REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION NUMBER 222 OF 2018.

FRANCIS MUNGAI MBURU.....1ST APPLICANT

MARK MBURU MUNGAI.....2ND APPLICANT

JUSTIN MBURU.....3RD APPLICANT

JOHN MURITHI MUTWIRI.....4TH APPLICANT

VERSUS

INSPECTOR GENENERAL OF POLICE.....1ST RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION.....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....3RD RESPONDENT

RULING.

1. Francis Mungai Mburu, Mark Mburu Mungai, Justin Mburu and John Murithi Mutwiri, hereafter the 1st to 4th Applicants respectively brought the present application under a Certificate of Urgency dated 4th June, 2018. The main application was brought under Articles 3,10, 19, 20, 22, 25, 27, 49(1)(a)(i), (f(i)), and (h), 159 and 259 of the Constitution of Kenya, Section 123 of the Criminal Procedure Code, the inherent jurisdiction of the Court and all other enabling provisions of the law. The Applicants sought orders, *inter alia*, that they be granted anticipatory bail on such terms as the court deems fit and for costs of the application.

2. The grounds upon which the orders are sought are that; (i)the Applicants had learnt that the 1st and 2nd Respondents intend to arrest, detain and incarcerate them, (ii)the arrest in question relates to ostensibly lawful payments made to companies associated with them pursuant to a judgment by Mabeya J. in HCCC 617 of 2012(Afrison Export Import Limited and Huelands Limited *v.* Hon. The Attorney General and 2 others) in relation to the compulsory acquisition of the piece of land known as L.R. No. 7879/4 in Ruaraka, (iii)the Applicants are apprehensive that the threats of arrest are premised on fabrications and/or false information provided by third parties and/or extortionists well known to them and who have since the judgment in question attempted on several occasions to extort them through blackmail in the media and through law enforcement agencies, (iv)the Applicants believe that the 1st and 2nd Respondents have been and/or are being misled into abusing their statutory powers in order to coerce, intimidate and/or bully the Applicants to pay the third parties/extortionists part of the funds paid to the associated companies pursuant to the aforesaid judgment, a clear abuse of statutory powers, (v)the Applicants are not averse to submitting themselves to the processes of the law whenever called upon to do so but for the reasons articulated it was only fair for them to be granted protection from arbitrary arrest by the court, and (vi)the Applicants are law abiding citizens with commercial interest in Kenya and they were willing to co-operate with law enforcement agencies when necessary and no prejudice would be caused by the grant of the orders sought.

3. The application was supported by affidavits sworn by the 1st and 4th Applicants. The 1st Applicant deponed that he was a shareholder and director of Afrison Export Limited and Hueland Limited which on 24th September, 2014 filed suit number HCCC 617 of 2012 against the office of the Attorney General pursuant to loss of portions of the property known as L.R. 7879/4 to the State. That by a judgment delivered on 12th February, 2013 the court awarded the companies Kshs. 4,086,683,330/- as compensation for the claim plus costs. However, on 18th March, 2013 after a meeting with the Attorney General a settlement fee of Kshs. 2,400,000,000/- was agreed upon and a consent recorded on 8th April, 2018. He swore that as soon as the judgment was entered he started receiving calls and messages from individuals trying to extort part of the monies. He declined to make the payments in questions which led to the publication of defamatory statements about him and his family in the print and electronic media. That he has since commenced legal proceedings against some of this individuals in **HCCC No. 119 of 2018(Afrison Export Import Limited & another *v.* Meshack Onyango Dehay & 5 others)** and some of the newspapers have offered

retractions and apologized for publishing the defamatory statements. That he had been reliably informed that the same individuals had approached the 2nd Respondent with further false and/or concocted information relating to the decretal sum with a view to influencing the Applicants arrest.

