant Locho Kigamwa of the Internal Affairs Unit in the National Police Service and the investigating officer in a case of false presentation to a person employed by the public service contrary to Section 129 (a) of the Penal Code and obtaining registration by false pretence contrary to section 320 of the Penal Code. He depones that a complaint was raised in which the applicant and his wife were accused of using stolen identity cards in registering themselves. Further that investigations have been conducted and concluded wherein it was established that the applicant colluded and aided his wife in procuring a false registration through false pretence. In the course of the investigation, he discovered the applicant, mother in law and Sahara Abdi Hassan and others had illegally procured birth certificates.
5. After conducting his investigations, SS Loche prepared a report which was forwarded to the Inspector General of Police who later forwarded it to the DPP for his perusal and advice and charges have been preferred against the applicant. That the applicant ignored the summons to appear respectively- on March 20, 2023 and March 29, 2023. The same had been sent through signals to his superior RCIO Eastern.
6. SS Locho averred that the applicant has demonstrated all intents to evade arrest ever since he became aware of the summons and warrant of arrest, he has failed to present himself before the IAU for interview and investigations.
7. In rebuttal through the further affidavit sworn on May 18, 2023, the applicant depones that the investigations by SS Locho were a witchhunt against him and his wife. No evidence has been attached to prove that summons was served upon the applicant. That the summons was sent out of malice and were unnecessary as they were sent out after investigations had been conducted and the file forwarded to the DPP who had already preferred charges.
8. The court directed the application be dispensed through written submissions. The state counsel Mr Gacharia informed the court he will rely on the filed affidavit of SS Locho and not file submissions.
9. The applicant filed submissions on May 30, 2023 in which it was submitted the warrant of arrest was procured through misrepresentation of facts. That the applicant has not been charged with any offence.



And the summons was meant to intimidate and harass the applicant. That the respondent has displayed an abuse of power and devised plans to harass the applicant.

### **Analysis and determination**

10. I have considered the application, the affidavit both in support and in opposition of the application and the submissions filed by the applicant. The issues for determination are:
  - i. Whether this court should set aside and/or stay the execution of the warrant of arrest issued against the applicant.
  - ii. Whether this court should issue anticipatory bail.
  - iii. Whether the court should call and examine the court record in Kahawa Misc Criminal Application No E086 of 2023.
11. I will handle the three issues for determination together.
12. According to SS Locho - the investigating officer, a complaint was received by the Internal Affairs unit (National Police Service) against the CCIO Busia, SCCIO Busia, ATPU Busia Detachment and the Busia Police station for corruption and police inaction. A team of IAU investigators was nominated and investigations commenced. In the course of investigations, a further complaint was received on a matter against Ahmed Abdi Rage's wife Faiza Bashir Adan aka Faiza Ahmed Abdi and an accomplice, that they had used a stolen Kenyan identity card to register themselves as Kenyan citizens but had not been investigated by the DCI Busia. The investigations also stumbled on illegal acquiring of birth certificates syndicate involving the applicant, his mother-in-law and one Sahara Abdi Hassan.
13. That after the investigations on July 19, 2021, the IAU duplicate inquiry file was forwarded to the Inspector General of Police for perusal, who then had the file forwarded to the DPP and the latter recommended the preferring of charges against the applicant.
14. On his part the applicant argues that the respondent was driven by malice. That the summons sent out through the RCIO Eastern was never served upon him. The signal confirming service was not returned. The appellant submits summons ought to have been issued during the time of investigations and not after the conclusion of the investigations.
15. It was submitted for the applicant that having received a complaint, it was the duty of the police to conduct thorough investigations before preferring any charges against the applicant. The DPP has the discretion to decide whether the complaint discloses a criminal offence.
16. Article 157 (10) & (11) of the [Constitution](#) provides:
  - “ 157. Director of Public Prosecutions
    - (10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.
    - (11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”



17. In the conduct of their duties, the police ought to be very professional and should not be driven by malice. According to the respondent a complaint was received, investigations conducted and the 1<sup>st</sup> respondent preferred charges against the applicant. In the circumstances therefore, the applicant has to prove to the court that the investigations as conducted and the charges preferred against him were actuated by malice and that in conducting the duties conferred upon the police and the Director of Public Prosecutions, the same was interfered with.
18. This court considers that in criminal cases every accused person is to be accorded a fair trial under Article 50 of the Constitution of Kenya. The trial court will consider the evidence on record, if the same cannot sustain a conviction the applicant will be acquitted, and he will have the option to claim damages for malicious prosecution.
19. The court in Hannah Wambui Githira v. Director of Public Prosecution & 3 others (2018) eKLR relying on the case of Republic v. Chief Magistrate Court at Mombasa Ex-parte Ganijee & Another [2002] 2 KLR 703, was of the view that; “it is when the predominant purpose of the criminal proceedings is to further that ulterior motive that the High Court steps in. In other words, where that motive is not the predominant purpose of the criminal proceedings, the High Court may well allow the proceedings to proceed.
20. This court has the discretion to stay the execution of the warrant of arrest as well as restrain the respondents from executing the warrant of arrest. However, the court is not persuaded that the applicant has discharged his burden of proof as enshrined under Section 107 – 109 of the Evidence Act. Section 107 – 109 of the Evidence Act stipulates:
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1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
108. Incidence of burden.
- The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
109. Proof of particular fact.
- The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.
21. The applicant has failed to demonstrate that with the intended arrest and charges preferred were actuated by ulterior motive. He has also not demonstrated that the arrest has been occasioned by malice and that if the trial is allowed to proceed he will not be accorded a fair hearing as enshrined in the constitution. This court is mindful that it should not interfere with the duties bestowed upon the respondent by the Constitution.
22. The applicant ought to face his accusers and stand trial as was observed in the case of Daniel Ndungu vs. Director of Public Prosecutions & Another (2013) eKLR: - “...the petitioner ought to face his accusers, prove his innocence or otherwise and submit to the consequences of the law should he be found culpable”.



23. In conclusion, this court finds the application dated April 24, 2023 has no merit and the same is dismissed.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 3<sup>RD</sup> DAY OF AUGUST 2023.**

.....

**P.M. MULWA**

**JUDGE**

**In the Presence of:**

Kinyua/ Duale – court assistants

Mr. Murage - for the applicant

Mr. Muriuki- for the respondents

