



**Kisinger & another v State (Miscellaneous Criminal Application  
E044 of 2025) [2026] KEHC 667 (KLR) (21 January 2026) (Ruling)**

Neutral citation: [2026] KEHC 667 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
MISCELLANEOUS CRIMINAL APPLICATION E044 OF 2025**

**TA ODERA, J  
JANUARY 21, 2026**

**BETWEEN**

**FABIOUS KISINGER ..... 1<sup>ST</sup> APPLICANT**

**GABRIEL ATEKA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**STATE ..... RESPONDENT**

**RULING**

**I. Introduction**

1. Before this Court for determination is a Chamber Summons dated 12<sup>th</sup> June 2025, brought by the Applicants seeking several reliefs, primarily:
  - (a) Anticipatory bail pending arrest or charge;
  - (b) A stay of proceedings in Kisii Criminal Case No. E165 of 2025;
  - (c) Protection of the Applicants' fundamental rights and freedoms.
2. The application is supported by the affidavit of the 1<sup>st</sup> Applicant, Fabious Kisinger, and is grounded on the assertion that the criminal charges leveled against them are a result of malice, "settling scores" by a senior police officer, and a violation of their constitutional rights under Articles 27, 28, 29, 47, and 50 of *the Constitution*.

**II. The Applicants' Case**

3. The Applicants, who are police officers, state that while on official traffic duty on 12<sup>th</sup> August 2023, they attempted to stop a motor vehicle (Reg No. KDJ 263K). The driver, Bonface Ondieki Marega, allegedly sped off, hitting their official vehicle (GKB 332H). The driver was later apprehended but released without any charges being preferred.



3. The Applicants contend that they subsequently discovered the vehicle belonged to a senior police officer. They argue that the current charges in Kisii CMCR/E165 of 2025 (assault) were engineered via IPOA as retaliation.
3. Counsel for the Applicants submitted that while Article 49(1)(h) of *the Constitution* refers to bail for arrested persons, this Court has the jurisdiction under Article 165 to grant anticipatory bail where a breach of fundamental rights is imminent. They cited the precedent of *W<sup>3</sup>Njuguna vs Republic* [2004] 1 KLR 520 to argue that the state is using the criminal justice system to harass them.

### III. The Respondents' Case

6. The Respondents opposed the application via Grounds of Opposition, arguing that:
  - \* The application is an abuse of the court process and has been overtaken by events.
  - \* The Applicants have already been formally charged in Kisii CMCR/E165 of 2025, and warrants of arrest issued against the 2<sup>nd</sup> Applicant.
  - \* The Applicants have failed to submit to the jurisdiction of the trial court despite having knowledge of the summons.
  - \* The issues raised—regarding the merits of the assault charge—are matters for the trial court and do not constitute a constitutional crisis.

### IV. Issues For Determination

7. I have carefully considered the application the responses and the submissions by both parties herein. The primary issues for this Court to determine are:
  - (i) Whether the prayer for anticipatory bail is tenable when a criminal case is already active.
  - (ii) Whether the High Court should stay the proceedings of a lower criminal court.

### V. Analysis And Findings

8. On Anticipatory Bail Criminal Case No. E165 of 2025 is already in existence against them and that they were summoned for plea-taking. It is trite law that court orders are not issued in vain. Article 49. Anticipatory bail cannot be used to bypass the duty to honor a court summons.
9. However, the Applicants admit in their application that Anticipatory bail is a creature of judicial craft intended to protect the liberty of a person where there is a real threat of arrest motivated by ulterior motives rather than the bona fide enforcement of the law.
10. On Stay of Criminal Proceedings<sup>nd</sup> Applicant is currently in contempt of the trial court's summons, as evidenced by the existing warrant of arrest. Equity aids the vigilant and those with clean hands; one cannot seek the protection of a constitutional court while actively evading the process of a subordinate court.
11. If the Applicants believe the charges are "settling scores," that is a defense to be ventilated during the trial at the Chief Magistrate's Court. A constitutional petition or an application for anticipatory bail is not a substitute for a criminal defense. Furthermore, the 2
10. The Applicants seek to stay a criminal trial on the grounds that it is malicious. It is a settled principle that the High Court should be slow to interfere with the constitutional mandate of the Director of Public Prosecutions (DPP) to prosecute.



## **VI. Final Orders**

12. In the upshot I make the following orders:

- (a) The prayer for Anticipatory Bail is denied. The Applicants are directed to present themselves before the trial court in Kisii CMCR/E165 of 2025 to take plea.
- (b) The prayer for Stay of Proceedings in the lower court is denied.
- (c) The 2<sup>nd</sup> Applicant is directed to Honor the existing warrants and submit himself to the trial court for further orders and or directions on the issue of warrant of arrest.
- (d) Mention on before the trial court 8.2.26.
- (e) Lower court file is released.

**DELIVERED VIRTUALLY VIA TEAMS PLATFORM ON THIS THIS 21<sup>ST</sup> DAY OF JANUARY, 2026 IN THE PRESENCE OF:**

**T.A. ODERA**

**JUDGE**

**21. 01.26**

Mr. Koima for the Respondent

Applicant - Absent

