



Omido v Director of Criminal Investigation & 4 others (Criminal Miscellaneous Application E056 of 2025) [2025] KEHC 13337 (KLR) (25 September 2025) (Ruling)

Neutral citation: [2025] KEHC 13337 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL MISCELLANEOUS APPLICATION E056 OF 2025
WM KAGENDO., J
SEPTEMBER 25, 2025**

BETWEEN

PHYLLIS ISSA INDIATSI OMIDO APPLICANT

AND

DIRECTOR OF CRIMINAL INVESTIGATION 1ST RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY & 3 OTHERS

& 3 OTHERS & 3 OTHERS & 3 OTHERS & 3 OTHERS & 3

OTHERS 2ND RESPONDENT

RULING

1. Before the court is an application by way of an originating Notice of Motion dated 15th April, 2025, which is particularized to brought under Article 10, 22, 23, 25, 27, 28, 29, 47, 48, 49(1) & (h), 50, 165(6), Article 259 of the Constitution of Kenya, 210, and Section 123 of the Criminal Procedure Code.
2. Save for the spent reliefs, the applicant moved this court for substantive Orders;
3. ThatT pending the hearing and determination of this application inter-partes the Applicant be admitted to anticipatory bail or bond at such reasonable terms and conditions that this Honourable Court may deem just and fit in the circumstances.
4. ThatT this Honourable court be pleased to issue a conservatory order restraining the Respondents, their servants, agents, junior officers and/or anybody from effecting and/or anybody from arresting, charging, harassing or otherwise however interfering with the applicant without conducting investigations and according him an opportunity to be heard.
5. ThatT the Honourable Court do issue such further or other orders that in its discretion may deem fair and just in the circumstances.



Applicant's case

6. The application is propped by the grounds on its face and the affidavit of the applicant; Phylis Issa Indiatsi Omido, the executive director of the Center of Justice Governance and Environmental Action, which role she avers includes inter alia addressing environmental issues.
7. She deponed that she received credible information from officers of the Kenya Police that they are under express instructions to arbitrarily capture and arrest her in a view of arraigning her in court on tramp up charges.
8. That, officers of the 5th respondent, and the 4th respondent have attempted to arrest her to prevent her from carrying out the remediation of restoration of the environment of the Owino Uhuru Community after NEMA failed to comply with court orders of presenting a report on the said remediation.
9. That, the Supreme Court on 6th December, 2024 ordered the 5th Respondent to remediate the environment of Owino Uhuru Community within four (4) months, where in default they should pay Kshs 700,000,000/= to the applicant to undertake the remediation.
10. The applicant avers that the respondent has been using state power and extrajudicial means, through state agencies against the applicant and her organization to prevent her from undertaking the suit remediation and therefore expending the Kshs 700 million.
11. That, she has neither been summoned to appear in any police station or investigative agency nor warrants issued against her, thus the risk of her imminent arrest constitutes a clear breach of due process.
12. Further, that the 4th and 5th respondents have already demonstrated malice in disregarding due process and the rule of law as the Deputy County Commissioner issued orders to have the 5th respondent report the matter to the police and obtain an occurrence book record (OB) against the applicant.
13. That, the news of the applicant's imminent arrest has been widely circulated, despite which she is willing to submit herself to a just and fair legal system/process, which her rights and freedoms as guaranteed in the Constitution are respected and protected.

Respondent's case

14. The 1st, 2nd and 3rd opposed the application through a Replying Affidavit sworn by one Dolphine Wanzala Okondo, the Deputy County Commissioner in charge of Jomvu Sub-County, Mombasa County and Grounds of Opposition dated 22nd April, 2025.
15. She denied the applicant's allegations terming them as falsehoods which remain unsubstantiated through evidence.
16. Further, she deponed that the applicant has not proved or demonstrated through evidence of her impending arrest where the Office of the Director of Public Prosecutions is yet to prefer a decision to apprehend or charge the applicant.
17. She posited that, following the Supreme Court's orders to the 5th respondent amongst other government agencies to remediate the environment of Owino Uhuru, the 5th respondent requested the National Government Administration and Coordination(NGAO) to mobilize and facilitate public participation and stake holder engagement on the exercise, which in her capacity as the public officer under NGAO undertook.



