REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISC. CRIMINAL APPLICATION NO. E022 OF 2021

IN THE MATTER OF: AN APPLICATION BY OMAR KAHINDI GONA, ELISHA KAHINDI GONA, MARTIN KALAMA GONA, KATANA PATRICK AND SAMUEL NGOLO GONA FOR AN ORDER OF ANTICIPATORY BAIL OR BAIL; BEFORE ARREST AND/ OR CHARGE

AND

IN THE MATTER OF: THE CONSTITUION OF KENYA AND THE MATTER OF THE CRIMINAL PROCEDURE CODE (CAP 75 OF LAWS OF KENYA) AND THE PRINCIPLES OF NATURAL JUSTICE AND THE RULE OF LAW

BETWEEN

OMAR KAHINDI GONA

ELISHA KAHINDI GONA

MARTIN KALAMA GONA

KATANA PATRICK

SAMUEL NGOLO GONA.....APPLICANTS

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Mr. Mwangi for the state

Mr. Komora for the Applicants

R U L I N G

Litigation History

On 9th July, 2021 the Applicants **Omar Kahindi Gona, Martin Kalama Gona, Katana Patrick** and **Samuel Gona** moved the Court by way of a Notice of Motion in terms of Article 32, 33, 35, 38, 39, 43, 47, 49 and 50 of the Constitution as read with section 123 (3) of the Criminal Procedure Code for an order on anticipatory bail to issue and the Attorney General to forbear the respondents from effecting an arrest. The reasons for the application is that they have not committed any cognizable offence. Second, there is at the moment a pending **ELC case No. E41 of 2020** in which the Plaintiff has been seeking police assistance to harass and intimidate them including their family members. That the ELC case had been scheduled for hearing on 8th July, 2021 at Malindi Chief Magistrate Court but the matter was never heard due to the absence of the trial magistrate. Third, the police officers from Malindi Police Station stormed the Court premises where the applicants were on their way out with instructions to effect an arrest, presumably on the basis of that land dispute yet to be determined by the ELC Court. Fourth, that the applicants are apprehensive of a violation of their constitutional rights unless the Court comes to their aid by issuing an order on anticipatory bail.

This Certificate of Urgency was certified urgent by this Court and service of the suit papers was to be served upon the cited respondents. To that effect the applicant counsel filed an affidavit of service dated 15th July, 2021 to demonstrate compliance with the Court directions on Service of the application to the respondents. Undoubtedly, there was no appearance or defence filed by the respondents. The motion was therefore prosecuted as undefended suit. This Court delivered its ruling on 19th July, 2021 granting of various reliefs including anticipatory bail to the applicants.

Present application

On 3rd August, 2021 the Director of Public Prosecution aggrieved with the ruling filed a Notice of Motion pursuant to Articles 25, 49, 50 (1) 157 (6) 9 (10), (11), 159 (2), (d), 165 3 (a) of the Constitution, section 123A of the Criminal Procedure Code seeking the following consequential orders; -

1. That the Orders obtained on 19th July, 2021 by the applicants and all consequential orders be set aside.

2. That the respondents herein be served with the Motion of 9th July, 2021 and be granted leave to file their appropriate responses.

The basis in which the applicant made this application was on the grounds of lack of proper service. The applicants counsel was further to invite the Court to consider the principles in **Ananita Kariuki case**, the provisions under Article 157 of the Constitution and Section 31 of 22(2), and the Office of the Director of Public Prosecution Act as the legal basis to set aside the orders on anticipatory bail.

The respondents to the latest Notice of Motion filed a rejoinder appropriately to the issues as seen in the replying affidavit dated 18th July, 2021. In addition, learned counsel Mr Komora provided brief skeleton written submissions that the impugned decision was taken wholly in reliance of true information on service of processes upon the respondent.

This Court therefore has the power to determine the application by the applicant, more specifically the Director of Public Prosecution for review of the decision.

Determination

The issue arising in that impugned Notice of Motion is whether this Court was wrong to conclude that the respondents were entitled to anticipatory bail by applying the legal principles to the facts of the case. Secondly whether leave to enter appearance and file

defence to the original Notice of Motion ought to be granted.

Before considering the issues in the Notice of Motion before the Court, it is necessary first to consider in detail the jurisdiction and powers of the Director of Public Prosecution. The Office of the Director of Public Prosecutions is a constitutional office set out under Article 157 (1) of the Constitution of Kenya. The functions of the directorate are clearly outlined in terms of sub section (6) (a), (b), (c) of the aforesaid.

