



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC CRIMINAL APPLICATION NO. 179 OF 2020

YES BOSS SACCO LTD.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The instant application was filed on 1st July, 2020 by way of a Notice of Motion brought under a Certificate of Urgency seeking the following main prayers:

- a) That the Respondents, their servants, employees, agents and or any other person acting on their behalf and/or their instructions be restrained from interfering in any manner with the smooth running of the Applicant's/Petitioner's business pending the hearing and determination of the application and suit herein.
- b) That the Respondents, their servants, employees, agents and or any other person acting on their behalf and/or their instructions be restrained from harassing, threatening, insulting, arresting and/or intimidating the Applicant's/Petitioner's employees pending the hearing and determination of the application and the suit herein.
- c) That court grants any other prayers sought by the Applicant, and
- d) That the costs of the application be borne by the Respondents.

2. The application is based on the grounds that the Respondents have been harassing and intimidating the staff/employees of the Applicant/Petitioner at their work place, that the police have totally crippled and/or paralyzed the smooth running of the Applicant's/Petitioner's businesses both inside and outside Nairobi resulting to the closure for fear of intimidation, harassment and/or threat of arrest, that the police are harassing the Applicant's staff because they want to frustrate the civil proceedings currently before the court namely **Nairobi HCCC No. 106 of 2018** and **Nairobi CMCC No. 1749 of 2020**, that it is an abuse of police powers to arrest and release the Applicant's staff members without prosecuting them, that the police have violated the provisions of Criminal Procedure Code on how arrests should be executed, that the Applicant's businesses have suffered financial losses running into millions of shillings for failure to serve the customers and that if the court does not interfere the Applicant stands to suffer irreparable loss of business, customers and money running into millions of shillings.

3. The application is supported by the affidavit of Vincent Basweti Gikoi, the Chief Executive Officer of the Applicant Sacco sworn on 30th June, 2020. The same basically states that the police started harassing and intimidating the employees of the Applicant after the Applicant filed civil suits both at Milimani High Court Civil Division and Milimani Chief Magistrate's Commercial Court. Further, that those suits have no criminal elements in them, hence the police ought not of interfere with the running of the Applicant's businesses or harassing the staff of the Applicant Sacco. As such, the police should be restrained from harassing and or intimidating the employees of the Applicant Sacco.

4. The application was opposed by the Respondents vide Grounds of Opposition filed by Zaphida Chege, prosecuting counsel in the office of DPP on 15th July, 2020. They are that:

a) That the application and grounds raised therein do not raise any reasonable apprehension in the mind of a reasonable, fair minded and informed member of public and the court cannot issue orders in vain.

b) That the Applicant has not discharged the duty to bear facts upon which the Honourable court is to draw an inference of the imminent threat of arrest by a particular Respondent.

c) *That the Respondents have not demonstrated any circumstances that would lead to the arrest of the Applicant which is a Savings and Credit Cooperative Society/Statutory body.*

d) *That the application is unfounded and that Applicant has not established the real or eminent threat of arrest, harassment or intimidation by the 1st and 2nd Respondent.*

e) *That the Applicant's application is flimsy and full of baseless allegations.*

f) *That the Applicant's application is misconceived and an abuse of the court process.*

g) *That the application lacks merit and the same should be dismissed in its entirety.*

5. The application was canvassed before me on 15th July, 2020 by way of oral submissions. The Applicant was represented by learned counsel, Mr. Bosire whilst the Respondent was represented by learned State counsel, Miss Chege. I have considered the respective rival submissions and I take the following view of the application.

6. I understood the Applicant's counsel to be basically seeking orders that the police be barred from harassing, intimidating and arresting the Applicant's employees because doing so is and will adversely affect their business. Mr. Bosire submitted that the police have been arresting these employees and releasing them without any charges which amounted to a violation of their constitutional rights. Further, that in doing so the police were abusing their powers of arrest. In that regard, I have concluded that what the Applicant is seeking are orders for anticipatory bail.

7. The genesis for grant of anticipatory bail is hinged on this Court's wide discretion and jurisdiction conferred on it to determine the application in that under Article 22(1) of the Constitution of Kenya 2010 every person has the right:-

"to institute proceedings claiming her rights or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened."

