



**Elius v Republic (Miscellaneous Application E404 of 2023)
[2024] KEHC 3522 (KLR) (Crim) (19 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3522 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS APPLICATION E404 OF 2023
LN MUTENDE, J
MARCH 19, 2024**

BETWEEN

DR KORIR ELIUS APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Dr. Korir Elius, the Applicant, approached this court through an application dated 19th October, 2023 seeking anticipatory bail and further orders that any interrogations and investigations against him be done at CID headquarters at Mazingira House or any police station within Nairobi County and arraignment be done in a court within Nairobi County.
2. The applicant also prays for summons to show cause to issue against the respondent in event that court orders are disobeyed.
3. The application is premised on ground that the applicant was arrested detained over the weekend without being granted bond. That this happened three times and it has become a norm for the respondent to arrest and detain him on Friday.
4. He has firm reason to believe and also credible information that the respondent intends to arrest him over the weekends and that the arrests are connected to his management of an NGO named Women Youth Against AIDS and poverty where he also served as the CEO.
5. That the powers of arrest have been used to harass, intimidate and oppress the applicant. That the motive is to force the applicant to make payments to various companies who claim to have made supplies to the NGO but which the applicant disputes on ground of fraud by employees



6. That the applicant made a complaint at the DCI Gigiri offices where he pointed out the employees responsible and also defrauded the NGO, however, the respondent has not made any arrests and keeps summoning him over employees who he dismissed for collusion and defrauding the NGO.
He has also been summoned on particulars that are before court in Civil Case No. 2874 of 2021 .
7. That the respondent intends to use extrajudicial processes against him.
8. That he has been charged before a criminal court, however the charges preferred are defective, unconstitutional and unsubstantiated.
9. Lastly that he is ready to submit himself to a just and fair legal system where fundamental rights and freedoms are respected. That he is entitled to secure protection of the law under Articles 25, 27, 28, 29 47 ,49, 50 ,51 and his rights under Article 25 cannot be limited.
10. The application is supported by an affidavit deposed by the applicant where he depones that he discovered that his chairperson and the employees in the procurement department had been colluding with third parties to defraud the NGO causing him to dismiss the said employees. That he filed Civil Case No 2874 of 2023 against the suppliers and has also challenged expenditures and supplies made to the NGO. That he believes that the arrests are linked to the case. Further that the defendants in the civil case are using the police to harass and intimidate him to pay the money.
11. That summons were issued against him by IP Mercy Mule over allegations of Conspiracy to defraud and Conspiracy to commit a felony, however, there is no letter head from the respondent's office and that no charges had been preferred at the time of the application.
12. The application is opposed by the respondent through a replying affidavit sworn by No. 234040 C I Vincent Kokeno who is one of the Investigating Officers in the matter. It is deponed that the DCI Regional Headquarters in Nairobi is investigating a case on conspiracy to defraud and obtaining goods by false pretences contrary to Sections 317 and 313 of the Penal Code, a case reported by one of the directors of Asha Ltd claiming that she received a call from the chairlady of the Women and Youth Against Aids and Poverty (WAYAAP) an NGO requiring the company to supply food to an orphanage.
13. That they agreed on pricing and an agreement was eventually executed, the purchase order was given and the applicant was aware of the arrangements made between 13th -16th December, 2022, when deliveries worth Ksh 21,487,820/= were made at the NGO's Gigiri offices ,the deliveries were also stamped and signed in presence of the NGO chairperson.
14. That the only employee who was dismissed from office was the procurement officer, a crucial prosecution witness in the criminal case and investigations established that the applicant received the goods.
15. That the respondent has the mandate to investigate any complaint brought to their attention and to determine whether a criminal offence has been committed. That reports confirmed that the NGO committed a criminal offence and the respondent Director of Public Prosecutions has also directed that charges be preferred. That the respondent's acts are under Article 245 as read with Section 14 of the *Police Act* and further contends that there was no harassment as alleged. In response to the allegations that the applicant had been arrested on Friday and released on Monday, the respondent depones that the applicant was arrested on 16th October, 2023 and released on cash bail pending plea on 17th October, 2023.
16. That the applicant had appeared before CPL Mwangi and was processed, arrested and granted cash bail and subsequently charged for the offence conspiracy to defraud. The respondent is also in receipt