18. That, on 2nd April, 2025 the 4th respondent, chaired a meeting where officials of the 5th respondent amongst other representatives of relevant government agencies were present, the applicant in company of other rowdy persons without notice violently forced their entry in the meeting terming the meeting as illegal, organised to hoodwink the Owino Uhuru residents their court awarded monies and demanded nobody should step at Owino Uhuru.
19. That, following the threats the 5th respondent reported the incidence at Central Police Station – Mombasa.
20. Further, security intelligence caused the public baraza venues from the said Owino Uhuru area to a nearby village (mtaa ya ndege to ensure the participants safety. However, to date the applicants have disrupted the 5th respondent’s attempts to carry out an environmental assessment exercise against the Supreme Court orders.
21. That, as it stands the 1st and 2nd respondents are currently undertaking investigations into complaints by the 5th respondent but are yet to make arrests where there is probable cause.
22. She thus contends that the application is repugnant to Article 245 of the *Constitution*, where the orders sought by the applicant amounts to interruption and/or interference of the independent power and mandate of investigations vested in the 2nd and 3rd respondents.
23. The Application was further canvassed through written submissions. As at the time of making this determination only the Applicant filed their submissions.

Written submissions

24. The applicant summarily rehashed her position in the application thereby reiterating that she has demonstrated a prima facie case to this Honourable Court that she is under imminent threat of arrest by the Respondents and is justifiably apprehensive that her constitutional rights are being violated.
25. Further, she submitted the malicious intent by officers of the 1st and 2nd Respondents to arrest and detain her without attendant evidence of any alleged offense is arbitrary, illegal and unconstitutional and amounts to wrongful/false arrest and detention, to the that she is entitled to anticipatory bail.
26. Simply put, the applicants maintains that she satisfied all the prerequisites for the grant of anticipatory bail and conservatory orders as interpreted by the courts and as such, it is in the interest of justice and law that the present suit is allowed as prayed.

Analysis and determination

27. The only issue for determination is whether the Applicant is entitled to the orders sought.
28. Articles 28 and 29 of the *Constitution* provide that;
 - “Every person has inherent dignity and the right to have that dignity respected and protected.”
 - “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;
 - b. detained without trial except under a state of emergency in which case the detention is subject to Article 58;



- c. subjected to any form of violence from either public or private sources;
- d. subjected to torture in any manner, whether physical or psychological;
- e. subjected to corporal punishment in a cruel, inhuman or degrading manner.”

29. From the onset, it is noteworthy that in Kenya, there is no specific provision on anticipatory bail. However, where the remedy has been applied for, courts have considered it, and applied the threshold for an application for violation or threatened violation of rights under Articles 23 and 165(3) of the Constitution.

30. Further, relief granted by the High Court in exercise of its mandate under Article 165 of the Constitution. It provides as follows;

“ 165 (3) Subject to clause (5), the High Court shall have—

- (a) unlimited original jurisdiction in criminal and civil matters;
- (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
- ...
- (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - i. the question whether any law is inconsistent with or in contravention of this Constitution;
 - ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

31. This court has in replete occasions considered this phenomenon. Lady Justice Teresia M. Matheka, in Simon Mwaniki & 2 others v Director of Public Prosecution & 2 others [2021] eKLR aptly captured this position. She observed thus: -

“Anticipatory bail was really necessary in this country in the dark days when one could be arrested and detained for days and months without any reason and, without trial and sometimes for trumped up non-ailable offences.

32. That changed with the promulgation of the Constitution of Kenya 2010 through which we the people put in measures to bring to an end those dark days. The Bill of Rights at Article 25 provides that certain fundamental rights and freedoms shall not be limited, Article 28, guarantees the right to human dignity and Article 29, freedom and security of person whereby everyone has the right not to be deprived of their freedoms arbitrarily or without just cause. To achieve this the framers of our Constitution demarcated the lanes for law enforcers, giving them powers needed to carry out their jobs, while at the same time keeping them within the binding boundaries of the Constitution and the Bill of Rights.

33. Article 20 clearly speaks to this: It states:

Application of Bill of Rights

1. The Bill of Rights applies to all law and binds all State organs and all persons.



2. Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.”
34. Be that as it may, its not lost to this court that the nexus of anticipatory bail ought to be weighed against the impending constitutional mandate of investigation.
35. Odunga J. appreciated this novel philosophy and the standard required in evaluation of application for anticipatory bail when he stated in the case of Republic v Chief Magistrate Milimani & another Ex parte Tusker Mattresses Ltd & 3 others [2013] eKLR as follows:

“However before going to the merits of the instant application it is important to note that what is sought to be prohibited is the continuation of investigation rather than a criminal trial. The Court must in such circumstances take care not to trespass into the jurisdiction of the investigators or the Court which may eventually be called upon to determine the issues hence the Court ought not to make determinations which may affect the investigations or the yet to be conducted trial.

