



**Njeru v Director of Public Prosecutions & another (Criminal Miscellaneous Application E026 of 2025) [2025] KEHC 16899 (KLR) (Crim) (17 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 16899 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL MISCELLANEOUS APPLICATION E026 OF 2025  
MW MUIGAI, J  
NOVEMBER 17, 2025**

**BETWEEN**

**MICHAEL NJERU ..... APPLICANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Applicant fled the Notice of Motion dated 3/2/2025 seeking anticipatory bail. The application is brought under the provisions of Articles 20, 22, 23 (1) and 49 (1) (h) of *the Constitution* and Sections 39, 123 and 124 of the Criminal Procedure code. The Applicant prays for: -
  - a) Anticipatory bail of Ksh 50,000/= Cash Bail and such reasonable terms and conditions that the Court may deem just and fit in the circumstances.
  - b) A court order restraining the Respondent's servant, agents, junior officers or anybody from arresting harassing or otherwise interfering with Applicant's freedom.

**Grounds Of The Applicaton.**

2. The Applicant is apprehensive that his fundamental rights may be infringed. That summons have been issued by the Directorate of Criminal Investigations (DCI) in a matter purely civil in nature and involves a financial dispute from an agreement on written obligations.
3. That the dispute is of payment of Ksh 25 million resulting from miscommunication error and inadvertence between parties. That funds were mistakenly deposited into an account with an overdraft facility and that the Applicant is not at fault and Ksh10 million was already paid by the Applicant to



the Complainant. The Applicant has also demonstrated efforts to pay the balance of Ksh 15million and to resolve the matter and there is regular communication to reach a mutual agreement,

4. The Applicant has also submitted viable payment proposal and has corresponded with the Director of Criminal Investigations to clarify facts and the status of the matter. However there has been no response from the Complainant and the arrest and prosecution would be based on erroneous information and is unjustified. Further, that arresting him would harm his reputation and disrupt his business.
5. The Applicant prays for intervention to prevent undue harassment and that the civil matter be addressed through appropriate channels.

#### **Supporting Affidavit.**

6. The application is filed with the Applicant's affidavit sworn on even date. The Applicant explains that: He is the director of Advent Solutions Limited and that Advent Solutions Ltd Advent was awarded a legal tender by KENGEN and the Applicant supplied spare parts to Olkaria Power Station.
7. That the Company was financed by John Kiprotich Kibet, the Complainant in the matter and the tender was duly performed as per attached LPO. That KENGEN was to deposit the amount into a designated account which was shared between parties.
8. The Applicant was awarded Ksh. 25 million on complete performance of the tender but the amount was deposited into an account with overdraft. That Ksh 10 million was deducted from the amount and the Applicant became indebted to the Complainant the remaining amount of Ksh 15million. That this was promptly explained to the Complainant and the Applicant assured him that he would settle the outstanding amount. The communication has been ongoing and he has been persistent. That non-payment is not intentional but is caused by delay in payments of, money from other tenders which are pending. The Applicant has attached invoices, contracts demonstrating prospects of payment.
9. That he was summoned by Directorate of Criminal Investigations and his advocate also advised the Directorate of Criminal Investigations vide letter dated 25/1/2025 attached to the affidavit on the matter.
10. The Applicant's Counsel clarified that the case is a civil matter and is meant for arbitration but there has been no response from the Respondent or the Complainant .
11. The Applicant is deeply concerned that his liberty is at risk of infringement and prays for protection. He also faces police harassment through incessant calls to appear before the DCI. This is despite him seeking audience and his further clarification on the details of the case.
12. He is fearful that there is ulterior motive behind the summon tarnish his reputation, lead to financial hardship and damage his business interests.

#### **Replying Affidavit.**

13. The Respondent s filed the affidavit of No 58714 Investigations Economic Crimes Unit to contest the application. The officer explains that he was tasked with investigation of conspiracy to defraud and forgery following a complaint received from John Kiprotich Kibet on 10/11/2024.
14. That the Respondent confirms that the complaint was on aspects of a commercial agreement entered on 3/11/2023 where the Complainant would finance Advent Solutions Ltd with the sum of Ksh 20 million. However, the amount which was to be paid through NCBA Bank was diverted by the Applicant to Credit Bank without the Complainant's knowledge.



15. That the Complainant visited Advent Solutions office at Kilimani but found out that the Applicant had flown out of the country after diverting the money. That the application is filed to evade investigations and probable prosecution and is an abuse of process.
16. That Respondent reiterates that the investigations are bonafide and that they should be allowed to continue with their constitutional and statutory mandate. Further, in event of prosecution the Applicant will be afforded an opportunity to defend himself in case of prosecution. That the Applicant has not demonstrated threat of objects of Article 244 of *the Constitution* Constitutional standards and Human Rights.
17. The Respondent has attached the complaint letter dated 9/12/2024 addressed to the Directorate of Criminal Investigations. It is claimed that the Applicant changed the designated Bank Account to Upperhill Account No. 9094830016.
18. The agreed account had 3 signatories which includes the Applicant and Complainant .