- of the complaint by the applicant for investigations confirm that the police from DCI Gigiri have a file CR 164/41/2023 investigated by IP Mercy Mule which is pending recommendation for charges.
17. That the fact that a matter is in issue or substantially in issue in a civil court does not prevent or affect bringing of charges as provided by Section 193A of the *Criminal Procedure Code*. That the prayers sought are overtaken since the matter is now pending before Milimani Chief Magistrates Court in CF E.862 of 2023.
 18. That the applicant has not demonstrated that the respondent acted outside its mandate. The accuracy and correctness of the evidence gathered by investigations can be determined by the trial court and the applicant is assured of fair trial; and, that the applicant has not demonstrated that the respondents' actions are tainted with irregularity, irrationality or procedural impropriety to warrant intervention by this court and to grant anticipatory bail.
 19. The application was canvassed through written submissions. The applicant submits that he has a right to equal protection, equal benefit and equal enjoyment of fundamental rights and freedoms and the respondent's obligations under *the constitution* can be cautioned by the court. That he is not seeking to curtail the respondent statutory duties but seeks prohibition of infringement of constitutional rights.
 20. That Articles 47 and 48 as read with Section 2 of the *Fair Administrative Action Act* provide for the right to fair administrative action and the right of access to justice which is enforceable by this court under Article 22 of *the Constitution*. He urges that he has the right to freedom and security under Article 29 which should not be deprived arbitrarily and that arrested persons have a right to bail and appropriate reliefs under Article 23 of *the Constitution*. And, that the NGO business rights are also protected by law. His case is that his arrest and detention relate to the same offence he has been charged with in Milimani court and he is still subjected to arbitrary arrest despite having obtained bail. Reference is made to the case of *Eric Mailu vs Republic and 2 Others*, Misc Criminal Application No. 24 of 2013 where the court emphasized that anticipatory bail would only issue when there was serious breach of a citizen's organ of State..
 21. That the respondents are in breach of Article 49 which require that the accused should be produced in court within 24 hours and be granted bail pending charges, and the respondent also intends to come up with charges in future.
 22. That Criminal Miscellaneous case No. 390/2023 filed in this case was withdrawn after the police arraigned him before court and he was admitted to cash bail. However, he has been arrested by various police officers who claim that they are from Kiambu and Githurai Police Stations and that the arrests are for unknown reasons and happen each time he attends court.
 23. That the respondents should pay costs considering the eventualities in this case.
 24. Respondent submit that the threshold for granting anticipatory bail has not been met and that the applicant has not demonstrated any infringement, threat of violation. Reliance is placed on the case of *Mandiki Luyeye vs R* (2015) eklr and *Erick Mailu vs R & 2 Others* (2013) eklr
 25. That as per attached summons issued against him and the charge sheet the applicant was eventually charged through Criminal Case No. Milimani E862 of 2023.
 26. That the summons which were annexed on the applicant's supporting affidavit filed in this case relate to Cr. 164 of 41 of 2023 which was concluded and is pending recommendations for prosecution. That the application is premature and preempts the results of investigations. That bail should be granted at the police station or by the court and the applicant may also be charged. That there is no threat of arrest at this time.



27. That the investigations are within the law and the applicant has not demonstrated abuse of discretion in the respondent's performance of its constitutional mandate. Hence the court should only interfere where there is unjustified interference of investigations as per the case of *R-Vs- Chief Magistrate Milimani & Another Ex-parte Tusker Mattresses Ltd 3 Others* (2013) eKLR.
28. I have considered the application, response and affidavit evidence and oral submissions.
29. Article 22 as read with Articles 23 and 65 of *the Constitution* is the applicable law for enforcement a fundamental rights or freedoms. Any person whose right has been violated or threatened to be violated has the right to approach the High Court for relief. Article 65 (5) gives the court power to determine whether a Constitutional and human right has been violated and grant such reliefs listed under Article 23(3) of *the Constitution*
30. The applicant's case is that he has been arrested by the respondent and detained without being released on bail and was also not arraigned for plea within 24 hours.
31. He lists violations as arbitrary deprivation of his freedom and further denial of bail in violation of Article 29 and 49(1)(h) and that the respondents have acted outside its constitutional powers and mandate.
32. In *Njuguna -vs- Republic Nairobi Misc. Cr. Case No. 710 of 2002 1 KLR* the court spelt out the purpose of anticipatory bail holding that it 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. It is also the object between the enactments of Article 49(h) of *the constitution*”
33. In *Kurt vs Turkey* (1998) (15/1987/799/1002) the European Court of Human Rights held that:

“...the authors of *the constitution* reinforced the individual's protection against the arbitrary deportation of his or her liberty by guaranteeing a corpus of substantive rights which are intended to minimise the risks of arbitrariness by allowing the act of deprivation of liberty to be amenable to independent judicial scrutiny and by securing the accountability of the authorities, for that act. What is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection” “Any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of natural law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from arbitrariness”
34. From the responses filed by the respondents, it is not disputed that the applicant was subjected to investigations and that summons were issued from Kiambu Police Station. The investigations were taken over and dealt with within Nairobi County and he has also appeared before Capitol Hill Police Station. The applicant has also been arraigned before Milimani Chief Magistrates Criminal court.
35. The respondents depone and also submit that there is no more threat of arrest and interrogation and that the results of the investigations based on final summons issued by IP Mercy Mule have been presented to the DPP who has given necessary directions.
36. The applicant claims in his submissions that he has been subsequently subjected to arrests and has been detained without bail.



