



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION NUMBER 224 OF 2018.

TERESIA WANJIKU MWANGI.....1ST APPLICANT.

JAMES MWANGI MAIGUA.....2ND APPLICANT.

VERSUS

REPUBLIC.....RESPONDENT.

RULING

1. Teresia Wanjiku Mwangi and James Mwangi Maigua, hereafter the 1st and 2nd Applicants respectively filed the present application under a certificate of urgency on 4th June, 2018. The application is brought under Articles 19, 20, 21, 22, 23 and 25 of the Constitution of Kenya together with Section 123 and 124 of the Criminal Procedure Code. The Applicants seek orders that; (i) they be granted anticipatory bail or bail pending arrest for any bailable offence particularly on the issue relating to the collapse of Huruma Building, Casanova, Huruma, (ii) a day be appointed for the Applicants to appear before court, together with their counsel, to enable them undertake formal procedure including charge and caution if necessary without being taken into custody, (iii) a day be appointed for the Applicants to appear in court for purposes of trial if criminal charges are preferred and filed in court against them.

2. The application is premised on the grounds, *inter alia*, that the 1st Applicant was a businesswoman and heir to the building which formerly belonged to her late father located at Casanova in Huruma which unfortunately collapsed and she is apprehensive that police officers were preparing to wrongfully arrest her and cause her incarceration. That the 2nd Applicant was weary that he might be incarcerated as he had acted as a rent collection agent at the building and had been summoned to Pangani Police Station. They state that they were ready to defend themselves in any court of law but prayed that the tenets of fairness be upheld. Further that the officers from Pangani Police Station were looking for them and threatening to arrest them.

3. The application was supported by affidavits sworn by each of the Applicants. The 1st Applicant deposed that she was the daughter of the late Joseph Mwangi Gachoka who passed away in 2014 and left the management of the 5-storey building to her. That she managed the building and was at times assisted by the 2nd Applicant, her nephew, to collect rent. That due to the prolonged rains the foundation of the building was affected and she informed the Nairobi County Officials who informed the tenants to vacate the premises. However, a few tenants refused to vacate the premises and on the night of 2nd June, 2018 the building collapsed due to the on-going rains. That she was thereafter summoned to Pangani Police Station to record a statement and the police threatened to prosecute her yet she is a single mother of two school-going children and had not committed any crimes. Further, that her nephew had also not committed a crime and she therefore urged the court to admit them to bail pending any investigations.

4. The 2nd Applicant deposed that the building belonged to his late grand father, Joseph Mwangi Gachoka. That he is apprehensive that the police are going to arrest him and incarcerate him, possibly deny him bail as he has already been summoned to Pangani Police Station and recorded a statement. He deposed that he mostly acted as a rent collection agent on behalf of the 1st Applicant. That he is a law abiding citizen and his lawyer had recommended that he avails himself in court to seek anticipatory bail. Further, that he was certain that if the police incarcerated him he will suffer extreme prejudice. He attached to the affidavit newspaper cuttings detailing the tragic incident.

5. A Replying Affidavit sworn by CPL Joseph Njoroge, one of the investigating officers was filed on 7th June, 2018. He avers that upon visiting the scene at Huruma they met the 1st Applicant who claimed to be the caretaker of the building and who informed them that the 2nd Applicant was the owner. They requested the Applicants to appear at Pangani Police Station to assist in the investigation and on 4th June, 2018 they honored the summons and statements were recorded. However, the Applicants sneaked out of the station before their interrogation was complete. That the Applicants had also refused to furnish the police with documents in their possession crucial to the completion of investigations. That the Applicants have since switched off their mobile phones and the 1st Applicant has moved out of her known residential address. That at the police station the Applicants changed their statements with the 1st Applicant stating that she was the alleged owner of the

building while the 2nd Applicant financed its construction. That their preliminary investigations had revealed that the 1st Applicant was the caretaker of the building while the 2nd Applicant was the beneficial owner of the same.