These are to institute and undertake criminal proceedings against

(1). Any person before any Court in Kenya other than the Court Martial, in respect of any offence that contravenes the Laws of Kenya; -

(2). To take over and continue any such proceedings that may have been instituted by any other person or authority.

(3). To discontinue at any stage before any judgement is delivered any such criminal proceedings instituted or undertaken by the directorate or any other person or Authority.

In accordance to Article 157 the powers conferred upon the Director of Public Prosecutions are vested exclusively to that office in exclusion of any other person or organ of government. It is therefore correct to state that the Director of Public Prosecutions has unfettered discretion to bring charges against a person and that prerogative is exercised without any control or interference from any other authority or person. From the above provisions the role of a prosecutor ripens immediately a decision to charge a suspect of an alleged offence. That he or she must make available witnesses to proof the charge beyond reasonable as an agent of justice in our criminal justice system.

In this instance it is significant to take judicial notice that prosecutors are essential agents in the justice sector in ensuring fair administration of justice. As such they are under a duty to respect and protect human dignity in Article 28, contribute towards ensuring the due process and right to a fair hearing under Article 50 of the Constitution and smooth functioning of the criminal justice system as expressed in Article 157 (6), 7, 8 (9) (10) and (11) of the Constitution. It can be deduced from Article 157 (6) that the functions of the Director of Public Prosecutions is the decision to charge and to prosecute accused persons before trial/appeals Courts.

The guidelines which have been formulated within the framework of the Constitution and Office of the Director of Public Prosecution Act principally does not recognize the power to arrest as an essential function accorded that office. In hierachal systems likewise, the precise scope of any power to arrest with necessary modifications is vested with the National Police Service under Article 244 of the Constitution.

In the instant case the respondents had raised before the Court an issue for relief on anticipatory bail. In effect they had knowledge police were in hot pursuit to curtail that right to liberty and freedom of movement on an investigation yet to be brought to their attention. In formulation of the question to be considered by the Notice of Motion on anticipatory bail the applicant has not demonstrated existence of a reasonable and probable cause of a prosecution arising against the respondents.

The applicant needed to show that on existence of facts from which Article 157 (6) (a) of the Constitution could be involved the respondents were persons of concerns that the Office of the Director of Public Prosecution pursued with the intention to initiate or commence a prosecution for an alleged offence.

The criminal justice system in Kenya entrusts the function of investigations to the police or other investigative agencies and the prosecution directorate is never an active actor in that process of evidence gathering geared towards a recommendation to charge a suspect of crime. Whereas the Director of Public Prosecution's role is to decide whether a primafacie case exists to initiate or continue a prosecution before the trial Courts. To this effect, the requirement of existence of a crime having been committed by the respondents founded on the provisions of any penal Law remained considerably unknown. In line with Article 157 (6) of the Constitution the Law expects the Director of Public Prosecution to act where the breath of the Law which carries a criminal sanction has been violated. It is clear from the Notice of Motion, the prosecutors task within the circle of Article 157 (6) of the Constitution to conduct or direct a prosecution had not arisen.

In the instant Motion, the applicant's affidavit fails to demonstrate existence of evidence to be assessed, or draft charges against the respondents. In essence, constitutional power, characteristics of the functions of the Director Public Prosecution within the broad terms under Article 157 to ordain and initiate a prosecution at the instance of a recommendation by the investigative agency in many respects remains fetched as against the respondents. Therefore, the jurisdiction by the applicant to determine the validity of such orders to set aside in part or wholly on account of the constitution lacks merit.

In my view with regard to jurisdiction on the part of the Director of Public Prosecution, on matters in which the Court addressed on 19th July, 2021 the mandate for that office had not ripened to warrant it to be cited or sued as a party. Therefore, there can be no doubt that the challenge being posed in equal force by the applicant in a way lacks the requisite jurisdiction and locus standi. There is a delimitation of the power between the Office of the Director of Public Prosecution under Article 157 and the National Police Service under Article 244 of the Constitution read conjunctively with the relevant statutes enabling the functions of the two Constitutional organs of state. Thus no matter, the public importance of the issues raised by the respondents in their original motion, the applicant has failed to establish a direct relationship with the subject matter of the proceedings. The way I viewed the application was for the National Police Service to swear an affidavit to justify to the Court why the respondents were under their radar given the factual matrix deposed in the respective affidavit.