37. It seems that the respondent filed criminal charges after the application, the applicant was also granted bail by the Criminal Court which he continues to enjoy to date. The instant application was served upon them and upon arrangement.
38. The inference drawn is that at the time of filing the application before this court on 19th October, 2023, the applicant had been already arraigned before a court of law in Nairobi County and he is also out on bail. It is also evident that the charges are related to the summons and interrogation he went through in Kiambu which forms the main contention in the application. This means that the application has been overtaken by events.
39. In *Kipkerich Koskei -vs- Director of Public Prosecutions & 2 Others* (2018) eKLR the High court held that:
- “The power to grant anticipatory bail is limited to the period the suspect has been notified by the police as a person of concern in a particular criminal case. It is apparent that in certain instances the anticipatory bail remains in operation for a very long period of time.”
40. The applicant has not demonstrated that he is still subjected to arbitrary arrest and detention. Such claims cannot be made in written submissions but require proof. It is trite that submissions are not part of evidence or avenues to prove facts.
41. Anticipatory bail cannot be granted on fears and speculation. In *Eric Mailu -vs- Republic and 2 others*, Misc Criminal Application No 24 of 2013, the court emphasized that anticipatory bail would only issue when there was serious breach of a citizen’s rights by organs of the State.
42. In *Mandiki Luyeye -vs- Republic* (2015) eKLR, the High Court held:
- “...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.”
43. The respondent also deponed that the applicant was arrested on 16th October, 2023 and granted cash bail pending his arraignment on 17th October, 2023 and a copy of the charge sheet was annexed to the affidavit. On the other hand the applicant brought his application on 19th October, 2023 and he did not mention dates on the three (3) times he claims he was previously arrested and arbitrarily detained over the weekend. He fears that he will be arrested and detained again and seeks the court intervention. The credibility of his depositions is questionable
44. As regards the legality, constitutionality and basis of the charges and further interrogations, Section 193A of the *Criminal Procedure Code* provides that:
- “Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”
45. The police power to investigate and the DPPs power to bring charges should not be affected by applicants suit filed in Civil Case No. 2874 of 2021.



46. Article 157 (6) of the *Constitution* states that:

The Director of Public Prosecutions shall exercise State powers of prosecution and may —

- a. Institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.

47. The fact that the applicant has contested the debt claims against the NGO and his further claim in this court that the defendants are working with the police to defeat the civil suit or force him to settle the debts is an issue that should be addressed appropriately and with specific orders in this regard. The applicant has not sought for quashing of the criminal charges and has only prayed that the respondent's actions be checked and highlighted within its legal and constitutional mandate.

48. As stated, the applicant's fears do not meet the threshold of granting anticipatory bail. Additionally, issues raised herein are now before the trial court where the applicant has been granted bail. Any further issues should be addressed before the trial court and the respondents should also expedite its process and bring up all charges that are connected to the fraudulent dealings represented in this application .

49. The law is that anticipatory bail orders are exceptional and also not issued in limbo, if issued they operate for a limited period and where the police complies, the trial court should handle further issues.

50. In *Salauddin Abdulsamad Shaikh vs The State of Maharashtra* 1996 CRLJ 1368 the Indian Supreme Court observed that:

“That anticipatory bail orders should be of limited duration only and ordinarily on the expiry of the duration or extended duration the court granting anticipatory bail should leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigator has made progress or the charge sheet is submitted”

51. Also the court cannot issue anticipatory bail to prevent, preempt or interfere with further investigations or charges. See the case of *Republic -vs- Chief Magistrate Milimani & Another Exparte Tusker Mattresses Ltd & 3 Others* (2013) eKLR where the High Court held that anticipatory bail ought not to be granted to prohibit investigations.

52. From the foregoing, I find the application lacking merit. Accordingly, it is dismissed.

53. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 19TH DAY OF MARCH, 2024.

L. N. MUTENDE

JUDGE

In the Presence of:

Mr. Kyobika for Applicant

Mr. Mongare for ODPP

Court Assistants – Asin/Gladys

