



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC CRIMINAL APPLICATION NO. 44 OF 2013

ABDI ABDULLAHI SOMO.....APPLICANT

Versus

BEN CHIKAMAI.....1ST RESPONDENT

AHMED QURESHI.....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

RULING

So-called Anticipated bail

[1] I have before me a Notice of Motion Application expressed to be brought pursuant to Articles 22 (1) and 23 (1) and 3 (b) of the Constitution of Kenya and Sections 123 and 124 of the Criminal Procedure Code the Applicant. In the Motion, the Applicant has sought for the following orders:

- 1. That this honourable court be pleased to admit the Applicant to bail and restrain the police by an order of injunction from arresting, incarcerating and/or interfering with the applicant's freedom of movement in relation to any business transaction between him and the 1st and 2nd respondents hereof.***
- 2. That this honourable be pleased to grant any other or further Orders that it may deem fit and just to grant in the greater interest of justice.***

[2] The said application is premised on the following grounds:

- 1. That the 1st and 2nd Respondents herein have threatened to use the police and have the applicant arrested and tortured to compel him to pay off monies due and owed to them out of their business transaction and which matter is purely civil in nature.**
- 2. That the Applicant has been called twice by persons claiming to be C.I.D Officers Nairobi commanding him to pay up all monies due to the 1st and 2nd Respondent or else they would be arresting him.**
- 3. The Applicant is apprehensive that he shall be arrested and put up in cells on trumped up allegations separate from what is real and due between him and the Respondents hereof.**

Brief facts

[3] Briefly the Applicant's case is that they have been in a business partnership of purchasing and exporting "Arabic Gum" with the 1st and 2nd Respondents since 2012. The parties in the year 2012 exported 12.3 metric tonnes of Arabic Gum to the United Kingdom which earned them US Dollars 30,000 and shared these proceeds without any hitch. However, according to the Applicant, the 2nd transaction began on a wrong footing as majority of the Arabic Gum was found to be bad and was subsequently rejected by the importing agents. As a result thereof, they incurred huge losses which two of his partners want him to reimburse them. It was his case that he had no objection to refunding the 1st and 2nd Respondent Kshs 1,900,000 which was occasioned by the above loss except that he is currently very low financially. But, now the Respondents are using the police to harass him to repay the debt. He is really apprehensive that the police were after him.

Application was opposed

[4] The 1st and 2nd Respondent opposed the application and contended *inter alia* that anticipatory bail is usually granted where there are serious breaches by state organs and that the supporting affidavit had not demonstrated how the rights of the Applicant under the Constitution had been violated. Further arguments were made that Article 49 (1) (h) of the Constitution provided for right of an arrested person to be released on bail/bond and that in the instant case the Applicant was yet to be arrested.

[5] The Respondents had also given a Notice of Preliminary Objection to the application in which the following points of objection were taken up:

1. Pursuant to provisions of Article 157 of the Constitution of Kenya 2010, this court has no jurisdiction to issue an injunction against the 3rd Respondent.

2. That prayer number one of the Notice of Motion Application dated 19th December, 2013 is untenable this honourable court has no jurisdiction to issue an injunction against the police to restrain them from arresting the Applicant herein.

3. The prayers sought against the police who are not a party to this Application is against the rules of natural justice as it seeks to condemn the police unheard.

4. A Notice of Motion Application is not a proper way to originate a suit and is not provided for in law.

DETERMINATION

Direction

[6] When this matter came up for hearing on 10th March 2016, the court directed that the main Application and the Preliminary Objection to be heard together. I will, therefore, proceed on that basis. I will, however, start with the points of objection raised by the Respondents.

Notice of Motion as initiating pleading

[7] One of the points of objection to these proceedings taken by the Respondents is that:-

1. A Notice of Motion Application is not a proper way to originate a suit and is not provided for in law.

In my life as a judge, I have in the past heard similar arguments being advanced that a Notice of Motion cannot commence substantive proceedings. But, it should be understood that, as a matter of general principle, a Notice of Motion is a competent way of initiating substantive proceedings in court. It will all

depend on the particular statute governing the particular proceeding in question. Therefore, where the law provides for the manner of commencing a suit or proceedings in court, then that procedure applies. For instance, proceedings for appointment of inspectors under the Companies Act are commenced by way of Notice of Motion yet they are substantive proceedings. Close to the proceedings at hand, substantive judicial review proceedings under Order 53 rule 3 of the Civil Procedure Rules are commenced by a Notice of Motion. Before I conclude on this point, I should say that the Constitution seems to seek keeping of formalities especially on applications based on denial, or violation or infringement or threatening of fundamental rights and freedoms, to bear minimum. On this please see article 22(3) (b) of the Constitution. I need not say more about this objection. It fails flat.