6. He deponed that the police have a mandate under the law to investigate and summon any person to assist in their investigations. He swore that the Applicants had refused to co-operate with the police. That their investigations had also disclosed that the 2nd Applicant had absconded from duty at his workstation at the Kenya Revenue Authority since 4th June, 2018 and is about to leave the country. He concluded by stating that the case was serious and of great public interest as three people lost their lives in the tragedy and two others are admitted in hospital with serious injuries.

7. The application was canvassed before me on 7th June, 2018. Mr. King'ara and Mr. Njenga acted for the Applicants whilst Ms. Atina acted for the Respondent. Mr. King'ara who was the lead counsel reiterated the averments in the respective supporting affidavits. He confirmed that the Applicants were asked to present themselves to the police for investigation which they did on 3rd June, 2018 and were asked to go and record statements on 4th June, 2018. That they complied and recorded statements before leaving the station and asking the advocate to make the present application. He submitted that the property was erected on an informal allotment that had been issued to the late Joseph Mwangi Gachoka, father to the 1st Applicant and grandfather to the 2nd Applicant. That once problems were noted with the building the City Council was informed and it informed tenants to vacate the property. That while some acquiesced to the request to move out others were still in the building when it collapsed on the night of 2nd June, 2018 and three people died.

8. He submitted that the 2nd Applicant is an employee with Kenya Revenue Authority and went to the police station as a beneficial owner and was at the station for the entire morning. That this was an indication that he was not a flight risk and since he had already recorded a statement he has no problem with being charged but fears an arrest. That the 2nd Applicant was ready to co-operate with the police. He submitted that the 1st Applicant was a single mother of two and that the police had threatened to prosecute her yet she was just a caretaker of the building. Further, that the Applicants had not run away from anyone. He denied that the 2nd Applicant absconded from his job and that he intended to flee the country as he had a job to keep.

9. In opposing the application, Ms. Atina relied on the Replying Affidavit sworn by CPL Njoroge. She submitted that it was trite that a court will grant anticipatory bail only where there is a serious breach of a citizen's rights by a State organ which is supposed to protect them. That it was not in dispute that the building that collapsed was built on an illegal settlement. That the police have a mandate to investigate crimes and in this case three people had lost their lives and two others were seriously injured. She submitted that the possible charges would be either murder or manslaughter. She submitted that the story concerning the ownership of the building had changed severally including, in the pleadings and in court which pointed to a lack of truthfulness on the part of the Applicants. She submitted that the Applicants were not co-operating with the police as on 4th June, 2018 they sneaked out of the police station while interrogation was ongoing and switched off their phones.

10. Miss Atina added that the Applicants had changed their known address. She submitted that the 2nd Applicant had not been reporting to work and police had information that he might flee the country. That the Applicants were requested to provide certain documents in their possession but are yet to co-operate. She submitted that the Application was meant to defeat the ongoing investigations and was immature. She submitted that investigations can go either way and until they are completed the police have yet to form an opinion that they will charge them

11. Further, that the Applicants could only be held in custody for a period of 24 hours and were entitled to bail upon being charged. She submitted that the Applicants had not demonstrated how their fundamental rights have been infringed as the police are neither harassing nor intimidating them in any way. She informed the court that this was a matter of great public interest and the Applicants must not use the court process to defeat justice. Further, that the Applicants had a duty to co-operate with the police. She submitted that it was not true that a warning was given to the tenants to vacate the building as no evidence was adduced to support the same. She submitted that the court could not rely on the media reports as they were mere hearsay. She urged the court to dismiss the application.

12. Mr. King'ara, in reply, submitted that the Daily Nation and People Daily newspapers report quoted persons involved in the investigation. That both reports indicated that those who died sneaked back into the building. He submitted that investigations could not only be carried out after the Applicants' arrest and that if the Applicants are required they shall avail themselves in court. He submitted that the Applicants were not trying to preempt the investigations as they had recorded statements. Further, that he read malice in the insistence that the Applicants be arrested. He submitted that the Applicants' guilt would be determined by the trial court.

DETERMINATION

13. The principles that guide the court in considering whether to grant anticipatory bail were ably set out 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.”

