



REPUBLIC OF KENYA



Charity v DCIO Kitengela Police Station & 2 others (Miscellaneous Criminal Application E093 of 2025) [2025] KEHC 11762 (KLR) (6 August 2025) (Ruling)

Neutral citation: [2025] KEHC 11762 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CRIMINAL APPLICATION E093 OF 2025
RN NYAKUNDI, J
AUGUST 6, 2025**

BETWEEN

NDOMBI JENIPHER CHARITY APPLICANT

AND

DCIO KITENGELA POLICE STATION 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION 3RD RESPONDENT

RULING

Representation:

M/s C.J Ndombi & Co Advocates

M/s Ombego Co Advocates

M/s Sidi Kirenge for the DPP

1. What is pending before this Court for determination is an ex-parte Notice of Motion application dated 2nd July 2025 in which the Applicant is seeking the following orders:
 - a. Spent
 - b. That the honorable court be pleased to admit to the applicant advocate to anticipatory bail pending determination of this application inter-partes.
 - c. That this honorable court be pleased to admit the Applicant to anticipatory bail pending her arrest or charge on such terms as the court may deem fit.
 - d. That the Respondents whether acting by themselves, their agents, representatives and/or all other officers subordinate to them be and are hereby restrained from summoning, arresting,



holding, detaining, incarcerating and/or in any other way interfering with the Applicant's liberty and/or in any other way without following the due process of the law.

- e. That the costs of this Application be provided for.
2. The Application is made on the following grounds among others: -
- a. That the 1st Respondent has been arbitrarily summoning the Applicant on numerous occasions and compelled the Applicant to attend Kitengela police for an unspecified time frame with a view to arrest her on allegations of obtaining money by false pretense yet she was only paid her legal fees and issued a receipt to the client to that effect.
 - b. That the 1st Respondent has specified with clarity to the Applicant on the reasons for his frequent attendance to DCI Kitengela Police Station, a position that the applicant has explained over and over again that she received the instructions fees of Kshs. 150,000 as client-attorney fees and even paid a receipt on the same.
 - c. That the Applicant is subjected to psychological anguish and torture, causing her unreasonable anxiety as a result of the arbitrary summoning by the 1st Respondent.
 - d. That the Applicant is not aware of any criminal investigations against her, that is currently being done by the 1st Respondent save for the explanation given to the effect that the money she was paid as legal fees are proceeds of crime, facts which the applicant cannot and should not be party to since she only received fees for professional work done.
 - e. That the continued malevolent actions by the Respondents are unjustified and a threat to the rights and fundamental freedoms of the Applicant enshrined in *the Constitution* of Kenya 2010.
 - f. That although the Applicant fears for his life, she is willing to cooperate with the Respondents if need be as well as to abide by such reasonable bail terms that the court may direct.
 - g. That unless the aforementioned orders are granted, the Applicant stands to suffer great prejudice.
3. The Application is supported by the annexed affidavit sworn by the Applicant who has deponed on oath as follows;
- a. That the applicant received instructions from her client whose is a person of interest to the 1st respondent to represent her and her husband in the Criminal Misc. No E 217of 2025 R v Hezron Okwiri and 2 others at Kajiado Law Courts.
 - b. That the advocate upon receiving the instructions prepared the brief and the fees payable, which amount was agreed at Ksh. 150,000. This was paid and the receipt issued to the clients.
 - c. That after a while, the applicant advocate received a strange call from unknown number that indicated that they are calling from DCI Kitengela Police Station.
 - d. That the said officer informed the applicant that they want the money amounting to Kshs 99,000 USD. That was paid to her by one of the suspect as fees.
 - e. That the Advocate has maintained that she was only paid Kshs 150,000 and even issued a receipt to that effect.



- f. That the said DCIO from Kitengela have insisted on arresting the applicant for obtaining money by false pretense, a fact that the applicant highly oppose and deny since she as only paid her professional fees and nothing more.
 - g. That on several occasions I have been summoned by a representative of the 1st Respondent on diverse dates of July, 2025 without clear information as to the reasons for my summons to Kitengela Police Station since I have told them that I was only paid legal fees and that I am entitled to it.
 - h. That the frequent calls from the 1st Respondent who is a representative of the 4th Respondent has inflicted upon me great anxiety and psychological anguish for the lack of clear information as to the numerous summons.
 - i. That at all material times, I have been a law abiding citizen and have portrayed my willingness and readiness to cooperate with the Respondents only that they fail to inform me of any offence and/or criminal act that I may have committed.
 - j. That the arbitrary summoning by the 1st Respondent curtails my freedom of movement and likely to cause a threat to my well-being.
 - k. That failure of the 1st Respondent to inform me of any preferred allegations against me obscures my right to fair administrative action.
 - l. That the uninformed actions by the 1st Respondent are unjustified and malicious, thus I fear for my life.
 - m. That the unexplained summons by the 1st Respondent has caused me to live in fear of being arrested any time for an offence not known to me.
 - n. That I have justifiable reasons that I may be put up in cells on false and trumped-up charges that may not be true.
 - o. That subsequently I am apprehensive that the 1st and 2nd Respondent are out to harass, intimidate and threaten me and it is my honest belief that an arrest is imminent.
 - p. That in the event I am granted bail I am willing and ready to appear before the Court or the police once am summoned.
4. The application is opposed by the replying affidavit of No. 84829 CPL Silas Ngaina who on oath deponed as follows:
- a. That I am a Police Officer duly appointed and serving within the National Police Service and currently attached to DCI Kitengela, and the Investigating Officer in respect of a criminal complaint under OB No.98/3/6/2025, involving the offence of stealing contrary to section 268[1] as read with section 275 of the Penal Code. By virtue of this position, I am competent and authorized to swear this affidavit.
 - b. That I have read and understood the application by the Applicant seeking, inter alia, conservatory orders and anticipatory bail, ostensibly to stop her arrest and/or investigation. I wish to respond to the same and oppose it on both factual and legal grounds.
 - c. That the matter under investigation stems from a formal complaint made by one Reinhard Nyambina, who reported at Kitengela DCI theft involving substantial sums of money, by Hezron Okwiri, a client of the applicant herein.