That this Court has power to quash impugned warrants cannot be doubted. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the police to investigate allegations of commission a criminal offence ought to be interfered with. It is not enough to simply inform the Court that the intended trial is bound to fail or that the complaints constitute both criminal offence as well as civil liability. The High Court ought not to interfere with the investigative powers conferred upon the police or the Director of Public Prosecution unless cogent reasons are given for doing so.”

36. The applicant has claimed violation and threatened violation of her right and fundamental freedom by the Police. Orders that will impede criminal investigations should be on cogent and constitutionally-sound reasons. Specifically, she argues that she received credible information from officers of the Kenya Police that they are under express instructions to arbitrarily capture and arrest her in a view of arraigning her in court on trump up charges.
37. To contextualize the root cause of the perceived bad blood between the parties herein as narrated by the applicant, is a Supreme Court Order issued on the 6th of December 2024, directing the 5th Respondent to remediate environmental damage in the Owino Uhuru area or pay Kshs 700 million to the Applicant's organization for that purpose and it is her firm belief that the timing of the arrest is designed to ensure that she does not implement the orders of the court.
38. The respondents position as detailed by their deponent, the Deputy County Commissioner is that in her capacity as public officer the National Government Administration and Coordination(NGAO), on request by the 5th Respondent, undertook the remediation exercise through mobilization and facilitation public participation and stake holder engagement.
39. However, allegedly, the applicant in one of the 4th and 5th respondents' public barazas unlawfully infiltrated the meeting causing chaos and hurled threats thereby halting the smooth remediation process, which acts were captured in the minutes of the meeting. The actions by the applicant caused the 5th respondent to report the matter to the police whereby investigations are still ongoing but not arrests are yet to be made or charges preferred against anyone.
40. At this juncture, I am inclined to tread cautiously by avoiding any perceived inadvertent consideration or conclusion of matters pertinent in an ongoing investigation.



- 41 For what is worth, any relief including the instant, requires courts to ensure that interference with the functions of other bodies and institutions established by law; statute or the *Constitution* of Kenya, is only on cogent and robust reasons. Merely feeling inconvenienced by investigations is not sufficient reason for relief. Proof of violation, infringement or threat or contravention of a person's right under the *Constitution* of Kenya is required.
42. I am alive to the present realities where the executive arm of the government, and especially the police have not really endeared themselves to the Kenyan citizenry, where history is replete with cases of unnecessary arrests being conducted, all with the aim of satisfying the wishes of a state agency or even individuals.
43. The applicant acknowledged that she has neither been summoned to appear in any police station or investigative agency nor warrants issued against her. Other than making mere allegations, the applicant did not provide proof that the police are using their investigation powers to coerce or intimidate the applicant and her organization.
44. Having considered, the application, its merit or lack thereof, the response and the submissions, as viewed through the lens of the law, this court does not find any iota of evidence that the Applicants' fundamental rights have been breached or denied or that there is a threat of them being infringed, contravened or violated.
46. Investigations are legal processes aimed at fact-finding of the commission of a crime in our justice system and do not, per se amount to an infringement on the rights or fundamental freedoms of the person under investigation. If investigations are carried out in accordance with the law and rules, the processes thereto must be allowed to run their course for proper administration of justice.
47. In the upshot, Notice of Motion application dated 15th April, 2025 fails and is rejected in so far as it seeks to stop ongoing investigations. However, the applicant shall not be arrested except, when required, to appear before the investigators and or court if any charges are preferred.
48. There shall be no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS 25TH DAY OF SEPTEMBER, 2025.

W. K. MICHENI JUDGE

In The Presence Of;

For The Applicant(s).....mr Lempaa.....

For The Respondent(s)...mr Sirima.....

Court Assistant.....ms Bebora.....

Signed By/for:

HON. LADY JUSTICE WENDY MICHENI

THE JUDICIARY OF KENYA.

DATE: 2025-09-25 10:13:25