4. He swore that the conduct of the 2nd Respondent so far convinced him that there was an imminent threat that they shall act on the extortion threats and arrest him. He pointed out an application on 5th February, 2018 by the 2nd Respondent, Misc Criminal Application 389 of 2018, in which they froze the accounts of Afrison Export Import Limited and Huelands Limited for purposes of investigating the commission of a crime and a few days later, on 8th February, 2018, they applied to unfreeze the accounts in question on the grounds that ***"the investigations were fully conducted and the investigating officer finds there is no valid reason to continue freezing the accounts."*** He deponed that the actions by the 2nd Respondent had affected a total of 28 accounts and extensively affected business operations. He pointed to the interval of freezing of the accounts as a pointer to the whimsical and/or unreasonable nature of the actions. He swore that his bankers had been approached to justify transactions in the accounts without a court order and that his advocate, one Mr. Albert Kamunde, had been questioned concerning funds handled on their behalf and queries made about his client accounts. Further, that he had reason to believe that officers from the 2nd Respondent were following him and his family thereby violating his right to privacy. That their homes had also been visited by unmarked cars whom he believes to be agents and/or officers of the 2nd Respondent and the intrusions increased in the month of May, 2018. He swore that he was recently summoned to the offices of the 2nd Respondent alongside the 2nd and 3rd Applicant and he has been reliably informed that the individuals were pressing for their arrest. He submitted that these actions were a clear abuse of the 2nd Respondent's statutory powers and in breach of Section 46 of the Anti-Corruption and Economic Crimes Act. He swore that the actions had caused him anxiety and psychological distress and were meant to portray the Applicants as looters with the singular objective of unduly influencing and coercing them into giving up their legitimate interests and claims. He deponed that the actions by the 2nd Respondent are not connected to the purpose of enforcing the law, rather they were actuated by malice with a singular motive or objective of inconveniencing and/or embarrassing them. He deponed that if the orders prayed for were not granted there was a real danger that his rights to; equal protection under the law, human dignity, not be deprived of freedom arbitrarily or with just cause and his freedom or movement would be infringed. He concluded by stating that they were not averse to submitting themselves to the process of the court and were willing to comply with any bona fide investigations by the 2nd Respondent and to appear in court when required to.

5. The 4th Applicant deponed that due to his business association with the 1st Applicant he had been targeted, threatened and harassed by the 2nd Respondent and by persons purporting to be acting at its behest without justification of law. That considering the fears expressed by the 1st-3rd Applicants and given that their fears were founded on similar factual and legal circumstances he was apprehensive that unless the court intervened his right to privacy and liberty would be curtailed without proper justification in law. That he has been subjected to unwarranted intrusions onto his private property by unmarked/unidentified persons and vehicles which he has every reason to believe belong to the 2nd Respondent. He swore that he has co-operated with subpoenas by law enforcement authorities whenever called upon to do so and he was willing to co-operate in this case but given the arbitrary and unreasonable conduct of the 2nd Respondent, he was apprehensive his right to a fair process would not be infringed. He concluded by stating that he was a law abiding citizen and was ready and willing to abide by any terms and conditions the Court imposed for the award of bail/bond.

6. Annextured to the affidavits are land documents supporting the averments and evidence of the payment of Kshs. 2,400,000/- pursuant to the consent filed with the court.

7. The 2nd Respondent filed grounds of opposition on 5th June, 2018. They were that; (i)the entire application was defective, lacks merit and amounts to an abuse of the court process, (ii)the application is speculative and there is no reasonable ground for apprehension of breach of any fundamental rights or freedoms, (iii)the 2nd Respondent is executing its statutory mandate in undertaking the investigations into the conduct suspected to amount to corruption or an economic crime, (iv)contrary to the allegations in the application the 2nd Respondent is investigating allegations of a fraudulent claim for compensation for land already surrendered to the Government, (v)the Applicants have been accorded a fair hearing at all times material to the ongoing investigations and at no time subjected to threats, harassment or intimidation, (vi)the Applicants have not demonstrated that any fundamental rights have been breached or infringed by the 2nd Respondent or that the 2nd Respondent intends to arrest and charge them in court before a report is prepared and submitted to the 3rd Respondent for independent review, (vii)the matters in question are still under investigation and the outcome of those investigations cannot be pre-empted by the Applicants or the court and if the investigations culminate in the arrest of the Applicants their arrest and arraignment shall be according to known legal procedures and not infringe on their fundamental rights and freedoms, (viii)the application is without merit and does not meet the threshold for granting the prayer sought, finally (ix)that the application should be dismissed with costs.

