



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CR. MISC. APPLICATION NO. 16 OF 2018

DR. KIPKERICH KOSKEI.....APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS...1ST RESPONDENT

ONGATA RONGAI POLICE STATION.....2ND RESPONDENT

DIVISION INVESTIGATIONS OFFICER IN CHARGE OF

ONGATA RONGAI POLICE STATION.....3RD RESPONDENT

RULING

The applicant filed a notice of motion dated 18th May, 2018 seeking anticipatory bail by this court pending anticipatory arrest stated to be undertaken by the criminal investigation officers based at Ongata Rongai Police station. The application has been brought pursuant to Articles 47(2), 49(1) (h), 259(2) and 244(c) of the constitution of Kenya, Section 3 and 4 of the constitution protection of fundamental rights and freedoms of the individual, practice and procedures Rules Section 123 of the Criminal Procedure Code and inherent jurisdiction of the court.

The applicant in support of the application has relied on his own affidavit and the grounds on the body of the notice of motion alleging the following circumstances:

1. That applicant is a male adult of sound mind and understanding working for gain as a businessman and residing at Eldoret in the Republic of Kenya.
2. That the applicant is a serious family man married and leading a happy and affectionate family life
3. That the applicant has all along been a law abiding citizen and now a retired from the civil service where he served in many years in various senior positions including the Chief Pharmacists of the Republic of Kenya.
4. Sometimes in the month of April, 2018 the applicant received a telephone call from the officer in the Division of Criminal Investigation (DCIO) of Ongata Rongai Police Station, informing him that he was to present himself before the police station due to a complaint raised against him by some family members of the late Daniel Hinga Mutarakwa regarding a parcel of and that he legally owns and registered in his names known as Land reference numbers KAJIADO/KITENGELA/10657 decimal Zero five (0.05 Ha).
5. That the applicant is very concerned why the matter of him being legal owner of all that parcel of land aforesaid and which he legally acquired following all the pre-requisite process for land transactions such as execution of a sale agreement, terms and conditions stipulated thereof, obtaining of a letter of consent from the land control board, paying of stamp duty and causing the transfer in the normal way was fully adhered with has now become a criminal matter as the police are trying to allude to by the numerous telephone calls made to him to appear or to be arrested thereof.
6. That from that time onwards, the applicant and the said complainants have been living in most cordial, harmonious and happy co-existence as neighbours and friends for many years.
7. That the threats and call of intimidation to arrest him are all means and purposes of interfering with, denying, violating and

infringing with his personal liberty freedom of movement, functions, operations and smooth running of his life and his work.

8. The said police officers are in the process of searching the applicant home which is making the relatives of the applicant apprehensive, anxious and/or fearful for their safety and lives generally.

9. The powers of arrest by police is being used to harass, intimidate and oppress the applicant herein unnecessarily.

10. That the applicant is a law abiding citizen of this country is entitled to the secure and equal prosecutions of the law as proved for in Articles 49(1) and 50(1) of the constitution of Kenya.

11. That the applicant is entitled to the enjoyment of the right to personal liberty as provided for in Articles 49 and 50 of the Constitution of Kenya.

12. That the intended arrest and/or prosecution by the police officers is for extraneous purpose intended to settle personal vendetta, political overtones, old scores, malicious, an abuse of the court, vexatious and oppressive perpetrated by some forces and people with ulterior motives, anger, frustration and/or envy.

On the other hand the respondent in answer to the motion filed a replying affidavit sworn by IP Geoffrey Omwenga of Ongata Rongai Police Station. In the affidavit the respondent depones that on 4th February, 2013 a report was made by Mrs Nairuko Ene Mutaragwa against the applicant over parcel of land registered as KJD/Kitengela/10657 purported to have been transferred by the original owner to the applicant. Having considered the evidence collected from the complainant and the land registry the respondent depones that the applicant became a person of concern to be sought for an interview and recording of a statement. He denied that in seeking and calling the applicant to record the statement he is motivated by malice and interior motive.

The law

The sanctity of the bill of rights and the protection of fundamental rights and freedom of individual citizens is guaranteed in our constitution. The right to liberty and security of the person under Article 29 of the constitution is one of such rights that a person cannot be deprived of arbitrarily or without a just cause. On the other hand Article 49 provides and articulates rights of an arrested persons. The characteristics of the Article is that every arrested person has a right to be informed properly in a language that person understand of:

(a) The reason for the arrest

(b) The right to remain silent

(c) The consequences of not remaining silent

(d) To communicate with an advocate, and other persons whose assistance is necessary

(e) To be released on bond or bail on reasonable conditions pending a charge or trial unless there are compelling reasons not to be released.

The High court has the jurisdiction to release any person held in custody on bail pursuant to Article 49(h) of the constitution and Section 123 of the Criminal Procure Code.

That the constitution says Article 28 provides for ***the right to Human dignity: "Every person has inherent dignity and the right to have that dignity respected and protected.*** Further in Article 29, ***the right to freedom and security of the person; 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.***

In our new constitutional dispensation all cognizable offences under the penal code and other statutes with a catalogue of offences are bailable. The only requirement is that the state is given an opportunity under Article 49(h) to oppose the application for an accused person not to be released on bond by demonstrating through evidence that compelling reasons exist not to grant him or her bail.

