



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KILGORIS

MISC. CRIMINAL APPLICATION NO.2 OF 2021

(CORAM: F.M. GIKONYO J.)

PAUL OLE KUYANA.....1ST APPLICANT

SITATO OLOLMAMPULI IKOTET.....2ND APPLICANT

-VERSUS-

DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

RULING

Anticipatory Bail

[1]. Before me is a Notice of Motion dated 19th April, 2021 expressed to be brought pursuant to Articles 19, 20, 21, 22, 23, 24,28 ,29 ,49 and 159 of the Constitution and Section 165 and 123(1) Part 5 of the Criminal Procedure Code Cap 75 of the Laws of Kenya. It seeks the following substantive orders;

a. THAT the honorable court be pleased to grant the applicant anticipatory bail pending arrest or charge on such terms the court may deem fit to impose.

b. That this honorable court be pleased to issue a conservatory order restraining the Respondents, their Servants, Agents, junior officers and/ or anybody from effecting and/or anybody from arresting, harassing or otherwise however interfering with the Applicant herein pending the hearing and determination of this application/petition in the matters related to Transmara West Adjudication Section.

c. That the Costs of this application be provided for.

d. Such further and / or other orders be made as the court may deem fit and expedient.

The Applicants' Case

[2]. The application was premised on grounds on the face of the notice of motion and supported by the Applicants' affidavit that was sworn on 18th April 2021. Their Written Submissions filed on 21st June 2021.

[3]. Their case was that they were summoned to appear before the office of the chief inspector Soit GSU Patrol Base on several occasions and particularly on 16th April 2021.

[4]. At Soit GSU patrol base they were informed that they had incited people to violence in regards to adjudication of Transmara West Adjudication Section.

[5]. Further they were locked up for several hours where they were interrogated on the specifics of ELC JUDICIAL REVIEW CASE NUMBER 5 OF 2020 in which they are not parties but the Respondents insisted that they were secretly involved in the same.

[6]. They are of the view that because the police are summoning them on the issue of incitement to violence, they might be suspects and therefore they need's court's protection for their constitutional rights have been threatened and violated.

[7]. They termed the Respondents actions as illegal and manifest injustice, impunity, irregularity and oppression. They stated that there has been frustration of their legitimate expectations and flagrant infringement of their constitutional rights.

[8]. They are apprehensive that the police are out to harass, intimidate and incarcerate them and it is their honest belief that an arrest is imminent.

The Respondents' Case

[9]. None of the respondents have filed any opposition to the application.

ANALYSIS AND DETERMINATION

[10]. Does the application meet the threshold for grant of relief of anticipatory bail and conservatory orders?

Of Anticipatory bail

[1]. I do note that the order sought is anticipatory bail. I wish to express a point or two on this relief.

[2]. In jurisdictions where anticipatory bail is practiced, it is expressly provided. And, it emerges that anticipatory bail is a direction issued by the court to release a person on bail, even before the person is arrested. In other jurisdictions, anticipatory bail is granted to a person who has been arrested by the court.

[3]. Anticipatory bail is, therefore, a special relief in criminal law. However, the core, character and scope of anticipatory bail may be problematic, requiring clear and careful stitching of the relief. Some jurisdictions have gone round this dilemma by expressly and specifically providing for anticipatory bail in the law; and its nature, core and effect is regulated in the statute and regulations or rules thereunder. For instance, **Indian** criminal law has a specific provision for **anticipatory bail** under Section 438(1) of the Criminal Procedure Code. It is also expressly provided that anticipatory bail in India is issued only by the Sessions Court and High Court. This kind of hemming of anticipatory bail becomes necessary due to the very nature of anticipatory bail to become potentially inhibitive of investigative mandate of the police and other investigative organs of the state. A case is, therefore, made out that, prescription of the core, content and scope of anticipatory bail or whatever other order granted in that genre should be properly set out in law or in the jurisprudence creating or adopting it.

[4]. In Kenya, there is no express provision in law or the Constitution. The Constitution of Kenya, 2010, provides for; (a) bail of arrested person under article 49(1)(h); and (b) appropriate reliefs under article 23(3) for breach or threat of breach of the Bill of Rights. I am acutely aware that arguments have been made that anticipatory bail could be and have been tailored and granted by the court as an appropriate relief under article 23(3) of the Constitution. Thus, anticipatory bail is a creature of judicial craft in Kenya- but as the order is granted by different courts so does the relief of anticipatory bail remain at large; increasing the danger of having a relief without specific genre, character, scope, core and content.

[5]. I am nevertheless, aware that 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. As we engage with this phenomenon, I only find it instructive that the core of orders under article 23 and 165(3) should be properly-fashioned as to be in accord with the Constitution of Kenya, 2010 as redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights should be ascertained. Thus, care should be taken not to adopt an amorphous practice in the name of anticipatory bail which may be a less austere approach for redress for violation or threatened violation of the Bill of Rights and fundamental freedoms intended in the Constitution, and perhaps make it a toll to place unnecessary impediment upon constitutional function and mandate of other state organs.

Impeding constitutional mandate of investigation

[6]. Odunga J. appreciated this novel philosophy and the standard required in evaluation of application for anticipatory bail when he stated in the case of **Republic vs 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.”

Applying the test...

[11] I will therefore treat this application as an application for redress for breach or threat of breach of Rights and fundamental freedom of the applicant.

[12] 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.”

[13] The applicant has claimed violation and threatened violation of his right and fundamental freedom by the Police. Orders that will impede criminal investigations should be on cogent and constitutionally-sound reasons. For instances as was stated in the case of **W’Njuguna vs Republic (2004) eKLR** such orders are granted only: -

“...when there are circumstances of serious breaches of a citizen’s rights by an organ of the state which is supposed to protect the same.”

[14] In the case of **Mandiki Luyeye vs Republic [2015] eKLR**, 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.”

[15] In the case of **Republic vs Chief Magistrate Milimani & Another Exparte Tusker Mattresses Ltd & 3 Others** (Supra), Odunga J held that anticipatory bail ought not to be granted to prohibit investigations.

[16] More case law. 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 Otieno vs Republic (2013) eKLR**.

[17] Any relief by whatever name called say, anticipatory bail, requires courts to ensure that interference with the functions of other bodies and institutions established by law; statute or the Constitution of Kenya, is only on cogent and robust reasons. Merely feeling inconvenienced by investigations is not sufficient reason for relief. Proof of violation, infringement or threat or contravention of a person’s right under the Constitution of Kenya is required.

[18] The Applicant herein had contended that the Respondents had been harassing him with investigations for crimes he has specified in his affidavit. Other than making mere allegations, the applicant did not provide proof thereof. Accordingly, having carefully considered the affidavit evidence, the Written Submissions and the case law that was relied upon by the parties herein, this court does not find any iota of evidence that the Applicant’s fundamental rights have been breached or denied or that there is a threat of them being infringed, contravened or violated. Investigations are legal processes aimed at fact finding of commission of crime in our justice system and do not, *per se* amount to infringement on the rights or fundamental freedoms of the person under investigations. As long as investigations are carried out in accordance with the law and rules, the processes thereto must be allowed to run their course for proper administration of justice.

[19] In the upshot, this court comes to the firm conclusion that the application herein has not met the threshold for the granting of relief to stop investigation herein. For the foregoing reasons, the Applicant’s Notice of Motion application dated 19th April 2021 is without merit and is hereby dismissed. I make no orders as to costs given the nature of these proceedings. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 6TH DAY OF JULY, 2021

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F. GIKONYO M.

JUDGE

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 6TH DAY OF JULY, 2021

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F. GIKONYO M.

JUDGE