



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**MISC CRIMINAL APP NO. 69 OF 2020**

**IN THE MATTER OF AN APPLICATION FOR ANTICIPATORY BAIL**

**AND**

**IN THE MATTER OF AN APPLICATION UNDER ARTICLES 22, 25, 28, 47(2), 49(1) 165(3) AND 244(C) OF THE  
CONSTITUTION OF KENYA**

**BETWEEN**

**KIPYEGON KIRUI .....APPLICANT**

**AND**

**INSPECTOR GENERAL OF POLICE.....1<sup>ST</sup> RESPONDENT**

**OCCS KERICHO POLICE STATION.....2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. This a ruling on application dated **24<sup>th</sup> June, 2020** brought under **articles 22, 25, 28, 47(2), 49(1) 165(3) and 244(c) of the Constitution of Kenya**. It seeks release of the applicant on bail or bond pending arrest . The application is supported by affidavit sworn by the applicant on **24<sup>th</sup> June 2020**.
2. Grounds on the face of the applicant are that, the applicant received a phone call from the crime unit, Kericho Police Station informing him of the impending arrest on the basis that he owes one **Mark Rotich** Ksh. 165,000/= allegedly obtained fraudulently for repairs of motor vehicle registration No. KAW 407U.
3. The applicant averred that he paid the complainant **Mark Rotich** Kshs. 100,000/= for the purchase of the engine but he later discovered that the engine costs Ksh. 80,000/= and to avoid further losses, he stopped further payment to the complainant by canceling the cheques he had issued to him.
4. He further averred that the claim is purely civil and wishes that a civil court addresses itself on the issue.
5. In opposing the application herein, the **2<sup>nd</sup>** respondent filed replying affidavit dated **22<sup>nd</sup> July, 2020** and the **3<sup>rd</sup>** respondent filed written submissions.
6. The **2<sup>nd</sup>** respondent averred that on **18<sup>th</sup> June 2019** they received a complaint from one **Mark Rotich** who stated that he had entered into an oral agreement with the applicant herein for the purchase of motor vehicle Registration No. KAW 704U which was mechanically broken down for consideration of Kshs. 200,000/=.
7. He further averred that the complainant was to pay the purchase price after deducting the money for the repairs and pay the balance to the applicant. He stated that the applicant failed to honor the oral agreement and instead cancelled the transaction and agreed to pay **Erick and Mark** an amount of Ksh. 155,000/=; which he paid Kshs.80,000/= in cash and issued three cheques but he later cancelled 2 cheques amounting to 55,000/= without informing the complainant leading to the complaint and investigations; that upon complaint being lodged, the

applicant was called to tender his evidence.

8. The 3<sup>rd</sup> respondent in submissions filed, urged this court to dismiss the application with costs. 3<sup>rd</sup> respondent's argument is that the application herein is based on unknown fears which are misplaced. He urged the court to find that the application is premature and speculative since the applicant was only called by the 2<sup>nd</sup> respondent to report to the station to shed light on the matter and the same does not amount to an arrest.

9. The second respondent submitted that the application does not meet the threshold of issuing an anticipatory bail and relied on the case of **W. Njuguna Vs Republic, Nairobi Misc. Cr. Case No.710 of 20020(2004) 1 KLR 520.**

10. The 2<sup>nd</sup> respondent further submitted that the matter is purely criminal as the applicant has admitted to stopping some cheques written to the complainant without informing the complainant which resulted in the cheques being dishonored.

**ANALYSIS AND DETERMINATION**

11. **Article 49 (1) (h) of the Constitution of Kenya** provides as follows:-

**“An arrested person has the right to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.”**

12. **Articles 23, 29 and 258** of the constitution, the court is empowered to hear and determine applications relating to denial, violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights.

13. In the case of **Richard Mahkanu vs Republic [2014] eKLR**, the court held the firm view that orders for anticipatory bail or bond must not be sought with the intention of pre-empting the outcome of investigations;a position that was also held in the case of **Kevin Okore Otiemo vs Republic (2013) eKLR** where the court held that Investigators must feel and be free to do their work without fear of having their authority and/or mandate stifled by courts merely because courts have power and authority to grant anticipatory bail when sought. Further that the fact that a person feels inconvenienced by investigations is not sufficient reason for him to be granted anticipatory bail and such an order should only be granted in the clearest of situations that point to a violation, infringement or threat or contravention of a person's right under **Article 49 of the Constitution of Kenya.**

14. In my view,the fact that a complaint may be of civil nature does not mean the investigating urgency cannot investigate. They have a duty to investigate and find if there is criminal element in the complaint made.How would the investigating officer form an opinion that it is of civil nature without carrying out investigation?We cannot therefore say the investigating officer cannot investigate as they are required to investigate every complaint lodged but that does not mean all will result to arrest and criminal trail.

15. The 2<sup>nd</sup> Respondent has indicated that upon complaint being lodged, they called the applicant to explain himself concerning the issue. Threat to arrest has not been demonstrated. I do agree with the 3<sup>rd</sup> respondent that the respondents have both constitutional and statutory duty and powers to investigate complaints made and make decision to charge or not and the applicant being called to the police station to respond was part of investigation process.

16. In my view the applicant has not demonstrated threat of arrest. He has not demonstrated that his rights are under threat of infringement, violation, or denial. I find that the applicant has not proved through any factual or other evidence that the respondents have acted illegally, arbitrarily, unjustly, irregularly, or oppressively. I therefore see no merit in the application. The applicant has not met the threshold for granting anticipatory bail.

**17. FINAL ORDERS**

**1. Application dated 24<sup>th</sup> June 2020 is hereby dismissed.**

**2. No orders as to costs.**

**JUDGMENT DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 3<sup>RD</sup> DAY OF MARCH 2021**

.....

**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Schola/Jeniffer - Court Assistant

Mr.Bitok counsel for Applicant

Mr.Ondieki State Counsel.