



Makori v Director Criminal Investigation & 2 others (Miscellaneous Criminal Application E036 of 2022) [2024] KEHC 14535 (KLR) (12 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14535 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
MISCELLANEOUS CRIMINAL APPLICATION E036 OF 2022**

**TA ODERA, J
NOVEMBER 12, 2024**

BETWEEN

ELIJAH MAKORI APPLICANT

AND

THE DIRECTOR CRIMINAL INVESTIGATION 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION 3RD RESPONDENT

RULING

Introduction

1. The Applicant filed this Application dated 8th March, 2024 seeking to be granted anticipatory bail pending arrest or charges as well as an order barring the respondents through their enforcement agents (police officers) from arresting him pending the hearing and determination of his Application.
2. In support of the Application the Applicant averred that:
 - a. On the 27.01.2024, he was arrested and charged on the 29.01.2024 at the Ogembo Law Courts vide Criminal Case number E116 of 2024 and was released on cash bail.
 - b. On the 7.02.2024 one Laban Atandi Akuma called him on phone while he was attending a Chaplain's Conference in Limuru and told him that he is going to ensure that he lost his job as a civil servant and that he had nothing to lose.
 - c. The only reason the said Laban is pursuing him together with his father Samson Makori Mbaka is that are sureties to Lydia Oguta And Jared Ombati in Ogembo criminal case number E030 of 2024. That the said two were charged at the instance of the said Laban.



- d. After securing the release Of Lydia Oguta And Jared Ombati he attempted to reconcile the two with Mr. Laban but Mr. Laban refused and insisted that he wanted the two to return to him the money they had allegedly stolen from him.
 - e. Mr. Laban has persistently been threatening to have them arrested and said he was only going to back down if they chose to withdraw themselves as sureties for the above mentioned person so that they could spend time in prison something that will make him happy and contented.
 - f. He has received several calls from Mr. Laban with threats that he, Mr. Laban, will have him arrested and charged with serious charges unless he withdraws as surety.
 - g. Mr. Laban has filed a civil suit to recover his monies from the two accused persons this being Ogembo Civil Suit No. El27 of 2023, and thus he ought to pursue the same procedurally.
 - h. He is apprehensive that if Mr. Laban is allowed to bring false allegations without basis against him, the police officers from Itumbe and Nyangusu Police Stations will be out to harass, intimidate and incarcerate him.
 - i. He is sickly and if arrested and detained at the Police Station he stands to suffer irreparably.
 - j. He has brought this application promptly and in utmost good faith and therefore pray that this Honourable Court do grant him bail pending arrest.
3. In response the respondent filed grounds of opposition on 15th March, 2024 wherein it stated that;
 - a. The application is frivolous, vexatious and abuse of the court process.
 - b. That the application has been overtaken by events, the Applicant has already been arraigned in court.
 - c. The grounds advanced does not meet the principles and the requisite threshold for the grant of the orders sought.
 - d. The issues raised are trial related and that the applicant has an opportunity to be heard by the trial court.
 - e. The application is made in bad faith and not in the interest of justice.
 4. This court directed the Application be disposed of by way of written submissions and order the parties to file submissions. Both parties filed their submissions which I have considered in my determination below.

Determination

5. Upon consideration of the Application, the response thereto and the written submissions of the parties I find that only issue for determination is whether the Applicant is entitled to grant of an anticipatory bond/bail.
6. It is important to state from the onset that grant of an anticipatory bail/bond is at the discretion of the court. Unlike the right of an accused person to be released on bond, anticipatory bail is not provided for in statute or in the Constitution but is granted pursuant to the court's inherent jurisdiction to protect the rights and fundamental freedoms of the people of Kenya. Further, there are no specific provisions on anticipatory bail. However, where the remedy has been considered, the courts have applied the threshold for an application for violation or threatened violation of rights under Article 23 and 165(3) of the Constitution.



7. The principles that guide the court in considering whether to grant anticipatory bail were ably set out by Rawal and Kimaru, JJ in *Samuel Muciri W’Njuguna v. Republic* [2004] eKLR, to wit:

“When a person is constantly subjected to harassment or is in fear of being unjustifiably arrested, he has a right to recourse to the protection of the *Constitution* through the High Court where its enforcement is provided for by the *Constitution*. It would indeed be a tragedy, if the *Constitution* did not provide a remedy to a citizen whose fundamental rights have been breached... We are of the humble opinion that the right to anticipatory bail has to be called out when there are circumstances of serious breaches by an organ of the state of a citizen’s fundamental right.”

8. The principle was also stressed in the case of *Mandiki Luyeye vs Republic* [2015] eKLR, where Ngenye J held as follows:-

“Similar sentiments were observed in the case of Eric Mailu vs Republic and 2 others Nairobi Misc. Cr. 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 state. 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 to fundamental right must be real and demonstrable. An Applicant must demonstrate the breach by acts and facts constituting the alleged breach.”

9. In the instant application the Applicant alleges that he has received several calls from one Mr. Laban Atandi with threats that he, Mr. Laban Atandi, will have him arrested and charged with more serious charges if he failed to withdraw his surety for some accused persons. He is apprehensive that if Mr. Laban is allowed to bring false allegations without basis against him, the police officers from Itumbe and Nyangusu police stations will harass, intimidate and incarcerate him. As correctly submitted by the learned counsel for the Respondent, the Applicant’s allegations are mere apprehensions that have not been substantiated. The Applicant had the onus of proving such threats and intimidation by the Police through Mr. Laban lies with him. The mere mention that he has received calls from Mr. Laban threatening him that he would have him arrested and charged with serious offenses does not in any way amount to harassment by the Respondents herein. No call logs were exhibited to support his claim of threats. In any case the Applicant has not stated any actions that have been taken by officers of the two police station apart from him claiming that they are likely to entertain reports from Mr. Laban.
10. It is the duty of police to do investigations of any complaint made to them and if investigations reveal criminal culpability, they take necessary action by charging the culprit. Issuing orders against police intended to halt their core mandate would amount to an interference with their duties. The courts should complement other organs in the criminal justice sector while appreciating the principle of separation of powers. The courts can only interfere where it is demonstrated that State organs are exceeding their mandate in executing their duties or the rights of citizens have been violated or where there is a real threat to such violation. This threshold has not been met in this case. No report of any threat to the Applicant by the said Mr. Laban has been made to the police. Rather than the mere apprehension that he might be arrested at the instigation of Mr. Laban which does not amount to violation of the rights.



11. I accordingly find that the applicant has not at all demonstrated that there exists any threat to his rights to fundamental freedom or that his fundamental freedom has been violated to warrant the grant of the orders sought.
12. The application is hereby dismissed with no orders as to costs.
13. It is so ordered.

T.A ODERA

JUDGE

12. 11.24

DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF:

Mr. Migiro for the applicant

Mr. Koima for the State

Oigo - Court Assistant.

