



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL MISC. APPLICATION NO. 9 OF 2015

MWANIKI MWARA T/A

MT. KENYA JAVA WINES AND SPIRITS LTD APPLICANT

VERSUS

THE OCS EMBU CHIEF INSPECTOR RICHARD NGOTHO 1ST RESPONDENT

INSPECTOR ESTHER GITHUI2ND RESPONDENT

THE DPP EMBU3RD RESPONDENT

RULING

This is a ruling on an application dated 13/2/2015 brought by the applicant Mwaniki Mwara T/A Mt. Kenya Java Wines and Spirits Ltd. seeking for the following orders:-

- 1. That pending the hearing of this application this Honourable court be pleased to issue an injunction order restraining the 1st and 2nd respondents either by themselves, servants, agents assigns and or person claiming to act on their behalf from arresting, harassing, coercing, arbitrary arresting, intimidating and or in any other manner whatsoever interfering with Mwaniki Mwara the applicant.*
- 2. That pending the hearing of this application this honourable court be pleased to issue a remedy/grant and/or relief of anticipatory bail pending arrest or charge.*

The application is supported by the affidavit of Mwaniki Mwara the applicant. He depones that the 1st and 2nd respondents have been looking for him and threatening to arrest him for undisclosed reasons. The two have constantly harassed him by frequently intruding his place of work without justification. The have arranged for arbitrary arrest and created negative impression, which undermines the integrity of the applicant in the eyes of the public. The 2nd respondent has frequently called the applicant and interfered with his quiet enjoyment of his peace.

A replying affidavit sworn by the 1st respondent states that the applicant made a report of impersonation on 21/2/2015 against one James Muthii through telephone. The officers from Embu police station responded and arrested the said James but was subsequently released. James complained that he had been assaulted by the applicant and his employees. Investigations revealed that the applicant was the perpetrator of the assault and it was decided that he be charged with a criminal offence. The applicant was summoned to appear at the station but he declined. He was also called by the 1st and 2nd respondent but he refused to go to the station.

The respondents stated that they were later served with the application before the court. They denied that they have violated the applicant's rights of ownership or free trade in his business. It is argued that the 1st and 2nd respondents were acting within their mandate under Section 24 & 52 of the National Police Act. The applicant has not demonstrated infringement of his fundamental rights to justify the orders sought.

In his supplementary affidavit, the applicant states that James came to his business premises and purported to extort a bribe from the applicant's employees claiming to be an employee of NACADA. The impersonator has already been charged by the 1st and 2nd respondents in Criminal Case No. 347 of 2014. As a counter measure the accused is trying to use the 1st respondent to fabricate charges with a view of intimidating him. The applicant is not mandated to co-operate with the 1st and 2nd respondents for they are violating his fundamental rights.

The applicant alleged that paragraph 5 of the replying affidavit is a falsehood. Paragraph 5 states that James made an assault report which was booked at the police station as OB No. 49 of 22/2/2015. This prompted the applicant to apply to cross examine the 1st respondent on his affidavit. During cross examination, the 1st respondent denied that he was aware of any charges having been preferred against James Muthii. However, he admitted the existence of the charges in police file No. 411/30/15. He said that it was after James recorded a statement that it was revealed that he had been assaulted by the applicant and his employees. James was issued with a P3 form and treated for the injuries sustained. He also admitted that he wanted to charge the applicant for selling sub-standard goods.

The counsel for the applicant Mr. Mungai Kivuti in his submissions framed up 4 questions for determination by this court as follows:-

- a. *Whether the intended charges of assault are sustainable and founded on any credible evidence.*
- b. *Whether an accused person can in a proper case find a cause of action during his criminal activity/trial.*
- c. *Whether in the cause of criminal transactions the accused had a reason for preferring a counter criminal offence against his complainant arising from the same cause of event.*
- d. *Whether with the exception of the offence of affray, the complainant and accused can simultaneously involve in the same capacity in the criminal indictment.*

The applicant seeks for anticipatory bail and for an injunction to restrain the 1st and the 2nd respondent from harassing him. It is therefore not the business of this court to determine whether the charges of assault are any other charge is sustainable. This court need not involve itself on whether the 1st and 2nd respondents have evidence to prefer a counter criminal offence against the applicant who had approached them as a complainant.

The issues for determination is whether the rights of the applicant have been violated by the actions of the 1st and 2nd respondents to justify granting bail pending arrest. The second issue is whether the applicant is entitled to an order restraining the 1st and the 2nd respondent from harassing him.

The applicable law is Section 52 of the National Police Service Act. It provides:-

“A police officer may, in writing, require any person whom the police officer has reason to believe has information which may assist in the investigation of an alleged offence to attend before him at a police station or police office in the county in which that person resides or for the time being is.”

In view of the foregoing provision, the 1st and 2nd respondents in their capacities as police officers are empowered to summon any person to appear before them in the course of investigation of a crime whom they believe has useful information. The material placed before me in this application is that the 1st and 2nd respondents summoned the applicant to attend before them to assist them to investigate a report of assault made by James Muthii. It was within their mandate to conduct investigations in respect of the said complaint in the same way they attended to the complaint made by the applicant. It has not been

demonstrated that any rights of the applicant have been violated. It has also not been specified which rights were likely to be violated.

It is clear in the affidavit of the applicant that the 1st and 2nd respondents were looking for him with a view of interrogating him. There is no evidence to show that the applicant was being harassed.

The respondents relied in the case of ***RICHARD MAKHANU VS REPUBLIC [2014] eKLR*** which had similar facts. The court cited the case of ***W'NJUGUNA VS REPUBLIC, Nairobi Misc. Cr. Case No. 710 of 2002, [2004] 1 KLR 520*** in its holding that anticipatory bail is usually granted where there is serious breaches of a citizen's rights by an organ of the state which is supposed to protect the same.

Article 49 of the constitution provides that an accused person shall be brought before the court as reasonably possible but not later than 24 hours after being arrested. In view of the provisions of the Constitution, the police have no mandate to hold a suspect at the police station for more than 24 hours.

It is appreciated that this case has very interesting history where the applicant was the original complainant. In the course of investigations, it turned out that he was the one who had committed the offence and James Muthii was set free and issued with a P3 form. The police are at liberty to investigate the report by James Muthii. The applicant has well founded fears that he may be arrested and locked in police custody.

Due to the facts presented in this case and the background of this matter, I allow prayer one (1) of the application.

As for prayer 2, I do not find any justification to issue a retraining order against the respondents. The 1st respondent has explained that all he wants to do is to investigate the crime. I therefore decline to grant prayer 2.

The applicant is hereby arrested by the court and admitted to bail. He maybe released on execution of his own bond of Shs.20,000/=.

The applicant is directed to report to the 1st respondent within 7 days. Mention before the Deputy Registrar High Court on 29/10/2015 with a view of closing this file.

It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 15TH DAY OF OCTOBER, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Nandwa for Respondents