Interestingly, as the matter had not been initiated by the Director of Public Prosecution or its scrutiny by way of a criminal charge compounded file pursuant to Article 157 (6) of the Constitution, the applicant can best be described by the Court as mere busy body assuming the role of a watchdog involving violations of fundamental rights, which may be presented in such form as the individuals deem fit.

It is the duty of the applicant to disclose in this Notice of Motion and corresponding affidavits, that he has the locus standi to institute the cause of action so as to enable the Court to inquire into the merits of the motion. In other words, full disclosure that as per the pleadings a condition precedent under Article 157 (6) of the Constitution had been fulfilled to enable the Court to hear the Notice of Motion for review of the Order. It is clear from a literal interpretation of Article 157 of the Constitution the locus standi of the applicant to be involved as a party to determine the question on anticipatory bail was neither here nor there. The respondents, only approached the Court, when the police swung into action to effect an arrest on a subject matter already pending before ELC Court. There was misapprehension on their part that the intended action was likely to violate their legal rights and fundamental freedoms in the Bill of Rights.

Clearly, therefore, no matter how unhappy or aggrieved the applicant is with the order, the burden placed on him to demonstrate to the satisfaction of the Court existence of an indictment or charge against the respondents likely to be presented before a Court of law remains in the realm of unknown. The justiciable issue at the time was touching on the rights of the respondents and the likely violation that relate specifically to police action to effect an arrest without a warrant. The scheme herein by the applicant was only permissible as long as locus standi an essential attribute to a proceeding of this nature was beyond question. Thus the Supreme Court of Nigeria in ***Adenuga V Odumeru[2008] S.C Part (1)*** observed;-

"Locus standi, denotes the legal capacity, based upon sufficient interest in a subject matter, to institute proceedings in a Court of law to pursue a certain cause. In order to ascertain whether a plaintiff has locus standi, the statement of claim must be seen to disclose a cause of action vested in the plaintiff and also establish the rights and obligations or interests of the plaintiff which have been or are about to be violated, and in respect of which he ought to be heard upon the reliefs he seeks."

In the instant case it means that the Director of Public Prosecution was not an indispensable party to have been automatically enjoined in the motion filed by the respondents. The entire controversy was of a nature that the Court required of the police to set out precisely the reasons why they blocked the respondents as they exited the Court premises. Manifestly, the proceedings for this purpose was conducted to avoid such a result that may threaten or violate the provisions, in chapter four relating to the bill of rights. There was a misunderstanding of the rule and mandate of the applicant by the respondents initial Motion and the joinder of the parties to a suit. It then goes that the application invoking the cause of action on review is an attempt to make the applicant an indispensable party but in essence he lacks locus standi for reason of Article 157 (6) of the Constitution. This Court further maintains, the subject matter fashioned by the respondents in the Certificate of Urgency of 9th July, 2021 was to avoid an adverse effect contemplated as human rights issue had the police carried their action of arresting the respondents. This factual effect should be balanced against any interest, the applicant may have to forcibly join proceedings in which the final decree enforcement will face a jurisdictional issue. I think I have said enough in this aspect as to the locus standi and jurisdiction of the applicant.

Secondly, presently the applicant proceeded to prosecute the Notice of Motion on the basis that there was no proper service. The applicant seems to contend that he is a tenant in common with the Attorney General and ought to be permitted to sue in equity, without acknowledging that the other party was duly served but chose not to enter appearance or file defence to the motion. It is plain from the affidavit of service that the Attorney General was served with the suit papers filed on 9th July, 2021 by the applicants. The most striking feature of the applicants' statements in support of the motion, is the total appreciation that the prosecution counsel attached to the High Court and been accorded the opportunity to consider the materiality and substance of the matter in question. By the Court inviting the prosecution to appraise himself of the application the criterion service of the Court process was inconformity with rules of procedure.

In that regard, the Director of Public Prosecution was neither a necessary or indispensable party to the interlocutory proceedings on anticipatory bail. Thus, the exercise of discretion for the Court to proceed in absence of the applicant was neither prejudicial or a miscarriage of justice as alleged in the affidavit seeking to re-open the case.