14. The Applicants herein seek the remedy of anticipatory bail with regards to what they state is their impending arrest. The undisputed facts in this application are that on the night of 2nd June, 2018 a building associated with the Applicants collapsed at Huruma Estate leading to the death of three people and the hospitalization of two more. It is also undisputed that the Applicants were summoned by the police and recorded their statements on 4th June, 2018, the same day they filed this application. What is in contention is whether the Applicants co-operated fully with the officers and whether since that day they have gone into hiding.

15. From the supporting affidavits that the Applicants did not depose that they would assist the police in their investigations. Instead, their advocate submitted that they had done their bit when they recorded their statements and were ready to present themselves in court when asked to do so. This seems to lend credence to the assertion by the investigating officer that the Applicants were not co-operating in the investigation regardless to their contrary submissions.

16. The Applicants' submissions point to a sole assertion that their rights are likely to be infringed by their imminent arrest. The Applicants do not indicate that any threats have been issued against them. Given that they have shown no desire to assist in the ongoing investigations, the test is whether an arrest would amount to a violation of their rights.

17. The Applicants are entitled to the right not to be deprived freedom arbitrarily under Article 29 of the Constitution. However, the current scenario does not indicate a situation where their arrest would be arbitrary. The police are currently simply exercising their powers under Section 24(e) of the National Police Service Act, hereafter the Act, to investigate crimes. At the conclusion of their investigations if they find that the Applicants are culpable they will exercise their power to apprehend under Section 24(h) of the Act. This will accord with their duty under Section 24(i) to enforce all laws and regulations they are charged with.

18. On the other hand, it must be appreciated that the law provides safeguards meant to assuage such fears. These include the right to be produced in court within the mandated time frame and to be released on bail or bond once charged (Article 49(1)(f) of the Constitution). These provisions are intended at mitigating arbitrary arrests that infringe on an accused/ arrested person's rights.

19. In view therefore, the court will rarely grant anticipatory bail unless the threshold enunciated in **W'Njuguna(Supra)** is satisfied. In situations such as the present one where the Applicants merely run to their counsel to make the instant application without a threat of arrest, is a clear case that the threshold for grant of anticipatory bail has not been met.

20. On the submission that some tenants refused to vacate the building after a warning was issued, is an issue, in my view, that ought to be canvassed in the trial if the Applicants are charged. As at now, I can only observe that the newspaper reports do not comprise evidence that would persuade this court to issue the orders sought.

21. It was submitted that the court needed to grant the orders sought because the 2nd Applicant was a civil servant, and for that matter a senior officer with Kenya Revenue Authority. I have already addressed myself on the threshold for the grant of anticipatory bail. I add that the law must be applied equally to all citizens, working and non-working, rich or poor. The moment a court appears to favour a particular category of citizens, implies that it has abrogated its duty as an independent arbiter. In equal voice, the 2nd Applicant stands not to be prejudiced as the police are obliged to obey the Constitution by upholding the rights of an arrested person. They also have powers to release him on police bond until investigations are complete.

22. An issue was raised by counsel for the Respondent of the Applicants' credibility. The same arose from the averments in the latter's respective supporting affidavits on their relationship to the collapsed building. The 1st Applicant deposed that she was the beneficial owner of the building, which was bequeathed by her father, and that the 2nd Applicant only acted as a rent collection agent. At the hearing of the application, their story changed with their advocate submitting that the 2nd Applicant was the beneficial owner to the building. This was clearly influenced by the Replying affidavit that called into question the ownership of the building. Whilst the court may not be conclusive of the reason behind the change of the goal posts, it may be implied that there exist a scheme to avoid responsibility. This is however, an issue this court is not prepared to delve into as it should be canvassed elsewhere. All in all, I have arrived at the conclusion that the application is not merited in view of the foregoing observations. The application is accordingly dismissed with no orders as to costs.

DATED and DELIVERED this 11th day of June, 2018.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. King'ara for the Applicant

2. Miss Atina for the Respondent.