8. The 2nd Respondent also filed a replying affidavit sworn by Mark Ndiema, one of its officers, who was part of the team conducting the investigations with regards to this matter. He swore that the 2nd Respondent started investigations into allegations that the Applicants, as directors of Afrison Import Export Limited and Hueland Limited, in collusion with officials from the National Land Commission(NLC) and other public officials fraudulently awarded compensation in the sum of Kshs.3,269,040,600/- as compensation for the compulsory acquisition of a portion of land reference L.R. No. 7879/4, a portion of land that had previously been surrendered to the public and belonging to Ruaraka High School and Drive-In Primary School. That the preliminary investigations had revealed that the said parcel of land was divided in 1983, upon application by the owners, on the condition that they surrender a part of the land in question to the Government free of charge for use as public utilities. That pursuant to the prescribed conditions an allotment letter was issued to the Permanent Secretary, Ministry of Education for unsurveyed Secondary School site off Thika road on part of L.R. No. 7879/4. That the 2nd Respondent was conducting investigations regarding the process leading to the claim for and award of compensation by National Land Commission of the said portion of land. He swore that they had discovered that the National Land Commission had published in Kenya Gazette Vol. CXIX-No 85 of 30th June, 2017 its intention to acquire the land in question being part of L.R. No. 7879/4 and that a payment was consequently made for Kshs. 1,500,000,000/- to Whispering Palms Estate Ltd, a company associated with the Applicants. That it was the above findings that the Applicant was investigating in accordance with its statutory mandate. He deponed that in light of the above it was clear that the 2nd Respondent was not investigating the allegations set out in the application and neither was it aware of investigations being carried out by the 1st Respondent. That the Applicants had availed themselves voluntarily at the offices of the 2nd Respondent and have been subjected to fair investigations with neither threats nor harassment nor intimidation being meted on them. He swore that the Applicants had failed to demonstrate that any of their

fundamental rights had been breached or infringed by the 2nd Respondent. That the matter in question was still under investigation and could not be pre-empted by the Applicants or this court. He concluded by urging the court to disallow the application with costs.

Submissions

9. Learned counsels, Mr. Ombija and Mr. Were acted for the Applicants, Ms. Aluda for the 1st and 3rd Respondents and Mr. Muraya for the 2nd Respondent. Ms. Aluda opted to adopt the submissions by counsel for the 2nd Respondent. Mr. Ombija begun by dispensing with the 3rd ground of the application. His entire submissions were premised on averments in the supporting affidavits of the 1st and 4th Applicants. He however emphasized that the danger to the Applicants was more than real and was being fueled by the failure on the Applicants' part to part with what was lawfully theirs, a part of the decretal sum awarded to them by the court. He underscored the Applicants willingness to subject themselves to the rule of law and to co-operate with police and the 2nd Respondent whenever necessary. He urged the court to grant the orders.

10. Mr. Muraya on the other hand submitted that the application had not met the threshold set out in **Richard Makhanu *v.* Republic[2014]eKLR** for the grant of anticipatory bail, namely that there must be demonstrable evidence of threats, intimidation or harassment. That the allegations were based on fear and phobia without tangible evidence could therefore not warrant the grant of the orders sought. Further, that in the case of **Gladys Shollei *v.* Republic [2015] eKLR** this court adopted the threshold set out in the **Richard Makhanu(Supra)** case with approval.

11. He submitted that the Applicants had misdirected the court in their application by stating that they were being harassed due to a legal judgment. That the 2nd Respondent was aware of the judgment in HCCC 617 of 2012 and the award of compensation to the Applicants but that they were not investigating that amount but a case of a fraudulent claim to compensation by the Applicants in collusion with officers from the National Land Commission and Ministry of Education. He reiterated the contents of the replying affidavits regarding the surrender of the parcels of land to the State and submitted that this portion of land was separate from that which was subject to the settlement pursuant to the judgment in HCCC 617 of 2012. He submitted that the land in question was public utility land and they were questioning the process of compensation. He conceded that the title to the land is the same as the one subject to the judgment and compensation.