The language of the Motion by the applicant, generally imports threshold grounds which permit review of an order, ruling or judgment as set out under Section 80 of the Civil Procedure Act and Order 45 Rule (1) of the Civil Procedure Rules. The provisions are usually interpreted to permit a Court's exercise of discretion to review a previous order, or ruling dependent upon circumstances of each case for reasons of error apparent on the face of the record, mistake or on clear findings of existence of new evidence which was not available at the time of the order or ruling subject matter of review.

In connection with the present application, its trite that review proceeding are not in any way to be confused with appeals jurisdiction. The powers of the Court here is to exercise inherent jurisdiction and the power of review to prevent miscarriage of justice or to correct grave and palpable errors committed during the initial hearings to render the impugned verdict.

As the Courts in **National Bank of Kenya Ltd v Ndungu Wanjau eKLR, Nyamogo & Nyamogo v Kogo {2001} EA 174 and Mayodi v Industrial & Commercial Development Corporation & Another {2006} 1 EA 243** observed:

"all power of review is only exercisable on some mistake or error apparent on the face of the record is found or discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the party seeking the review or could not be produced by him or her when the decree or order complained of was made."

From comparative jurisdiction in **Aribam Tuleshwar Sharma v Aribam Pishak Sharma (AIR 1979) SC 1047**. The Supreme Court of India held interalia that:

"an error apparent on the face of the record for acquiring jurisdiction to review must be such an error which may strike one or a mere looking at the record and would not require any long drawn process of reasoning."

In the comparable dicta in **Edison Kanyabwiera V Pastor Tunwebaze Supreme Court of Uganda in CA No. 6 of 2004** held; -

"In order that an error may be agreed for review, it must be out apparent on the face of the record, that is an evidence error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest and clear that no Court would permit such an error to remain on record. The error may be out of face but is not limited to matters of a fact and includes also error of law."

Reduced to its core, the central issue in the present case is not about an error or jurisdictional issue in the context of the impugned ruling but the far-reaching jurisprudential implication to be brought into force at the same time, on the decision and its relevance in protection or guaranteeing human rights. The main purpose and reasoning behind the impugned ruling is to ensure that the investigatory powers by the National Police Service are used in the promotion of human rights under chapter four of our Constitution.

At the Constitution level under Article 49 of the Constitution, the security agencies namely the National Police Service have a duty to give suspected persons to a crime information to the specific criminal act, the legal basis on which the suspects are to answer and evidence-based reasons for suspecting them. This information should be made clear promptly either on arrest or during the course of investigations. On a broader view the relief on anticipatory bail is predicated on the presumption of innocence as a fundamental

right. It is one which is at the heart of a fair trial rights under Article 50 (2) (a) of the Constitution. It is entrenchment in both international law and in the constitution places a higher burden on the state to carry out effective investigations that are designed to ensure a right to a fair trial. Regardless of its nature, investigations needs to be efficient, capable of systematic factors of establishing a prima facie case with a prospectus of a crime specified under the Penal Law and approved by the Director of Public Prosecutions.

The investigating agency must put forth sufficient evidence to establish prima facie case at that preliminary stage to warrant a belief that the suspect committed the offence to give effect to an inference for him or her to be called up to record a statement. It follows therefore that within the reliefs sought in the Notice of Motion by the applicant what can be said and essential in determining the matter conclusively falls contextually in this rubric of exposition.

First, in the statement of the applicant there isn't real difficulty to state that no error apparent on the face of record has been brought to the attention of the Court to review its earlier decision.

Second. The Learned prosecution counsel, on facts of this particular case was unable to answer the substantial question of existence of a mistake in the proceedings or discovery of new evidence which could be characterized as material and relevant whereby discretion would lie to correct the error or which was capable of making a difference on the earlier decision reached by the Court.

For purposes of this application as adverted to by the applicant the manifest omission of not being served with the initial notice of motion by the respondents is self-evident that hardly occasioned prejudice or failure of justice to justify the Court to exercise its power of review under Section 80 of the Civil Procedure Act as read with Order 45 Rule 1 of the Civil Procedure Rules. Its also the position of this Court that a review application filed by the applicant herein is not maintainable as there was no error apparent on the face of the record mistake or any sufficient reason which lie to invoke review jurisdiction.