The question of jurisdiction

[8] The Respondents submitted that this court lacks jurisdiction to entertain these proceedings in view of Article 157 (10) of the Constitution. Their reason for that submission is that the DPP does not require the consent of anybody or authority to initiate criminal proceedings in the exercise of its jurisdiction nor is it under the direction or control of any person or authority. I agree that the DPP is independent constitutional office which is not under the control or direction of any person or authority. But, he must exercise his powers and authority in accordance with the Constitution, in that, should a violation of the Constitution or infringement of the rights of persons occur or is alleged to occur in the course of his work, the court will always have jurisdiction to determine such disputes on infringement or threatened infringement of rights and freedoms of individuals. This jurisdiction is the design and architecture of the Constitution itself and cannot be ousted by improper invocation or interpretation of the notion of independence assigned to state organs and institutions. In fact by the exercise of judicial authority, we exercise delegated authority by the people which should not be seen to be an interference with the powers and functions of the DPP or any other independent office. Therefore, contrary the submissions by the Respondents, this court has jurisdiction to hear and determine matters such as the one the Applicant is raising by virtue of Articles 22 and 165 of the Constitution. Thus, the Preliminary Objection by the 1st and 2nd Respondent on that point fails.

Of the police

[9] The Respondents argued further that the court cannot possibly restrict the police from arresting a suspect and neither can the court issue any injunction restraining the DPP from discharging his constitutional duties as sought in this proceedings. It is true that the court will not seek to restrict the powers of the police as granted in the Constitution and the relevant laws. Except, however, and I will repeat this, where a denial, violation or infringement of or threat to the Constitution or rights and freedoms of persons is found to have occurred, the court has jurisdiction to ameliorate the infringement. Such remedy could be by way of conservatory order or judicial review orders or in form of other restraints permitted in the Constitution and the law. Their argument fails. The objections have been determined and I will now turn to the merits of the application.

[10] Upon careful consideration of this Application, the rival submissions and judicial authorities filed by the parties, I take this view of the matter. The main prayer in the Application seems to be anticipatory bail. In other jurisdictions anticipatory bail is provided for in the criminal procedure code especially on offences which are non-bailable. Such provision allows a person to seek for bail in anticipation of an arrest; and, the court may give direction for the person to be released on bail even before the person is arrested. I will give an example of India particularly section 438 of their Criminal Procedure Code. But let me come back home. I cannot say that the Constitution of Kenya provides anticipatory bail as Article 49 of the Constitution of Kenya provides for right to bail for arrested persons. My own view is that, constitutional remedies of injunction or conservatory orders or prohibition are being utilized within our criminal procedures through the tag ‘‘Anticipatory bail’’. I think it is time a clear and definite path is cut in this area of law and stick to the remedies available within the constitutional structure of our nation. Consider what the court stated in the case of **W’NJUGUNA vs. REPUBLIC, NAIROBI MISC. CR. CASE NO. 710 OF 2002, [2004] 1 KLR 520**, on the circumstances under which anticipatory bail can be given:-

“...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. “

The remedies permitted in article 23 of and the Constitution as a whole are tailored toward addressing any infringement of right envisage in cases where parties seek for anticipatory bail and I believe those remedies should be applied for as provided, and should be granted on the standards set in the Constitution and the law. That would prevent anticipatory bail from becoming amorphous and rogue for lack of definite or identifiable scale of proof which may be ascribed to it. I say these things because of the absence of a statutory framework for anticipatory bail. I could be wrong but let me decide this application on the facts before me.

[11] In this case, there is no evidence which was tendered by the Applicant to show that there have been serious breaches of his rights by the police or any state organs. He has made serious allegations that unless the court grants him the orders sought he will be arrested and tortured by the police. Look at the submissions by the Applicant in which he reiterated the contents of his supporting affidavit and the major allegation are twofold; (1) that the nature of the dispute between him and the 1st and 2nd Respondents was purely of a civil nature and that he had been called by people who were claiming to be police officers; and (2) that the 1st and 2nd Respondents had not denied that they were using police officers to threaten and put pressure on the Applicant to settle the debt between them. More and cogent details on the particular officers who were being used were needed if these allegations are to become potent in establishing a proper case for granting the prayers sought or for the DPP to effectively defend the application. The allegations are not based on anything tangible on which I can act. The apprehensions herein were left at very high level of generalization and conjecture. On this one I am content to cite a work by Achode J in the case of **KELVIN OKORE OTIENO vs. REPUBLIC NAIROBI HIGH COURT CRIMINAL REVISION NO. 207 OF 2013** that:

“Furthermore, if the matters in question are still under investigation the outcome of those investigations cannot be pre empted by the applicant or by this court. Should the investigations culminate in the arrest of the applicant, arrest and arraignment are known processes of our legal system and perse, do not amount to infringement on the fundamental rights and freedoms of the applicant. In any case he will be entitled to bail as provided for by the constitution. To my mind, the apprehension by the applicant does not meet the threshold of serious breach of his rights by a state organ.”

Even though the above authority is from a court of concurrent jurisdiction, the substance therein is manifested in great power and wit and I fully associate myself with it in the advancement of this my decision. Taking into account the totality of the circumstances of this case, I find and hold that the Applicant has not placed facts and material before me which would impel me to issue the orders sought. Even if I place the material before me upon the conditions precedent for the grant of anticipatory bail, the Applicant is awfully short of satisfying them. In the end result I find the instant Application to be without merit and I accordingly dismiss it with no order as to costs. The orders issued by Makau J on 20th December 2013 fall by the way side. It is so ordered.

Dated, signed and delivered in open court at Meru this 13th day of July 2016

F. GIKONYO

JUDGE

In the presence of:

Mr. Riungu advocate for 1st and 2nd respondents

No appearance for applicant

No appearance for 3rd respondent.

F. GIKONYO

JUDGE