



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL MISC. APPLICATION NO. 58 OF 2015

IN THE MATTER OF ARTICLES 10, 19, 20, 21, 29, 31, 47, 48, 49, 50, 60(1), 84,

157, 159, 165, 258 AND 259 OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF SECTION 123(3) AND SECTION 124 OF THE CRIMINAL

PROCEDURE CODE CHAPTER 75 LAWS OF KENYA

BETWEEN

KEN ODIGA.....APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....3RD RESPONDENT

THE SPECIAL CRIMES PREVENTION UNIT.....4TH RESPONDENT

RULING

Ken Odiga, the applicant, has moved this court through his advocate Mr. Nyaberi instructed by Omwoyo, Momanyi Gichuki & Co. Advocates by way of a Notice of Motion brought under certificate of urgency. The application is anchored on the various provisions of the Constitution and the Criminal Procedure Code as shown on the heading. The application is dated 23rd February 2015 and was filed on 24th February 2015. The application seeks the following orders in favour of the applicant:

- i. Certification of the application as urgent and hearing of the application ex parte;
- ii. Anticipatory bail pending his arrest and charge;
- iii. Stay of the intended arrest or proceedings against the applicant pending the hearing and determination of this application;
- iv. Conservatory orders in the interim restraining the Respondents whether by themselves, their

agents, officers and employees from arresting the applicant;

v. Appointment of a day when the applicant and his counsel can appear before the Nairobi Area Special Crimes Prevention Unit Department to enable police undertake their procedures without the applicant being taken into custody.

The application is supported by grounds found on the face of it and on the supporting affidavit sworn by the applicant on 23rd February 2015.

The grounds can be summarized as follows: that the applicant entered into a contract of sale with one Sammy Chagali Engoke in respect of a piece of land in Western Kenya for Kshs 700,000; that the said Sammy paid the applicant Kshs 300,000 leaving a balance of Kshs 400,000; that while the sale was pending finalization one Frank Engoke, Sammy's brother, entered into a different business venture with the applicant into which Frank paid Kshs 500,000 but later withdrew the money; that the sale agreement and the business venture collapsed leaving the applicant indebted to Sammy.

The applicant deposes that Sammy and Frank are now claiming he owes them Kshs 1,200,000 made up of the money paid by both towards the sale of land and the business venture and accrued interest. He claims that the two are using police to intimidate him and due to that intimidation and harassment, he was forced to draw two post-dated cheques for Kshs 650,000 which the two brothers are using to threaten him with imminent arrest.

Mr. Nyaberi made brief submissions in line with the supporting affidavit and urged the court to grant the prayers sought. He also asked the court to grant interim orders pending the ruling which this court declined.

Miss Macharia for the Respondents opposed the application. The Respondents did not swear a replying affidavit and counsel opted to orally submit in opposition. She stated that this court is being asked to make orders in vain because the applicant did not disclose the location the offence was committed; that this court lacks jurisdiction if the sale agreement is in relation to land situated in Western Kenya; that to grant anticipatory bail is to set a bad precedent because suspects will be seeking such orders without justification. She further submitted that if indeed the applicant has committed an offence he ought to have presented himself to the police. She asked the court to decline to grant the prayers sought.

Mr. Nyaberi responded that the police are seeking the applicant over a land sale transaction; that the applicant is not stopping police from performing their duties and that the complainant is using police in an unlawful way.

From the outset I wish to point out that the applicant seems to be citing the provisions of the Constitution 2010 without due regard to what provision is useful to his cause and what is not. Other than the provisions falling under Chapter Five on the Bill of Rights and perhaps Article 159 on the Judiciary, the other provisions of the Constitution in my view do not assist his cause.

I have carefully read the application and the supporting affidavit as well as the oral submissions by both counsels. The applicant states that the police have abused their powers of arrest by intimidating and oppressing him. In paragraphs 9 and 10 he deposes that the complainants caused his arrest after which he was forced to draw the two post-dated cheques while at the police station. From the submissions in court and the contents of the affidavit the applicant does not come out clearly whether the police are threatening to arrest him or he had been arrested sometimes around Christmas 2014. He does not bring out details to establish that he was arrested at one time over this issue. This court would have expected details of the date(s) of arrest, which police station he was taken to and perhaps the Occurrence Book details to confirm such arrest did take place.

One thing comes out clearly, that the applicant entered into some sale agreement with one Sammy which he admits aborted after he had received Kshs 300,000 from the said Sammy. While this court is not handling the issue regarding the civil debt between the parties, it is my view that there is reason for

Sammy to pursue him over that debt. The applicant does not show that he has made any attempts to settle that debt or to present himself to the police with his advocate to sort out the matter. He did not show he has taken any attempts to meet Sammy either in person or through his advocate to discuss and propose how the debt will be settled.

This court gets a feeling that the applicant is trying to use this court to evade his responsibilities. While this court does not condone harassment by the police or any other organ of the State and would like to see due process followed, I am afraid the applicant has not demonstrated to this court that his constitutional rights have been infringed upon or in any manner violated by the Respondents. In **W’Njuguna versus Republic, High Court of Kenya at Nairobi, Miscellaneous Criminal Case No. 710 of 2002, [2004] 1 KLR 520**, 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 my considered view that the applicant has not persuaded this court that there has been any breach of his rights and further, he has not demonstrated that any such breach was occasioned to him by the Respondents. Consequently, this court has no alternative than to dismiss this application which I hereby do. Orders are made accordingly.

Dated, signed and delivered this 2nd March 2015.

S. N. MUTUKU

JUDGE