What however also stands out is the question whether the subject matter before Court justified joinder of the applicant as an indispensable or necessary party. In the opinion of the Court within the parameters of Article 157 (6), of the Constitution a distinction between the role of the Director of Public Prosecution and National Police Service in Article 244. The question on roles clearly as set out and forcefully binding to each organ of state. The provisions indicate that any attempt by the Director of Public Prosecution to appear as of necessity on behalf of the National Police Service is ultra vires his jurisdiction on this vital matter raised by the respondents. The principles which can be called out from the above noted analysis are that the applicant lacked the requisite jurisdiction and locus standi to apply for review of the Court decision. Though, sued as a party by the respondents, the Court took note of the matter and within its knowledge substantive orders so issued were directed to the National Police Service and not the Director of Public Prosecution. At the most, observations made by the applicant in reference to **Mutunga Rules** can be said to be erroneous for the reasons that there was no substantive Constitutional petition herein on the interpretation of Articles of the Constitution, within the rubric of public interest litigation.

It is required that if the applicant was desirous of having any such matters litigated as a Constitutional petition and interpretation, framing of the issues was therefore necessary. It is inescapable to state that the pleadings so pleaded by the respondents were interlocutory in nature and were averments on the right to anticipatory bail, nothing more or less.

Thus neither prejudice has been shown or caused to the applicant which can be said to warrant, this Court to vitiate the order on grant of anticipatory bail. The other observations, I must make are that a suspect suspected of a criminal offence faces grave, social and personal circumstances, including potential loss of physical liberty and human dignity as specified in Article 28 and 29 of our Constitution. Presumption of innocence and the sanctity of individual liberty remain to be the touchstone of the fundamental principles for grant of bail. The expression anticipatory bail though not expressly provided for in the Criminal Procedure Code finds its entry point under the bill of rights. It is therefore a device to secure the individual's liberty to forestall any abuse of power by the state actors who may be used by malicious complainants with the sole purpose of disgracing some Law abiding citizens to secure arrest and detention as a punishment.

In the context of the Constitution, it's a residual remedy only granted under special and exceptional circumstances to protect individual liberties. The power of granting bail being extraordinary in nature is purely interim and the exercise of such discretion must pass the margin of appreciation and threshold outlined by the Supreme Court of India in **Raam v State of Rajastham AIR (1985) SC 969** thus:

"(1). The nature and gravity of the accusations and the exact role of the accused must be properly comprehended before arrest is made.

(2). The antecedents of the applicant including the fact as to whether the accused was previously undersignant imprisonment on conviction by a Court in respect of any cognizable offence.

(3). The possibility of the applicant to flee from justice.

(4). The possibility of the accused's likelihood to repeat similar or other offences.

(5). Where the accusations have been made only with the object of informing or humiliating the applicant by arrest.

(6). Impact of grant of anticipatory bail particularly incases of large magnitude affecting large number of people.

(7). Frivolity in prosecution should always be considered vis viz, the element of genuiness in the matter in the event of there being some doubt, as to the genuiness of the prosecution, the accused should be considered to an order of bail.

(8). While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigations and on the other hand harassment, humiliation and unjustified detention of the accused be avoided.

(9). The Court should consider with even greater case and caution because over implication in the cases is a matter of common knowledge and concern."

From what has been said by the Court, the benefits of anticipatory bail are clear, it does not obstruct the National Police Service or the Director of Public Prosecution in executing their constitutional and statutory mandate. In order to determine whether a right or freedom of an individual is under threat or infringement, the Court as the neutral arbiter must seek to establish the interest that the right or freedom was meant to protect as expressly stated under Article 29 of the Constitution. The words in this Article are to be given wide and generous interpretation in the context of an application for anticipatory bail.

In the Notice of Motion perfected by the applicant the legal and evidential burden shifted from the respondents for him to discharge that the right or freedom of the respondents was not likely to be violated. The Learned Prosecution Counsel cited some authorities to challenge the findings of the Court, hence calling for review. Very respectfully, I do not think that those cases were particularly helpful. It cannot be deduced from the record that the order on anticipatory bail interrupted any on-going investigations or the power of the Director of Public Prosecutions under Article 157 (6) of the Constitution to initiate, commence and prosecute the respondents for a cognizable offence. So why the fuss"

It is therefore my respectful view that the applicant Motion and reasons advanced have not merited a case for review of the impugned ruling. The Motion is lost with no orders as to costs.

DATED, SIGNED AND DELIVERED via email AT MALINDI THIS 6TH DAY OF OCTOBER 2021

.....

R. NYAKUNDI

JUDGE