



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA COUNTY

COURT NAME: MOMBASA HIGH COURT

CASE NUMBER: HCCRMISCAPPL/E063/2025

MWAMWERO HAMISI DIYO VS NATIONAL POLICE SERVICE COMMISSION (NPSC) AND
DIRECTOR OF CRIMINAL INVESTIGATION AND 3 OTHERS

RULING

1. Before me for determination is a Notice of Motion dated 24th April 2025 brought pursuant to Articles 10,22,23,25,27,28,29,47,48, 49 (1) & (h), 50, 165 (6) and 259 of the Constitution of Kenya 2010 and Section 123 of the Criminal Procedure Code.
2. The applicant, Mwamwero Hamisi Diyo moved this court for ORDERS:
3. Spent
4. Spent
5. Spent
6. THAT this Honourable Court be pleased to issue a conservatory order restraining the Respondents, their servants, agents, junior officers and/or anybody from affecting 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.
7. THAT this application be consolidated with HCCRMISCAPPL/E056/2025 which was scheduled for a mention on the 22nd April 2025.
8. THAT the Honourable Court do issue such further or other orders that in its discretion may deem fair just and just in the circumstances.
9. THAT costs be in the cause.
10. The application is propped by the grounds on its face and the affidavit of Mwamwero Hamisi Diyo sworn on 24th April 2025.
11. According to the applicant, he is an environmental and human rights defender who works closely with the executive director, Center for Justice Governance and Environmental Action (CJGEA). He has defended communities including the victims of the Owino Uhuru lead poisoning among other environmental issues. He has received information from officers of the Kenya Police that they are under express instructions to arbitrarily capture him with a view of



arraigning him in court on trump up charges and for ulterior motives.

12. The applicant states that the 4th and 5th Respondents have attempted to arrest and prevent him from carrying out remediation or restoration of the Environment of Owino Uhuru Community after the 5th respondent failed to comply with the Supreme Court's orders of 6th December 2024. He states that the 5th Respondent is using state organs to frustrate CJGEA and the Owino Uhuru community from complying with the Supreme Court orders.
13. The applicant avers that he has never been summoned to appear before any police station or investigative agency nor warrants of arrest issued against him thus a clear breach of the due process. In the event that he is required for questioning, investigations or arraignment in court, he is more than ready and willing to submit himself to a just and fair legal process that respects and protects his fundamental rights.
14. I have considered the application filed, the affidavit in support and the submissions on record. I also note that the respondents never filed any response nor submissions as at the time of making this determination. The issue for consideration is whether the application has merit and what orders this court should make.
15. The applicant has referred to **Section 123 of the Criminal Procedure Code**. The Section reads as follows: -

“(1) When a person, other than a person accused of murder, treason, robbery with violence, attempted robbery with violence and any related offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail:

Provided that the officer or court may, instead of taking bail from the person, release him on his executing a bond without sureties for his appearance as provided beafter in this part.

(2) The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive.

(3) The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced.”

1. This provision implies that for bail to issue, an offender ought to be under arrest or detention without warrant of an in-charge of a police station or is brought before a court and at that point has not been granted bail. It is at that point while in the custody of either a police station or court that the offender should seek the bail.
2. The provision also gives the court the discretion with respect to the terms of the bail or bond it can grant. The section outlines three circumstances under which the bail can be granted;
3. When a person is arrested or detained without warrant by an officer in charge of a police station, or
4. the person appears, or
5. the person is brought before a court.
6. The heading under (b) **“or appears”** is ambiguous in that it does not spell out where the person should appear and does not therefore meet the threshold for a party to apply for anticipatory bail under **Section 123 of the Criminal Procedure Code**. In effect Section 123 should not be invoked in an application of this nature.



1. I am yet to see any provision under the Criminal Procedure Code where bail ought to issue before an arrest or detention by either the police or the court. However, this Court enjoys the wide discretion and jurisdiction to determine this application under **Article 22 (1) of the Constitution of Kenya** which provides: -

“Enforcement of Bill of Rights.

22. (1) Every person has the right to institute court proceedings

claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”

1. Additionally, Article 165 of the Constitution of Kenya allows any person to seek redress for a denial or violation, infringement or threat to a right to fundamental freedoms as envisaged in the Bill of rights. In Kenya, in instances where anticipatory bail has been granted, it is on the basis of infringement of rights and fundamental freedoms in the Bill of Rights as enshrined under **Article 23**.
2. In **Gladys Boss Shollei vs Attorney General & 3 Others [2015]** eKLR, the court held:-

“Anticipatory bail shall be granted only when an applicant demonstrates that his constitutional right has been violated or is likely to be violated. This is also in the footsteps of my brother Justice Mabeya in his ruling in the case of Richard Mahanu (Supra) where he stated as follows: -

“With regard to the issue of anticipatory bail, it is usually granted where there is alleged to be serious breaches of a state organ. In the case of W’Njuguna –Vs- Republic, Nairobi Miscellaneous 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.”

