



Kariuki v Director of Public Prosecution & another; Ziva Agriventures Limited & another (Interested Parties) (Constitutional Petition E045 of 2023) [2024] KEHC 13520 (KLR) (4 November 2024) (Ruling)

Neutral citation: [2024] KEHC 13520 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CONSTITUTIONAL PETITION E045 OF 2023
DO CHEPKWONY, J
NOVEMBER 4, 2024**

BETWEEN

GEORGE MACHARIA KARIUKI PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

AND

ZIVA AGRIVENTURES LIMITED INTERESTED PARTY

ESTHER WAMUYU INTERESTED PARTY

RULING

1. Before this court for determination is the Notice of Motion application dated 3rd August, 2023, where the Applicant, George Macharia Kariuki, seeks the following reliefs: -
 - a. Spent.
 - b. That the Applicant be granted anticipatory bail pending any contemplated arrest, charge, or adverse action by the Respondents or their agents, including police officers or other instructed persons.
 - c. That the Applicant be admitted to anticipatory bail on terms the Court may deem reasonable, pending any contemplated action by the Respondents.
 - d. That the 2nd Interested Party be ordered to return the Applicant's driving license.



- e. That the 2nd Interested Party be directed to grant the Applicant access to his email accounts, including customercare@zivaagriventures.co.ke and zivaagriventuresltd@gmail.com
- SUBPARA f.
That the 2nd Interested Party be directed to give the Applicant access to personal data lodged in a laptop previously used by him.
- g. Any other relief the Court deems fit and just.
- h. That the 2nd Interested Party be compelled to authorize the Applicant as a co-signatory to the bank account of the 1st Interested Party.
- i. That the costs of the Application be borne by the Respondents.

Factual Background

- 2. In support of his application, the Applicant alleges that on 31st August, 2023, the 2nd Interested Party instructed him to explain certain dealings involving the 1st Interested Party. Specifically, the Applicant was required to account for payments made to Syrafo Limited, a shareholder in the 1st Interested Party. Following this, he was directed to surrender the vehicle assigned to him as a Director of the 1st Interested Party, along with personal belongings such as his laptop and driving license, which the 2nd Interested Party retained. The Applicant alleges he was thereafter dismissed from the 1st Interested Party's premises without being accorded a fair hearing.
- 3. Further, the Applicant contends that the 2nd Interested Party has been defaming him by communicating to clients of the 1st Interested Party that he, the Applicant is a fraudster. This has caused him apprehension that the Respondents may take adverse actions such as arrest and detention, thus prompting his request for anticipatory bail.

The Respondent's Opposition

- 4. The application is opposed through an affidavit sworn by Esther Wamuyu, the Director and CEO of the 1st Interested Party, who also serves as the 2nd Interested Party. She has averred that the Petitioner, who is a co-director of the 1st Interested Party, colluded with Syrafo Limited to defraud the 1st interested party company of Kshs.1,323,900.00 through sales made to entities such as Kabarak Farm Ltd and Ausquest Kenya Ltd. As a result, the 2nd Interested Party reported the matter to Juja Police Station under OB No. 22/31/07/23.
- 5. The 2nd Interested Party states that the Petitioner admitted to the alleged fraud in the pleadings, following which his access to the company vehicle was withdrawn and later, his driving license which was in the said motor vehicle was later returned to him. Further, the Petitioner returned his laptop which is the Company's property, and there was no violation of his rights.
- 6. She added that the fraud allegations against the Petitioner can only be addressed by the Board of Directors of the 1st Interested Party. However, due to a lack of quorum, the Company has applied to the High Court in Nairobi for leave to convene an extraordinary meeting.
- 7. According to the deponent, in investigating the allegations of fraud, the Respondents are fulfilling their constitutional mandate under Articles 157 and 245 of *the Constitution*. She asserts that the Applicant's rights have not been violated, as no arrest or charge has been effected or even preferred against him.



8. As at the time of writing this Ruling, the court notes that only the 1st and 2nd Interested Parties had filed their Submissions dated 20th December, 2023.

When the matter came before court on 9th May, 2024, the court indicated that the Petitioner's submissions were not in record and neither was he in court and the court deferred the Ruling while directing that the Petitioner's Counsel be duly notified of the same. By consent of the parties, the application was canvassed by way of written submissions and I have read through and considered the submissions filed by the respective parties and since they are a reiteration of the summary in the preceding paragraphs, I do not wish to reproduce the same here.