- d. That preliminary investigations reveal that the Applicant Ndombi Jenipher Charity was handed a sum of USD 9,900 by one Rebecca Nafula, the spouse of Mr. Hezron Okwire [who has already been charged before the Kajiado Law Courts], to deposit into the latter's account. This transaction is a material part of the financial trail under inquiry.
- e. That the applicant has been mentioned adversely in statements of prosecution witnesses in the said case. Attached and marked SN1 is the statement of one of the prosecution witnesses adversely mentioning the applicant herein.
- f. That the said sum is part of funds alleged to have been unlawfully obtained from the complainant, and the involvement of the Applicant is under legitimate and active inquiry in the interests of justice.
- g. That the Applicant's claim that being summoned or investigated violates her constitutional rights is misconceived. The constitutional right to liberty under Article 49 is not absolute and may be limited where reasonable suspicion of criminal conduct exists.
- h. That the said investigations indicate that the applicant's client account is being used for suspicious activity and the same calls for further investigations.
- i. That the Applicant has not demonstrated any imminent threat, unlawful conduct, or abuse of police powers that would justify the grant of anticipatory bail or conservatory orders. No evidence has been placed before this Court to show that her rights have been or are likely to be violated.
- j. That it is a well-established principle that anticipatory bail is an exceptional remedy, only available where the Applicant proves a genuine and imminent threat of unlawful arrest or harassment by State agents, which threshold has not been met in this case.
- k. That the mere fact of being summoned to record a statement or being investigated does not amount to a violation of rights and is a lawful exercise of police mandate under *the Constitution*, the Criminal Procedure Code, and the *National Police Service Act*.
- l. That no arbitrariness, malice, or bad faith has been shown in the manner in which the investigation is being conducted. The Applicant has neither been arrested nor threatened with arrest in an unlawful manner.
- m. That this Court has held in numerous decisions that anticipatory bail or conservatory orders should not be used to shield individuals from legitimate investigation or arrest in accordance with due process of law.
- n. That the continued preservation of conservatory orders will unjustifiably impede the discharge of my lawful investigative mandate and frustrate the administration of justice.
- o. That the Applicant's cooperation is necessary for the full and impartial resolution of this matter. Other individuals have recorded statements without incident, and there is no basis to suggest that the Applicant will be treated differently.
- p. That I undertake that any investigative steps to be undertaken, including summons or arrest [if any], will be strictly within the confines of *the Constitution* and all applicable laws. The Applicant's constitutional safeguards will be fully respected.



- q. That I therefore urge this Honorable Court to decline the invitation to interfere with ongoing investigations, dismiss the Application in its entirety, and allow the police to complete the inquiry without obstruction.

Analysis and Determination

5. The Applicant's notice of motion on the face of it has the import of the principle outlined by the court in the case of *Republic v Director of Public Prosecution & 3 Others Ex-Parte Juma Nyatieko & 2 Others; Maurice Onyango Oketch [Interested Party] [2021] KEHC 1775 [KLR]* observed as follows:

“For this court to prohibit, bring to a halt or quash the intended criminal proceedings against the applicants, it must establish the respondents acted within their respective mandates in their investigation and subsequent institution of a criminal charge against the applicant. Concomitant with this issue would be to answer the question of whether the applicant's rights have been violated in the manner that they claim and finally, whether the applicants are deserving of the reliefs sought.

Revisiting the circumstances under which the court will grant an order quashing or prohibiting the commencement or continuation of a criminal trial process, the factors which a court ought to consider are now well settled in various judicial pronouncements. First, the court ought to be extremely cautious in making its determination so as to avoid prejudicing the intended or pending criminal proceedings. Secondly, the court ought not to usurp the constitutional and statutory mandate of the DPP and neither should it curtail the investigatory mandate accorded to the DCI. However, the court may intervene where the said discretion is exercised unlawfully and in bad faith, for instance where the discretion is being abused or being used for achievement of some collateral purpose which are not geared towards the vindication of the commission of a criminal offence.”