12. He submitted that the allegations that the Applicants were being followed by unmarked cars were untrue. That the 2nd Respondent had been investigating the matter very objectively and has not arrested the Applicants or threatened them with arbitrary arrests. He submitted that Section 35 of the Anti-Corruption and Economic Crimes Act mandates the 2nd Respondent to transmit any report of investigations for independent review and it only makes recommendations to the 3rd Respondent who makes a decision to charge. That the application was meant to water down the ongoing investigations given that there is no evidence of the unmarked cars or proof that the cars belong to the 2nd Respondent. He urged the court to dismiss the application.

13. Mr. Ombija, in reply, pointed to a portion in an annexed Hansard of 14th May, 2018 in which the Cabinet Secretary for Lands stated that there was no surrender of the land for a public utility. He submitted that they had not misled the court and he questioned why the Applicants had been investigated and never charged. He was of the view that the intimidation implied that the 2nd Respondent had no evidence to warrant the charging of the Applicants. He submitted that there was therefore no need to pursue the Applicants' children save in pursuit of the decretal amount. He concluded by submitting that the court had a duty to protect the Applicants and he urged the court to do so.

DETERMINATION

14. The principles to be considered for grant of anticipatory bail were ably enunciated 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."***

15. It is therefore trite that anticipatory bail will be granted where there is a threat, violation or imminent breach of an Applicant's rights or fundamental freedoms. In the present case the Applicants are weary of the intentions of the 2nd Applicant, hereafter the EACC, who they aver are being used in a continuing plot to try and part from the Applicants monies obtained pursuant to a judgment in HCCC 617 of 2012.

16. EACC does not deny that it is carrying out investigations into the Applicants, as the proprietors of Afrison Export Import Ltd and Huelands Ltd, but states that its investigations pertain to compensation paid to the Applicants by the National Land Commission for compulsory acquisition of land. They aver that during their investigations they have realized that the compensation in question was illegally paid out since the land in question was already public land after the Applicants gave it to the State as part of a subdivision agreement. That the payments were made to the Applicants pursuant to collusion between them, officials at the Ministry of Education and the National Land Commission.

17. This court has considered the judgment of Mabeya J., dated 12th February, 2013, which relates to a suit by the Applicants with respect to a portion of the suit property **L.R. No. 7879/4** that was occupied by a State entity and compensation in the sum of Kshs. 4,086,683,330/- was judgment sum granted to the Applicants. However, pursuant to meetings between the Applicants and the State a consent order was made on **8th April, 2013** for a sum of Kshs. 2,400,000,000/-.

18. The court has also noted the legal opinion attached from the Attorney General to the Principal Secretary, Ministry of Education regarding

the compensation for Ruaraka High School and Drive-In Primary School located on L.R. No. 7879/4 in which he lays out how the schools came to be premised in the suit land. The Attorney General submitted that team constituted by the Ministry had come to the conclusion that the land was surrendered for a public utility by companies affiliated to the Applicants and that a letter of allotment was issued to the secondary school. Further, that a letter dated 28th March, 1984 from the Nairobi City Council to the proprietor of the property informing them of a grant of conditional subdivision approval but that the proprietor in a letter dated 3rd April, 1984 declined the conditions set out for the subdivision. That later, in a letter dated 3rd August, 1984, the Ministry of Education wrote to the Commissioner of Lands supporting the proprietors' bid to erect a private school on the land.

19. The advise that the Attorney General imparted on the Principal Secretary was that, given that the two schools were public schools, they met the public interest requirement for compulsory acquisition of private land. A gazette notice No. 6322 of 30th June, 2017 was also clear that the National Land Commission did advertise its intention to acquire the land in question. The above was also confirmed by the Cabinet Secretary, Lands when she appeared before the Senate Sessional Committee on County Public Accounts and Investments where she submitted that **L.R. No. 7879/4** was still a freehold title and that although the proprietors did apply for sub-division in 1983, which the Ministry of Lands approved, they disagreed with the department of City planning on the conditions for sub-division and did not proceed with the sub-division.