Analysis and Determination

9. Having considered the Application, the affidavits filed in support and rebuttal of the Application together with the submissions filed by the parties, this Court finds the key issues for determination before the court being: -
- a. Whether the Applicant has established a breach of his fundamental rights warranting the issuance of anticipatory bail.
 - b. Whether the Respondents' conduct justifies interference by this Court.
 - c. Whether the reliefs sought by the Applicant regarding access to personal and corporate data are sustainable.
 - d. Who should bear the costs of the Application?
10. On whether the Applicant has made a case to justify the granting of anticipatory bail, the Applicant argues that he faces imminent arrest and detention following the complaint made by the 2nd Interested Party. As per the Court of Appeal's decision in the case of *W'Njuguna –vs- Republic* [2004] eKLR, Anticipatory Bail is designed to protect individuals from unlawful arrest and detention where there is a legitimate apprehension of violation of their rights to liberty. However, such relief is only available where there is a clear and imminent threat that the Respondents' actions are illegal or unconstitutional.
11. Under Article 49(1)(h) of *the Constitution* of Kenya, provides for the right to bail unless there are compelling reasons. From what the Applicant has stated, I find he has failed to demonstrate that his arrest, if contemplated, would be unlawful or that the Respondents have acted outside their constitutional mandate.
12. The investigations, as outlined by the 2nd Interested Party, are lawful and justified under Articles 157 and 245 of *the Constitution*, which grant the Director of Public Prosecutions (DPP) and the Inspector General of Police the authority to investigate and prosecute criminal conduct.
13. In the case of *Republic –vs- Chief Magistrate Milimani - Ex-parte Tusker Mattresses Ltd* [2013] eKLR, it was held that 'the DPP should exercise its powers independently, without undue interference from the Courts, unless it is proven that those powers are being abused'.
14. In the present case, there is no evidence to suggest any abuse of power by the DPP or the police, and thus, the application for anticipatory bail is without merit. Here, the Applicant has failed to demonstrate that the Respondents are acting outside their constitutional authority. There is no evidence that his arrest, if it occurs, would be arbitrary, unlawful, or intended to harass or oppress him. Further, the fact that an investigation is underway does not, by itself, give rise to a presumption of illegality or abuse of power.



15. Consequently, the Court finds no grounds to grant anticipatory bail, since the threshold as established in *W’Njuguna v Republic* has not been met.

Whether the Respondents’ conduct amounts to a violation of the Applicant’s rights.

16. The Applicant alleges that the withdrawal of privileges, such as the company car, laptop, and driving license, as well as the defamatory statements made by the 2nd Interested Party, violate his rights. The Interested Parties in response contends that the actions taken were legitimate responses to the discovery of fraudulent dealings within the company. The 1st Interested Party, represented by the 2nd Interested Party, asserts that the Applicant colluded with Syrafo Limited, a shareholder in the 1st Interested Party, to misappropriate Kshs.1,323,900 through false sales transactions with Kabarak Farm Ltd and Ausquest Kenya Ltd.
17. In the case of *Republic –vs- Director of Public Prosecutions Ex-parte Keriako Tobiko & Another [2017]eKLR*, the Court underscored the importance of balancing the rights of an individual against the public interest in prosecuting criminal conduct. It held that judicial intervention is only justified where there is clear evidence of abuse of power or violation of constitutional rights.
18. In the present case, the 2nd Interested Party’s actions, including the revocation of the Applicant’s access to corporate resources, are reasonably linked to the internal investigations into the alleged fraud. There is no evidence to suggest that these actions were taken with malice or that the Applicant’s rights have been violated. In this Court’s view the Respondents and Interested Parties are acting within their legal and corporate duties to safeguard the interests of the 1st Interested Party.
19. Thus, the Court finds that the conduct of the Respondents does not amount to a violation of the Applicant’s constitutional rights, and therefore, no judicial intervention is warranted.

Whether the reliefs sought regarding access to emails, data, and reinstatement as a co-signatory are sustainable.

20. The Applicant seeks orders for access to corporate emails, personal data stored on a company laptop, and reinstatement as a co-signatory to the 1st Interested Party’s bank account. These requests must be examined in light of the ongoing investigation into the Applicant’s alleged fraudulent activities.
21. The Court notes that the emails in question, specifically customercare@zivaagriventures.co.ke and zivaagriventuresltd@gmail.com, are corporate accounts belonging to the 1st Interested Party. Access to these accounts is a matter for the company to decide, particularly in the context of a fraud investigation involving the Applicant.
22. Similarly, the request for access to personal data stored on a company laptop must be carefully considered. In the case of *Republic –vs- Director of Public Prosecutions, Ex-parte Keriako Tobiko*, the Court held that interim orders that prejudice ongoing investigations or corporate processes should not be granted unless there is a clear violation of rights. Here, granting the Applicant access to company property and data would be premature and potentially prejudicial to the integrity of the ongoing investigation.
23. Regarding the Applicant’s reinstatement as a co-signatory to the Company’s Bank Account, the Court finds that such a request cannot be sustained. Given the serious allegations of fraud and misappropriation of funds, it would be imprudent to compel the 1st Interested Party to reinstate the Applicant in a position of financial control over the Company’s accounts. This matter can best be addressed through the company’s internal governance structures or through the appropriate corporate



legal channels. Accordingly, the Court declines to grant the reliefs sought regarding access to corporate emails, personal data, and reinstatement as a co-signatory.

24. This Court finds as such in association with the sentiments in the case of Republic –vs- Director of Public Prosecutions, Ex-parte Keriako Tobiko & Another [2017] eKLR, where the Court emphasized that interim orders should not be granted where they risk prejudicing investigations or enabling further unlawful acts. In this case, the Applicant’s access to corporate data would be inappropriate given the ongoing investigations.

Conclusion

25. The upshot of the foregoing is that the Applicant has not demonstrated a violation of his constitutional rights that would warrant the grant of anticipatory bail or the other orders sought. In all respect, the Respondents are acting within their lawful mandate, and the Petitioner’s apprehensions do not meet the threshold for judicial intervention.
26. Accordingly, the Notice of Motion dated 3rd August, 2023 is hereby dismissed with costs to the 2nd Interested Party.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 4TH DAY OF OCTOBER , 2024.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. John K’ogweno counsel for Petitioner

Mr. Marienga counsel for 1st and 2nd Interested Party

Court Assistant - Martin