The case of Eric Mailu –Vs- Republic (Supra) also cited the W’Njuguna case emphasizing the circumstances under which anticipatory bail can issue which majorly are serious breach of a citizen’s rights by organs of state. In that respect I need not say more than is outlined in the said W’Njuguna case. It is then 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 freedom of a citizen. It cannot issue where an applicant labours under apprehension founded on rumours or unsubstantiated claims.”

1. In **Peter Mutua Kanyi vs Director of Public Prosecutions & 2 Others [2019]** eKLR the court stated: -

“In the case of Richard Makhanu vs Republic [2014] eKLR, the court held the firm view that orders for anticipatory bail or bond must not be sought with the intention of pre-empting the outcome of investigations a position that was also held in the case of Kevin Okore Otieno vs Republic (2013) eKLR Investigators must feel and be free to do their work without fear of having their authority and/or mandate stifled by courts merely because



courts have power and authority to grant anticipatory bail when sought. The fact that a person feels inconvenienced by investigations is not sufficient reason for him to be granted anticipatory bail. Such an order should only be granted in the clearest of situations that point to a violation, infringement or threat or contravention of a person's right under Article 49 of the Constitution."

1. In light of the above, it is clear that for an anticipatory order to be granted, the Court must consider whether circumstances exist that would occasion a serious breach of the applicant's fundamental right. Instantly, the applicant contends that he has received credible information from officers of the Kenya Police that they are under express instructions to arbitrarily capture and arrest him with a view of arraigning him in court on tramp up charges and for ulterior motives.
 2. That being the case, the applicant has a duty to demonstrate that such information from officers of the Kenya police is factual. The applicant failed to discharge the same thus the court cannot rely on rumors.
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1. The applicant states that the officers from NEMA and Mombasa County Commissioner have attempted to arrest him and prevent him from working with the like-minded people in carrying out remediation or restoration of the environment of Owino Uhuru community after NEMA failed to comply with the Supreme Court orders of 6th December 2024.
 2. The applicant has the onus to demonstrate that NEMA's failure to comply with Supreme Court orders of 6th December 2024 and his activities of restoring the environment of Owino Uhuru has crystalized into a concrete case for which he is about to be charged with and moreso that his likely arrest would result to breach of his fundamental rights. These contentions were not demonstrated.
 3. At this moment, the court is not in a position to ascertain that the applicant is likely to be arrested and charged in court as alluded in his affidavit. The fact that the applicant has never been summoned to appear before any police does not amount to any form of harassment.
 4. The applicant states that the timing of the intended arrest is designed to ensure that he does not implement the Supreme Court orders. That he is aware that his woes got worse on or after the 23rd March 2025 when he joined the executive director of CJGEA and her staff in an engagement meeting with the community where they disseminated the Supreme Court's judgment delivered in December 2024 and they explained the status progress of the same. These are rumors that the applicant has opted to rely on rather than seek a proper confirmation from the relevant authorities of the intention to arrest and charge him in court.
 5. The 1st and 2nd respondents have a statutory duty under the National Police Service Act to investigate criminal complaints, and the Director of Public Prosecutions has the mandate to determine whether to prosecute based on the evidence gathered.
 6. For what it's worth, the applicant is yet to be arrested and charged before a competent court vested with jurisdiction to handle the charges that would be preferred against him. His rights under Article 49 and 50 will automatically crystallize with the prosecution bearing the burden to prove its case against him and allowing him a fair opportunity to defend himself in court. He will at all times remain innocent until proved guilty.
 7. In conclusion, the applicant has not demonstrated that any of his fundamental freedoms and rights have been infringed as to warrant the granting of anticipatory bail.
 8. The application is not ripe it fails to the extent held hereinabove and the same is dismissed with no orders as to costs.



DELIVERED, DATED and SIGNED at MOMBASA on this 27th day of NOVEMBER 2025.

Ruling delivered through Microsoft Teams Online Platform.

WENDY KAGENDO MICHENI

JUDGE

In the presence

of;- FOR

APPLICANT

RESPONDENT MR. SIRIMA

COURT ASSISTANT BEBORA

SIGNED BY/FOR:
HON. LADY JUSTICE WENDY MICHENI



THE JUDICIARY OF KENYA.
MOMBASA HIGH COURT
HIGH COURT CRIMINAL
DATE: 2025-11-27 16:25:04

