

IN THE HIGH COURT OF KENYA AT KISII

MISCELLANEOUS CRIMINAL APPLICATION 5 OF 2018

IN THE MATTER OF AN APPLICATION FOR ANTICIPATORY BAIL

IN THE MATTER OF ARTICLE 22(1), (3), (B) (C) (D) (F), 31 (A) (B) (C) 47 (1) (2), 48 (H) 50(A) OF THE CONSTITUTION OF KENYA

BETWEEN

BERNARD NYAMANYA MOGAKA.....APPLICANT

VERSUS

OCS KISII POLICE STATION.....1ST RESPONDENT

THE DIRECTORATE OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

RULING

1. The applicant's application is dated the 3rd of June 2018. It brought under Order 51, of the Civil Procedure Rules 2010, Section 124, 125, 362, 364 of the Criminal Procedure Code, Article 49 (1) (h), 159 (1) (2) and 258 (1) of the Constitution. The applicant seeks orders that;

i. That the Court be pleased to admit the applicant to an anticipatory bail on such reasonable terms and conditions that the Court may deem fit pending arrest, investigations and or charges by the respondents.

ii. That the Court be pleased to direct the DCIO Kisii to give the applicant security to him and his family or issue any further and/or better orders as may meet the ends of justice.

2. The application is supported by the applicant's affidavit dated the 3rd of June 2018 together grounds stated on the face on the application. It has some annexures attached to it. The applicant contends that the OCS Kisii police station has been harassing him on alleged crime by the plaintiff of destroying barbed wire and fence on a disputed property which matter is still pending in Kisii ELC Court 401 of 2013. That he is apprehensive that the respondents have set a trap to have him arrested by members of community policing which is the same group that harmed him in 2013 over the same subject matter of land. That the complainant seems to have agreed with the police and are now harassing him. That he was arrested by the same complainant in 2012/2013 and was severely injured but the police did little to arrest the culprits on land dispute which has been in Court for the last 26 years. That he fears that his life is in danger as people went to his house without a search warrant. That the Court has power to protect him and his family and unless the orders sought are granted the applicant will not be able to attend and defend his case in the ELC Court on the 6/6/2018.

3. The application was opposed by the prosecution. Mr Otieno submitted that the applicant has constitutional safeguards for even if his arrested he will appear in Court in 24 hours and he will be granted bail. That the charges he will face will be vetted by the OCPD. That the application should not be allowed.

4. In reply Mr Abobo stated that they have exhibited documents showing that there is a land dispute and a letter from the PPC directing the DCI to investigate the complaint. That this shows that there is bad blood between the OCS and the Complainant. That his apprehension is real.

5. I have considered the applicant's application and the law relating to his application. The applicant has to demonstrate that his apprehension or threat he faces is real. From the documents attached the applicant has shown that there is some land dispute which has been in existence from 2015. All the correspondence attached relate to matters of 2015 and not 2018. There is no document attached showing any injuries he sustained in 2013 or 2018. The applicant in my view has failed to show that his life or that of his family is in danger. The applicant's right to be granted bail upon being charged is enshrined in the Constitution under Article 49. It submitted by the State Counsel the alleged charges will be vetted by the OCPD he will be produced in Court within 24 hours of his arrest. I therefore find no merit in the applicant's application dated the 3rd of June 2018. It is dismissed with no orders as to costs.

Dated signed and delivered this 6th day of June 2018.

R.E.OUGO

JUDGE

In the presence of:-

For the Applicant

For the State