6. In the same scope of jurisprudence, the court in *George Joshua Okungu & Another v the Chief Magistrates Court, Nairobi & Another [2014] eKLR* it was held that:

“The law is that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions or the authority charged with the prosecution of criminal offences to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings. That a petitioner has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is always open to the petitioner in those proceedings. However, if the Petitioner demonstrates that the intended or ongoing criminal proceedings constitute an abuse of process and are being carried out in breach of or threatened breach of the petitioner's Constitutional rights, the Court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore, the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the Petitioner to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognized aim. In the exercise of the discretion on whether or not to grant an order of prohibition, the court



takes into account the needs of good administration. See R v Monopolies and Mergers Commission Ex Parte Argyll Group Plc [1986] 1 WLR 763 and Re Bivac International SA [Bureau Veritas] [2005] 2 EA 43 [HCK].”

7. This application in essence seems to laid ground which forms the basis of exercise of review of jurisdiction vested with High court over inferior courts, or tribunals or quasi-judicial authority or person who is conferred with powers under the statute or constitution in making decisions likely to affect the fundamental rights and freedoms of another person or citizen within our borders. Generally, the celebrated grounds for judicial review include:
 - a. Lack of evidence – if there’s no credible evidence to support the charges, a court might find the decision to prosecute unlawful.
 - b. Ulterior Motives – if the prosecution is believed to be motivated by something other than a genuine pursuit of justice [e.g. harassment, political reasons], a court can intervene.
 - c. Abuse of process – if the process is being used to achieve a purpose not intended by law, it can be considered an abuse of process.
 - d. Procedural irregularities – if the police or DPP did not follow proper procedures when deciding to prosecute, this can be a ground for review.
8. The predominant question as of now falls within the provisions of Article 49 of *the constitution* which outlines the rights of arrested persons and the key aspects include the right to be informed of the reasons for arrest, the right to remain silent and consult with a legal representative, and the right to be brought before a court within 24 hours of arrest. There is also a right to be released on bond or bail unless there are compelling reasons not to be released.
9. The applicant in this case seeks inter alia anticipatory bail which is not precisely defined under Article 49 of *the constitution* and the Criminal Procedure Code. However the question of bail is anchored in the Bill of Rights being chapter 4 of our constitution. The jurisprudence emanating from our superior courts sets the tone of the legal maxim ubi jus ibi remedium i.e. where there is a right, there is a remedy, is recognized as a basic principle of our case law. This is what the Supreme Court of India had in mind when it observed in the case of Anita Kushwaha v Pushap Sudan reported in [2016] 8 SCC 509 that the right to access justice is so inalienable, that no system of governance can possibly ignore its significance, leave alone afford to deny the same to its citizens. It was also held that the ancient Roman jurisprudential maxim ubi jus ibi remedium has contributed to the acceptance of access to justice as a basic and inalienable human right, which all civilized societies recognize and enforce.
10. The right of the applicant to apply for pre-arrest bail commonly referred to as anticipatory bail is implicit within the letter, spirit and the ghost of chapter of our constitution which fashions the fundamental right and freedoms on the right to life, equality and freedom from discrimination, human dignity, freedom and the security of the person which are intrinsically linked to her right to access the competent court to avail her remedies under the law. The right of the applicant to protect her personal liberty within Article 29 of *the Constitution* entitles her to apply for pre-arrest bail which to me is within the rubric of Article 49 of *the constitution*. One of the concerns I have regarding this remedy is its potential for exploitation by Kenyans, including those suspected of being sought by the police for minor offences. Fundamentally, I believe that not every suspect who merely anticipates arrest on the basis of an alleged offence should rush to the courts seeking anticipatory bail. However, the legislature has not imposed any specific restrictions on the right of an accused person to apply for anticipatory bail. Jurisprudence on this subject has evolved to embrace flexible guidelines, allowing for the exercise of judicial discretion by various courts on a case-by-case basis.



11. Therefore, keeping in view the entire facts and circumstance of this case, including the affidavits by the investigating officer, there will be no prejudice or injustice for the applicant to be granted anticipatory bail pending the so referenced investigations on account of the complainant by made by one Reinhard Nyabinda. Clearly, therefore, there shall be no need to arrest and detain the applicant in police custody under the pretext of completing investigations into the allegations made by Nyabinda. From the above pronouncement, it should be emphasized that any summons issued to the applicant by the investigating officer must comply with the provisions of Article 50 of *the Constitution*, particularly the right to legal representation. I have often questioned why the National Police Service has a tendency to detain suspects in custody even where there is no compelling evidence that the individual is likely to abscond or otherwise abuse their liberty during the course of investigations.
12. Lastly, the court observes that the anticipatory bail is maintainable on the earlier terms set by this court of Kshs. 100,000/= deposited with the court in favour of the applicant pending the investigations being alluded to by CPL. Silas Ngaina.

**GIVEN UNDER MY HAND AND SEAL OF THIS COURT AND PUBLISHED VIA CTS AT
ELDORET THIS 6TH AUGUST 2025**

.....
R. NYAKUNDI
JUDGE

