REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

MISC.CRIMINAL APPLICATION NO. 60 OF 2016

PAUL KINUTHIA GACHOKA.....1ST APPLICANT

JOHN HOPE VAUDAMME.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

By Notice of Motion dated 17th February, 2017 brought under Articles 22, 23, 25, 28, 29.39, 47 and 50 of the Constitution, Section 123(3) of the Criminal Procedure Code, inherent jurisdiction of the court and general principals of natural justice and rule of law, the Applicants pray that they be admitted to bail pending arrest in respect of allegations of money laundering and/or any other allegations on such terms as the court will deem fit. In the alternative, they pray that they be directed to execute a bond for their appearance in court upon institution of any criminal proceedings against them. The application is premised on grounds that they are likely to be charged with offences of alleged money laundering of Kshs. 791,385.00 from the National Youth Service yet from an affidavit of one Josephine Kabura Irungu the real perpetrators are known, that they will cooperate with police in the event that they are required to appear in court, that their fundamental rights and freedoms are likely to be breached by arresting and charging them in court and that it is in the interest of justice that the prayers sought are granted.

The application is supported by affidavits of the Applicants sworn on 17th February, 2016 respectively. They reiterate the grounds on which the application is premised. Annexed to the affidavit of the 1st Applicant is a copy of an undated press statement signed by one Beatrice Omari, Senior Assistant Director Public prosecutions in the office of the Director of Public Prosecutions which confirm the persons who the DPP has concluded should be charged with offences related to money laundering at National Youth Service. Amongst them are the Applicants.

Learned counsel Mr. Gachie for both Applicants submitted that the main reason why the application was brought was so as to protect the fundamental rights and freedoms of the Applicants. He submitted that the manner in which the Applicants have been implicated in the scandal was unfair given that it is in the public domain that the investigators of the scandal at the Banking Fraud Investigation Unit (BFIU) were also under investigations. They did the investigations in a shoddy manner and implicated the Applicants as scapegoats. Counsel submitted that although it was brought to his attention that as at the time of hearing the application, criminal charges had been filed against the Applicants, under Article 49(1)(h) of

the Constitution, the Applicants were nevertheless entitled to bail.

Learned State Counsel Ms. Atina opposed the application. She submitted that it was a well known principle that anticipatory bail can only issue where an Applicant demonstrates existence of breach of fundamental rights by a state organ. The mere fact that the Director of Public Prosecutions had filed charges against the Applicants was not, of itself, a violation of the Applicants' fundamental rights and freedoms. In that regard, she submitted that the DPP had already preferred charges against the Applicants together with others vide Milimani Criminal Case No. 301 of 2016 based on results of police investigations. Thus, the best that the Applicants could do is to present themselves to court to take plea. Furthermore, the alleged affidavit by Josephine Kabura Irungu cannot be used to persuade the court in granting the prayers sought.

I have accordingly considered the respective submissions together with the application and I take the following view of the application. Article 49(1)(h) of the Constitution provides for rights of an arrested person. The same states as follows:-

> ***"An arrested person has the right-***
>
> ***(h) 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 above provision is clear in that it accords a mandatory right to bail to an arrested person to be released on bail on reasonable conditions unless there are compelling reasons. The position presented by the instant case is totally different. In the latter, the Applicants are seeking bail that would prevent them from being arrested and placed in police custody until such a time they would be requested to go to a court of law and take plea. They have so far not been arrested. As such, the provision cannot be applied to secure the orders sought. More so, at the hearing of this application, it was brought to the attention of the court that criminal charges had already been filed against the Applicants who are jointly charged with others vide Milimani Criminal case no. 301 of 2016. The court was presented with a copy of the charge sheet and it confirmed that position. With the prevailing circumstances, the most prudent thing that the Applicants should do is to present themselves before magistrate's court for purposes of taking plea in the criminal case. It does not matter that the criminal charges were filed after the instant application. What is paramount is that at the time the application was filed, the Applicants, by this application were seeking the court's protection so that they are not arrested and placed in police custody. And now that the criminal charges are a reality, the Applicants should do the noble thing; to take the plea. This is more justified in the sense that once they present themselves before the trial court, automatically Article 49(i)(h) of the Constitution shall be invoked by either the Applicants or the court on its own motion. They will only not be accorded the right under this provision if, in the view of the trial magistrate, there will be compelling reasons not to release them on bail.

On the issue about the suitability of the persons investigating the NYS scandal, I emphasize that the court does not decide on who investigates criminal cases. What will carry the day is whether quality investigations were conducted and whether the case presented to court is meritorious. In any case, the Applicants will be accorded an opportunity to defend themselves.

On the alleged affidavit sworn by one Josephine Kabura Irungu, the same is not the subject of this application. It is not necessary for this court to comment about it.

Be that as it may, it is important that I outline that anticipatory bail shall only be granted when an Applicant demonstrates that his constitutional right has been violated or is likely to be violated by a state organ. See the case of **W' Njuguna vs Republic, Nairobi Miscellaneous Case No. 710 of 2002, (2004) 1KLR 520.**

It is thus clear that anticipatory bail is aimed at giving remedy for breach or infringement of fundamental constitutional rights by a state organ. It cannot issue where like in the instant case, the state organ is merely performing its duty as enshrined under a written law. I need not emphasize then that in the present

case all that the DPP has done is to file criminal charges against the Applicants based on conclusive investigations that the Applicants are culpable in the NYS scandal. The court upholds the rights of an accused person to be presumed innocent until proven guilty. Thus, it would be the duty of the Applicants to combat the prosecution's case with a strong defence. They shall be accorded the opportunity to prove their innocence. Therefore, the mere fact that criminal charges have been filed against the Applicants does not, of itself, amount to a breach or violation of their fundamental rights and freedoms.

In the premises, it is my view that this application does not meet the threshold of granting anticipatory bail. The same is accordingly dismissed with no orders of cost.

DATED and **DELIVERED** in Nairobi this **8th** day of **March, 2016**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. No appearance for Mr. Gachie for the Applicants

2. M/s Nyaundo for the Respondent.