20. The 2nd Respondent supplied this court with a copy of a Letter of Allotment dated 28th June, 1999 granting 3.05 hectares to the Permanent Secretary, Ministry of Education. The letter has the subject line: UNS. SECONDARY SCHOOL SITE- OFF THIKA ROAD ON A PART OF L.R. NO. 7879/4 NAIROBI.

21. Counsel for the 2nd Respondent swore that this meant that the secondary school was unsurveyed and that the Applicants had surrendered the piece of land pursuant to a sub-division carried out in 1983.

22. Whilst this court cannot make a determination as to the validity of the title, it appears from what the court has set out above, which was never controverted by the Respondents that the payment was carried out above board. The court found the meandering submissions by the EACC with regard to the amount paid for the land in question confusing. In his submissions and whilst relying on the Replying Affidavit, Mr. Muraya submitted that a sum of Kshs. 3,269,040,600/- was the compensation paid by the National Land Commission. But his attachments, a letter dated 29th January, 2018 and copy of a National Bank cheque indicates the sum paid to be Kshs. 1,500,000,000/-.

23. Having laid out what appears to be the factual basis of the investigations at the heart of the application the court must now interrogate whether the Applicants have demonstrated that their rights or fundamental freedoms are threatened or have been infringed to warrant the grant of the orders sought.

24. The court found the submissions regarding the proceedings in **Misc. Criminal Application No. 389 of 2018** as set out by the Applicants informative. On 5th February, 2018 the EACC applied to have the accounts of companies related to the Applicants frozen **"for the purpose of investigating the commission of an offense".** A few days later on 8th February, 2018 they applied to have the accounts unfrozen as **"the investigations were fully conducted and the investigating officer [found] no valid reason to continue freezing the accounts".** It must be noted that the freezing order in question affected a total of 28 accounts.

25. The court has looked at the short period within which the freezing orders were in effect, and whilst the court will not term the period whimsical, as the Applicants' advocate did, I find that it points to an attempt to harass, threaten or intimidate the Applicants. This is informed by the sheer man-hours it would take to comb through and sift through the financial transactions in 28 accounts which would obviously be more than the three days that the EACC required. Alternatively, this could point to a fishing expedition on the part of the 2nd Respondent which would lend credence to the assertions by the Applicants that the 2nd Respondent's actions are powered by some ulterior motive.

26. The Applicants also averred that their bankers had been asked to justify transactions carried out in the accounts in question without a court order which is clearly unprocedural and further, and more worrying, that their advocate had been questioned concerning funds he had handled on their behalf and queries made about his client bank accounts.

27. This is clearly an untenable and blatant overreach on the part of the EACC who clearly acted *ultra vires*. While no proof was adduced to show that the Applicants were being followed the court is inclined to accept their assertion that even if EACC is carrying out investigations unrelated to the court decree, the same is being conducted in an atmosphere that is not devoid of harassment. I have delivered myself before that anticipatory bail will issue where it is demonstrated that investigations are being done with intimidation and harassment. This is a clear case then warranting the grant of the orders sought. That is to say that it has been demonstrated that the 2nd Respondent has harassed and threatened the Applicants and that the continued actions of this kind has resulted in the violation of the Applicants' rights and fundamental freedoms.

28. In sum, I find that the Applicants meet the criteria for the grant of anticipatory bail. I give the following final orders;

a) That each of the Applicants shall deposit a cash bail of Ksh. 100,000/- pending completion of any investigations by the Respondents and charge.

b) The Applicants must cooperate with the investigating officer, by appearing before him for purposes of facilitating the investigations.

c) The failure to comply with order (b) shall lead to cancellation of the bail granted upon application by the Respondents.

d) I make no orders as to costs.

DATED and **DELIVERED** this 7th day of **June, 2018.**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Awele for the Applicants.

2. Miss Atina for the 1st and 3rd Respondents.

3. Miss Ocharo for the 2nd Respondent.