8. Further, under Article 165 of the Constitution any person may seek redress for a denial or violation, or infringement or threat to a right to fundamental freedoms as envisaged in the Bill of Rights. Therefore, notwithstanding that no law was cited under which the application was brought, I nonetheless find that the application is properly before the Court.

9. Anticipatory bail shall be granted only when an Applicant demonstrates that his constitutional right has been violated or is likely to be violated. In a ruling of a court of concurrent jurisdiction in the case of **Richard Makhanu-Vs- Republic Bungoma High Court Miscellaneous Criminal Case No.10 of 2015** the court stated as follows:-

"With regard to the issue of anticipatory bail, it is usually granted where there is alleged to be serious breaches of a state organ. In the case of W'Njuguna -Vs- Republic, Nairobi Miscellaneous Case No.710 of 2002, (2004) 1 KLR 520 the court held that anticipatory bail can be granted:-

"...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."

10. In the case of **Hon. Martin Nyagah Wambora -Vs- Attorney General, Inspector General of Police and Director of Public Prosecution (DPP), Embu High Court Criminal Miscellaneous Application Case No.3 of 2015**, the Court delivered itself thus:

"To those erudite words I would only highlight the importance of demonstration of "real danger". The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court's attention.

11. It is then 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 freedom of a citizen. It cannot issue where an Applicant labours under apprehension founded on rumours or unsubstantiated claims.

12. As correctly submitted by Ms. Chege for the Respondent, the Applicant has filed the instant application as a statutory body, being a Savings and Credit Cooperative Society (SACCO). In its both the Notice of Motion and Supporting Affidavit, it has not specified which employees the police have been harassing, intimidating or arresting and releasing without any charges. The court cannot issue the nature of the orders sought against a statutory body yet it is alleged that it is the employees of the statutory body that are being harassed, intimidated and arrested and released without any charges.

13. Further, from both the pleadings and the oral submissions, the Applicant has failed to disclose which police stations and particular police officers have been harassing the Applicant/Petitioner's employees. I add that in his rejoinder to the submissions by the Respondent, counsel for the Applicant attempted to make material disclosure by stating that there are Occurrence Book (OB) entries that have been made upon complaints being reported to the police. He added that the Applicant could avail the persons who were being harassed when an opportunity arises, more so at the production of oral evidence.

14. On this, I hold that it is too late to attempt to make a disclosure from the bar to which the Respondent would not have an opportunity to

respond to. Be that as it may, counsel for the Applicant was still emphatic that on the reports made to the police station, no specific person was mentioned as being harassed as the harassment was not targeted at a particular person. In that case, counsel was admitting that the court would be unable to issue orders directed at protecting a particular individual.

15. The Applicant herein seeks anticipatory bail on grounds that some of its employees are being harassed by the police and are being arrested and released without any charges preferred against them. Further that the harassment is intended and has indeed financially crippled the Applicant's business.

16. My view is that the mere fact that some of the Applicant's employees have been summoned to record statements with the 1st and 2nd Respondents does not amount to any form of harassment but is a core process of investigations of any allegations against them. I say so because police have a right to undertake investigations freely without what appears to be intrusive intervention by courts.

17. Furthermore, the Applicant failed to disclose which particular employees were being harassed consequent which if orders prayed for are issued they would not be aimed at protecting particular individuals. Simply stated, the framing of the application is vague. In that respect, the court cannot issue orders in vain, incapable of being executed.

18. Again, the Applicant failed to state which police station or police officers were harassing its employees which again implies that even if protection orders were granted, the court would be unable to direct them at a particular individual or entity for execution.

19. On the whole, I find that although some investigations may be being carried out, the Applicant has failed to demonstrate that the Respondents have breached its fundamental rights to freedoms or that there exists any threat of its rights or of its employees to warrant the grant of anticipatory bail. The application has no merit and I accordingly dismiss it. It is so ordered.

DATED AT NAIROBI THIS 22nd JULY, 2020.

G.W.NGENYE-MACHARIA

JUDGE

DELIVERED AT NAIROBI ON 22nd JULY, 2020 BY:

L. KIMARU

JUDGE

In the presence of:

1.*for the Applicant.*

2. *for the Respondents.*