



**George Odoyo Gembe t/a Brosis Auctioneers v Director of Public Prosecution  
& 2 others; Gichini (Interested Party) (Miscellaneous Criminal Application  
E107 of 2023) [2024] KEHC 7813 (KLR) (27 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7813 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS CRIMINAL APPLICATION E107 OF 2023**

**HM NYAGA, J  
JUNE 27, 2024**

**BETWEEN**

**GEORGE ODOYO GEMBE T/A BROSIS AUCTIONEERS ..... APPLICANT**

**AND**

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

**DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 2<sup>ND</sup> RESPONDENT**

**INSPECTOR GENERAL OF NATIONAL POLICE SERVICE . 3<sup>RD</sup> RESPONDENT**

**AND**

**FRANCIS KARIUKI GICHINI ..... INTERESTED PARTY**

**RULING**

1. The Applicant filed an application dated 2<sup>nd</sup> August, 2023 brought pursuant to Articles 19, 20, 21, 22, 23, 24, 28, 29, 49 and 159 of the Constitution of Kenya and Section 165 & 123(1) Part 5 of the Criminal Procedure Code. The Application seeks for orders:-
  - a. Spent
  - b. Spent
  - c. Spent
  - d. That this Honourable Court be pleased to grant the Applicant anticipatory bail pending arrest or charge on such terms the court may deem fit to grant pending the hearing and determination of this Application in matters related to Motor Vehicle Registration Number KCV XXXX.
  - e. That this Honourable Court do issue such further orders as it may deem fit to grant.



- f. That costs of this Application be provided for.
2. The Application is premised on grounds on its face and supported by an affidavit of Applicant herein.
  3. He averred that on 31<sup>st</sup> January,2023 he received instructions from Oumo & Company Advocates to execute warrants of attachments in Molo Civil Suits Numbers E413,414 & 416 all of 2021 against the Judgement Debtors namely Joseph Githaka Kimani & Joseph Muhia Kinyanjui, and upon receiving the same he applied for warrants of attachment.
  4. He asserts that before attaching Motor Vehicle Registration Number KCV XXXX he conducted official search which revealed it belonged to Joseph Muhia Kinyanjui and he served him with the 7 days' Notice of Proclamation on 17<sup>th</sup> May, 2023.
  5. He further deponed that the Judgment Debtor failed to pay the decretal amount and redeem the aforesaid Motor vehicle and he was forced to attach it and eventually sold the aforesaid Motor Vehicle after following the due process.
  6. He further avers that on 28<sup>th</sup> July,2028 he received a call from the 2<sup>nd</sup> Respondent summoning him to the DCI Nakuru in regard to the aforesaid Motor Vehicle and since he was not within Nakuru he promised to avail himself on 1<sup>st</sup> August,2023.
  7. That on 1<sup>st</sup> August, 2023 he availed himself before the 2<sup>nd</sup> Respondent with the documents and the 2<sup>nd</sup> Respondent could not listen to his explanation but intimidated him with arrest and detention.
  8. He contended that this application has been necessitated by the conduct of Respondents' threats of arresting him.
  9. The Prosecution counsel Loice Nekesa Murunga swore a Replying Affidavit on behalf of the 1<sup>st</sup> Respondent on 9<sup>th</sup> October, 2023, wherein she deponed that the relief of anticipatory bail is not provided in the Constitution and is discretionary.
  10. She posited that the relief sought seeks to bar or prohibit the investigator from carrying on investigations because arrests are part and parcel of investigations.
  11. She deponed that the Constitution provides for the rights of an arrested person to be released on bail under Article 49(i)(h) which makes it clear that the framers of the Constitution did not want to interfere with the mandate of investigator.
  12. She contended that arresting a person who has been suspected of committing an offence is the mandate of the 2<sup>nd</sup> Respondent and this court should not interfere with this mandate.
  13. She contended that the orders sought have an effect of impending criminal investigations and they should therefore be based on cogent and constitutionally sound reasons such as a serious breach of the Applicants rights by an organ of the state which is supposed to protect the same.
  14. She asserted that it is clear from the affidavit by the Applicant that there is reasonable suspicion that an offence was committed either by him or by some other person and thus investigations into the matter is warranted and the same should be carried out without any interference resulting from this Application.
  15. She urged this court to promote the criminal justice system by dismissing the Application herein.
  16. On 7<sup>th</sup> December,2023, the interested party told court that he supports the Application.
  17. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, despite service, did not enter appearance and did not participate in the proceedings.



18. The Application was canvassed through written submissions. Only the Applicant filed their submissions.

### **Applicant's Submissions**

19. The Applicant submitted that he followed the required procedure for attachment, advertisement and sale of the said Motor Vehicle to the interested party.
20. He submitted that he is not opposed to the Respondents conducting the investigations on him hence the reason he honored the summons by the 2<sup>nd</sup> Respondent. He argued that the reason why he moved this court is because his fundamental constitutional rights were being violated and still being violated as he has never been informed of the offence he had committed.
21. He posited that the Respondents should not use their mandate to violate his fundamental rights as provided under the *Constitution*. He prayed that the Application be allowed. In buttressing his submissions, he referred this court to the case of *Caroline Kuthie Karanja v Director Public Prosecutions & 2 others* [2021] eKLR.