#### **Written Submissions .**

19. Parties filed written submission on the application.

#### **The Applicant's Submissions.**

20. The Applicant frames issues for determination as whether the Applicant has met the threshold for anticipatory bail. It is submitted that the Applicant's liberty and right to freedom and security are threatened and unless orders are granted, the Applicant will suffer heightened harassment and violations of rights.
21. That he has received unprecedented threatening phone calls from the 2<sup>nd</sup> Respondent 's officers which have occasioned him great inconvenience, mental anguish, disturbances which proves violation of freedom and security of the person. That harassment persists despite him being presumed innocent.
22. That the Respondent's allegations that he is a flight risk and that he seeks to evade investigations are not proved and the Respondent has the burden to establish these facts. That the Applicant has been cooperative throughout and clarified the status of the matter.
23. Anticipatory bail would not impede investigations but would give assurance that investigations would be conducted in strict compliance with *the Constitution*. The Applicant will fully cooperate with Authorities with assurance that his rights to liberty and freedom from arbitral detention and fair treatment are upheld.

#### **The Respondent 's Submissions.**

24. The Respondent frames issues for determination as Whether the threshold for anticipatory bail has been met and submits that the summons for investigations and for the Applicant to shed light on circumstances is not a basis for issuance of anticipatory bail.
25. That Section 52 (1) of *National Police Service Act* provides for the police power to compel attendance of witnesses at the police station. The Respondent submission is that the summons was within the law and that none of the Applicant's rights have been infringed. The Respondent relies on the cases of Republic -Vs- Chief Magistrate Tusker Mattresses Ltd, Paul Ole Kuyana -Vs- Directorate of Public Prosecution.



## Analysis & Determination

26. I have considered the Application, Replying Affidavit submissions of parties and the applicable law in Kenya on granting anticipatory bail.
27. The Application is also contested as per affidavit and attached Complainant letter lodged at the DCI office which has been considered.
28. The Applicant's case is that the dispute is civil in nature and that clarification on this has been made through the Applicant's counsel. Further that there is preponderance of the fact that settlement of the outstanding amount and the payment into a different account was not done by the Applicant.
29. The Respondent has summoned the Applicant for investigations and persistent calls have been made which the Applicant claims to be disturbance, harassment, inconvenience, causing him mental anguish and violation of his right to freedom and security of the person.
30. The Respondent's case is that the Applicant diverted the money to a different account without the Complainant knowledge or consent. That the Respondent is investigating claims of forgery and conspiracy to defraud. Lastly that being summoned to the Directorate of Criminal Investigations is not a violation of rights.
33. In the case of *Ololoso & another -Vs- Inspector General of Police & another* [2023] KEHC 25855 (KLR) anticipatory bail as a "pre-arrest relief taking the form of pre-arrest bail:
- "Anticipatory bail safeguards against unlawful incarceration and further violation of constitutional rights during investigations. These rights include the right against torture and inhuman treatment, freedom and security of the person and right against self-incrimination amid other violations that potentially occur during criminal investigations".
35. Article 29 of *the Constitution* list Constitutional Rights related to freedom and security of the person as follows: -
- "Every person has the right to freedom and security of the person, which includes:-
- the right not to bear. 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."
36. The burden of proof is on the Applicant to prove that these rights have been breached or are threatened. The allegations must not be based on conjecture and the threshold set in Article 23 of *the Constitution* and jurisprudence on proof of constitutional violations or threat applies.
37. In the case of *Leonard Otieno -Vs- Airtel Kenya Limited* [2018] eKLR, the Court explained the threshold thus:
- "It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of



constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize *the Constitution* and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not a mere technicality; rather, it is essential to a proper consideration of constitutional issues.”

39. In *Ololoso & another -Vs- Inspector General of Police* (ibid) the court stated that anticipatory bail should be issued sparingly and explained at paragraph 45 that:

“Care should be taken not to adopt the practice of anticipatory bail without regard to right to bail, redress for violation or threatened violation of the Bill of Rights and fundamental freedoms intended in *the Constitution*, and perhaps, the bonafide exercise of constitutional function and mandate by other state organs.”

41. At paragraph 51 that:

“Impeding criminal investigation or charging of an individual in a court law must be on cogent and constitutionally-sound reasons”

42. Parties entered into a commercial arrangement between Advent Solutions Ltd and John Kiprotich. The Complainant financed the company in a tender award between KENGEN plc and the company to procure equipment, strategic spares and components of KENGEN plc in its eastern region plants and Olkaria Geothermal plant amid other projects .

43. The agreement was executed between the Complainant and the Applicant as director of advent solutions Ltd and the parties agreed to equally share profits of the tender as well as other tenders to be strictly financed by the Complainant .

44. The contract indicates that the amount paid was to be deposited in Advent Solutions Ltd account at Cooperative Bank.

45. On disputes arising, the parties agreed that incase of breach parties would be given a grace period of 1 month and where it is beyond parties control, the negotiations would follow. Clause 11 is also instructive that parties would submit dispute to Arbitration within the laws of the country.