In Kenya there are no express provisions on anticipatory bail save for the constitutional provisions under the bill of rights. This lacuna has been further buttressed through the emerging jurisprudence articulated by the High Court.

I observe that in India a common law jurisdiction upon which our Criminal procedure code is premised has a specific section 438 of the code on Criminal procedure on anticipatory bail. It sates as follows.

Direction for grant of bail to person apprehending arrest

(1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the court of session for a direction under this section that in the event of such arrest he shall be released on bail and the court may after taking into consideration, inter alia the following factors namely:

(1) The incident and gravity of the accusations

(2) *The antecedents of the applicants including the facts as to whether he has previously undergone imprisonment or conviction by a court in respect of any cognizable offence.*

(3) *The possibility of the applicant to flee from justice and*

(4) *Where the accusation has been made with the object of injuring or humiliating the applicant by having him arrested, either reject the application forthwith or issue an interim order for grant of anticipatory bail.*

The constitutional court of India went further to consider the fundamental aspects of anticipatory bail to be of such importance and anchored on the right to life and liberty of a person.

In order to give meaning to the definition of right to liberty various scholarly texts and material were referred to like in commentaries on the law of England Volume 1 Blackstone observed that ***“personal liberty consists in the power of locomotion of changing situation, or removing one’s person to whatsoever place one’s own inclination may direct without imprisonment or restraint unless by one process of law”***

The universal declaration of Human Rights 1948 under Article 3 states ***“Every person has the right to life, liberty and security of person.*** Further Article 9 provides: ***“No one shall be subjected to arbitrary arrest, detention or exile”.*** The covenant in civil political rights under Article 9(1) states ***“Everyone has the right to liberty and security of person no one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”***

It has long been the practice in Kenya that anticipatory bail orders have been granted by the superior courts based on the bill of rights and fundamental freedoms, and section 123 of the Criminal Procedure Code. The position is clear as can be seen from the following cases: In ***Njuguna v Republic Nairobi Misc. Cr. Case No. 710 of 2002 IKLR*** 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. It is also the object between the enactments of Article 49(h) of the constitution”

This power to grant anticipatory bail is limited to the period the suspect has

been notified by the police as a person of concern in a particular criminal case. It is apparent that in certain instances the anticipatory bail remains in operation for a very long period of time.

I, however also consider the dictum on the principles in the case of ***Salauddin Abdulsamad Shaikh v the State of Maharashtra 1996 CRLJ 1368*** where the court observed ***“That anticipatory bail orders should be of limited duration only and ordinarily on the expiry of the duration or extended duration the court granting anticipatory bail should leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigator has made progress or the charge sheet is submitted”***

What can be deduced from the above constitutional provisions and the authorities cited the right to liberty and security of a person inevitably a unique one to protect ones freedom and security from state actors.

The European court interpreting Article 5 of the constitution on right to liberty and security with similar provisions with our own Article 29 of the constitution observed as follows in the case of ***Kurt v Turkey (1998)*** ***“that the authors of the constitution reinforced the individual’s protection against the arbitrary deportation of his or her liberty by guaranteeing a corpus of substantive rights which are intended to minimise the risks of arbitrariness by allowing the act of deprivation of liberty to be amenable to independent judicial scrutiny and by securing the accountability of the authorities, for that act. What is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection”***

“Any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of natural law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from arbitrariness”

What is engendered under Article 29 of our constitution as further entertained in the international states and conventions recognized in Article 2(5) of the constitution is a scheme in which the right to liberty and security of a person is fundamental human right in any functional system believing in the Rule of law. Deriving directly from Article 29 of our constitution, detention or deprivation of a person liberty and security must be in accordance with relevant laws and procedure. There is no doubt given that nature of the remedy anticipatory bail is a remedy under Article 29 of the constitution should be granted only in exceptional circumstances.

I have in mind the existence of rights of an arrested person as expressly provided for under Article 49 of the constitution. It is not hard to conceive by virtue of the conduct of the law enforcement agencies like the National Police Service to take an approach of acquiescence which is incompatible with the requirements of Article 49. By designating and buttressing these rights the framers of our constitution demand of every agency charged with the responsibility of arrest and investigations not to subject any person to acts which are inconsistent with or in contravention of Article 49 of the constitution. On this basis the facts of the present case are that anticipatory bail can be granted in the circumstances set out herein under.

(1) That the applicant be admitted to anticipatory bail of a personal cash bail of Kshs. 50,000.

(2) That the applicant be and is hereby ordered to avail himself for interrogation by the police officer at Ongata Rongai

Police station when and as requested.

(3) That at all times the applicant be accompanied by his legal counsel Mr. Naikuni.

(4) That the applicant is further ordered to co-operate with the investigation agency on matters arising from the report made in OB No. 7714/2/2013

(5) That in the interim the applicant shall not move out of the jurisdiction of this court without leave of this court.

Dated, signed and delivered in open court at Kajiado this **18th** day of **July, 2018**.

R. NYAKUNDI

JUDGE

In the presence of:

Mr. Naikuni for the applicant

Mr. Meroka for the DPP

The applicant in person