### **Analysis & Determination**

22. The only issue for determination is whether the Applicant is entitled to the orders sought.
23. Articles 28 and 29 of the *Constitution* provide that;
- 28.
- “Every person has inherent dignity and the right to have that dignity respected and protected.”
- 29.
- “Every person has the right to freedom and security of the person, which includes the right not to be-
- a. 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.”
24. Anticipatory bail is not specifically provided for in the *Constitution*. It is a relief granted by the High Court in exercise of its mandate under Article 165 of the *Constitution*. It provides as follows;
- “ 165 Subject to clause (5), the High Court shall have—
- (3)
- (a) unlimited original jurisdiction in criminal and civil matters;
  - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;



- (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
- (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
  - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
  - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
  - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
  - (iv) a question relating to conflict of laws under Article 191; and
- (e) any other jurisdiction, original or appellate, conferred on it by legislation.”

25. The High Court, therefore, has authority under Articles 23 and 29 as read with Article 258 to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

26. Lady Justice Teresia M. Matheka, in *Simon Mwaniki & 2 others v Director of Public Prosecution & 2 others* [2021] eKLR aptly captured this position. She observed thus: -

“Anticipatory bail was really necessary in this country in the dark days when one could be arrested and detained for days and months without any reason and, without trial and sometimes for trumped up non- bailable offences.

That changed with the promulgation of the *Constitution* of Kenya 2010 through which we the people put in measures to bring to an end those dark days. The Bill of Rights at Article 25 provides that certain fundamental rights and freedoms shall not be limited, Article 28, guarantees the right to human dignity and Article 29, freedom and security of person whereby everyone has the right not to be deprived of their freedoms arbitrarily or without just cause.

To achieve this the framers of our Constitution demarcated the lanes for law enforcers, giving them powers needed to carry out their jobs, while at the same time keeping them within the binding boundaries of the *Constitution* and the Bill of Rights. Article 20 clearly speaks to this: It states:

#### Application of Bill of Rights

- (1) The Bill of Rights applies to all law and binds all State organs and all persons.



- (2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.”

27. The Applicant herein contended that he honoured the summons by the 2<sup>nd</sup> Respondent but the 2<sup>nd</sup> Respondent was not ready to hear his explanation in regard to the aforesaid Motor Vehicle. He averred that he was instead intimidated with arrest and detention.
28. What the applicant seeks is anticipatory bail pending to prevent his arrest.
29. In the case of *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.”
30. Indeed, despite having authority to grant anticipatory bail, courts must exercise great restraint not to interfere with the functions of other bodies and institutions that have been created by statute or the *Constitution* and/or to prevent such bodies or institutions from carrying out their mandate.
31. In the case of *Richard Mahkanu v 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. This position was also held in the case of *Kevin Okore Otieno v Republic* (2013) eKLR.
32. Section 52 of the *National Police Service Act* allows a police officer to require any person, in writing, if they have reason to believe that person has information which may assist in investigation of an alleged offence, to appear before him at the police station.
33. From the material before me, it is uncontroverted that the Applicant was issued with summons by the 2<sup>nd</sup> Respondent. There is no contention that he failed to honour them. He states that he was acting on the strength of warrants of attachment issued by a court of competent jurisdiction. His contention of being intimidated with arrest and detention has not been controverted by the 2<sup>nd</sup> Respondent. That being the case, then there is no justifiable cause of unnecessarily arresting him.
34. In my view, the fears of arrest are real. The executive arm of the government, and especially the police have not really endeared themselves to the Kenyan citizenry. History is replete with cases of unnecessary arrests being conducted, all with the aim of satisfying the wishes of a state agency or even individuals. The victims of such arrests have only one recourse, and that is to seek protection from the courts of justice.
35. In granting anticipatory bail, the court cannot be said to be impeding the investigative process as alluded to by the state, through the ODPP. All that the court is doing is to ensure that the right to liberty, arguably one of the rights held as most sacrosanct, is not curtailed without good reason. Investigations can still go on without having to physically detain any person, and who is not shown to be a flight risk.



36. I am of the view that the applicant has set out sufficient grounds to warrant the grant of the orders sought.
37. To allay the applicant's fears, I will allow him to continue with his anticipatory bail/bond terms, which I had set as a personal bond of Ksh. 100,000/-.
38. I further direct that the applicant appears before the 1<sup>st</sup> Respondent as and when required to provide any information that may be required of him. The 1<sup>st</sup> respondent ought to give reasonable notice to the applicant to appear before it.
39. These orders for anticipatory bail shall cease in the event the applicant is arraigned in a court of law. In that event, the trial court shall be at liberty to impose reasonable bond terms.
40. In conclusion, the court makes the following orders;
  - a. The applicant shall continue with the bond terms set by this court until the time is charged in a court of law. The trial court shall be at liberty to impose its own reasonable bond terms.
  - b. The 1<sup>st</sup> respondent shall be at liberty to issue summons to the applicant upon reasonable notice to appear before the investigating officer, or other authorized officer. In default of appearance, the 1<sup>st</sup> respondent shall be at liberty to take any lawful action, including arrest, against the applicant.
  - c. Each party shall bear its own costs.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 27<sup>TH</sup> DAY OF JUNE, 2024.**

**H. M. NYAGA,**

**JUDGE.**

In the presence of;

Court Assistant Jamleck

State Counsel Nancy

Applicant present

Mr. Oduor for Applicant

Mr. K. Mbugua for Interested Party