46. The parties are in agreement that the Applicant has been summoned over the commercial agreement. Contrary to the Applicant’s preference and prayer before court for the matter to be resolved through civil process, the Respondent reads crime commission in the matter and is set to investigate conspiracy to defraud and forgery.

47. The Respondent ’s actions of summoning and investigating complaints are within the law. Civil processes cannot deter criminal investigations; further investigation of crime is done in public interest which exceed private arrangements of parties or breach of contractual obligations.

48. There is no prejudice since parties can still pursue civil processes alongside criminal proceedings.

51. Section 193 A of the Criminal Procedure Code and explained that :

“The police may investigate such matter which may also be substantially or directly in issue in a pending civil proceeding. Save, it bears repeating that, care should be taken that they are satisfied that an offence has been committed, and that the investigation is not to settle a score or civil debt between the parties.” .....



“ 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. As long as 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. “

52. In the case of Commissioner of Police & The Director of Criminal Investigations -Vs- Kenya Commercial Bank Muiru Coffee Estate Benjoh Amalgamated & 2 Others Civil appeal No 56/ 2012 , the Court of Appeal explained that the investigative powers should only be interfered where used in ulterior motive .

“It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. Ndarua -Vs-. Republic. [2002] 1EA Kuria & 3 Others -Vs-. Attorney General [2002] 2KLR 69.”

53. In the case W’Njuguna v Republic (2004) eKLR, court observed that anticipatory bail orders are granted only:

“...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.”

54. Further, in Mandiki Luyeye v Republic [2015] eKLR, Ngenye J (as she then was) held as follows:-

“Similar sentiments were observed in the case of Eric Mailu v Republic and 2 others Nairobi Misc. Cr. Application No. 24 of 2013 in which it was emphasized that anticipatory bail would only issue when there was serious breach of a citizen’s rights by organs of state. Accordingly, it is salient that anticipatory bail is aimed at giving remedy for breach of infringement of fundamental Constitutional rights in conformity with what *the Constitution* envisages constitutes protection of fundamental rights and freedoms of a citizen. It cannot issue where an Applicant labours under apprehension founded on unsubstantiated claims. The fear of breach to fundamental right must be real and demonstrable. An Applicant must demonstrate the breach by acts and facts constituting the alleged breach.”

55. Applied to the facts in this case, can it be said that the police and the Complainant have conspired to frustrate the Applicant’s settlement through criminal process? This has not been proved by pleadings and annexures filed

56. The letter by Applicant’s Advocates of 28/1/2025 is to the effect that the Complainant and Applicant entered into a contract for sharing of proceeds of a tender by KENGENPLC. The Complainant paid Ksh 10,000,000/- and a balance of Ksh 15,000,000/- fell due owing to the total amount being banked into wrong account by KENGEN which resulted to part of it being deducted for an outstanding overdraft.



57. This resulted to being summoned on diverse dates on phone. The Applicant claimed the matter was civil in nature and Clause 11 of Agreement provided for arbitration and he was ready to defray the balance.
58. The 1<sup>st</sup> & 2<sup>nd</sup> Respondent s confirmed report by Complainant by attached letter of 9/12/2024 of formal complaint of fraudulent diversion of funds by Applicant. The Complainant advanced Applicant Ksh 20,000,000/- the tender was done on payment instead of banking payment in the agreed account in NCBA bank the Applicant banked in another Account.
59. The Complaint discloses a matter for investigations by DCI and the Applicant claimed the deposit of funds was inadvertent and paid Ksh 10m remaining 15 m and required time to do so. Of importance and formed basis of the application was alleged harassment through phone calls and apprehension of imminent threat of arrest.
60. The investigation shall continue to their logical conclusion however, the Complainant and the Respondent must also act within the law and recognize that the parties have an underlying agreement which preceded criminal investigations and that some payments have been made in good faith.
61. On whether violation of constitutional rights have been proved, I find that the incessant calls harassment, disturbance and mental anguish may have been the basis of application .
62. The Applicant had not been arrested at the time of filing the application and has not been arbitrarily held in police custody. What is gathered is fear of arrest, anxiety after the Complainant had gone silent on the contract. The complaint was lodged in November 2024 when investigations were commenced. The Applicant Counsel also wrote to the Directorate of Criminal Investigations on 25/1/2025.
63. There has been no progress on the investigations since the Respondent has not advised Court on its findings for investigations which were lodged 12 months ago. This period of silence caused anxiety and fear of the unknown which is not the intention of lawful criminal investigation in public interest
64. The Respondent did not prove that the Applicant flew out of the country and that this affected investigations or speedy resolution of the matter.

#### Disposition

In the upshot, anticipatory bail an appropriate relief in this case is granted Ksh 50,000/- Cash Bail and shall be released on such terms in the event he is/was arrested.

The Applicant shall answer respond to summons by Police and shall be accompanied by Advocate on record to the Police Station.

**DELIVERED SIGNED & DATED AT HIGH COURT CRIMINAL DIVISION AT NAIROBI THIS  
17/11/2025 VIRTUALLY /PHYSICALLY**

**M.W.MUIGAI**

**JUDGE**

