



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. CRIMINAL APPLICATION NO. E038 OF 2021

COROLINE KUTHIE KARANJAAPPLICANT

VERSUS

DIRECTOR PUBLIC PROSECUTIONS.....1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

INSPECTOR OF GENERAL OF POLICE.....3RD RESPONDENT

RULING

1. Before me is the notice of motion dated the 19th day of November, 2021 expressed to be brought pursuant to Article 23 and 165(3) of the Constitution of Kenya, 2010. It seeks the following orders;

1) Spent

2) That the honourable court be pleased to grant the applicant anticipatory bail pending arrest or charge on such terms the court may deem fit to impose.

3) That the honourable court be pleased to issue a conservatory order restraining the respondents, their servants, agents, junior officers and or anybody from effecting and/or anybody from arresting, harassing or otherwise however interfering with the applicant herein pending the hearing and determination of this application/petition in the matters related coffee factories renovations within Meru County.

4) That the costs of this application be provided for.

5) Such further and/or other orders be made as the court may deem fit and expedient.

2. The application is premised on the grounds on the face of the motion and supported by the applicant's affidavit sworn on the 19th November 2021.

3. The applicant's case is that, she was involved in renovation of coffee factories in Tharaka Nthi and Meru County through an NGO called International Coffee Association which projects had been going well until the 15th October 2021 when she was arrested by DCI Tharaka Nthi and was charged in Chuka E053 of 2021 with an offence of conspiracy to effect lawful purpose through unlawful means contrary to Section 395(4) of the Penal Code.

4. That prior to her being charged, the DCI arrested her on Friday and declined to grant her bail to attend court despite the fact that she had voluntarily attended his office after being summoned by him.

5. That when she was presented before court, the DCI without justification sought (2 weeks) in order to conclude investigations but the court granted them 10 days. She further deposed that while in custody in Chuka, the DCI officers from Meru went to see her and indicated that once she is done with Chuka DCI would arrest her and seek from court at least 30 days to conclude investigations.

6. It is her contention that the offence being investigated in Tharaka Nthi was the same as the one in Meru County. The DCI ought to have questioned her and did whatever investigation they wanted to do while she was in custody at Chuka and that being one entity, the DCI ought to have carried out all the investigation simultaneously since they knew she was in custody.

7. She deposed that when she attended Chuka Court for mention of her case on the 15th November, 2021 she was informed that the same DCI officers from Meru were looking for her to arrest and detain her. She averred that she is agreeable to attend to their offices whenever she is summoned but they should not lock or detain her purporting to carry out investigations. That she is ready and willing to cooperate with the investigators but if they arrest and detain her they will unjustifiably infringe on her fundamental rights and freedom enshrined in the Constitution of Kenya, 2010.

8. Further that, she suffers from hypertension and if she is detained during this Covid-19 pandemic will put her health and her life at a greater risk of contracting the deadly virus. She states that she cannot abscond or jump anticipatory bail if the same is granted since she already have a court bond in Chuka Criminal Case No. E059 of 2021 which is pending in court. She is ready and willing to adhere to all the terms of the anticipatory bail which may be granted.

9. The 1st respondent filed a replying affidavit, sworn by Leah Mati, a Senior Prosecution Counsel, on the 3rd day of December 2021 in which it opposes the applicant's application. The 1st respondent noted that the applicant has not demonstrated how there is a serious breach of her fundamental rights by the respondents. That, prior to the institution of any charges against the applicant, investigations have to be carried out for the alleged offence(s) and therefore the application herein is pre-emptive because should the intended investigations culminate in an arrest, the same will be in a legal process in the Kenyan legal system and it does not in any way amount to infringement of the applicant's rights.

10. She deposes that the apprehension of the standard by the applicant does not meet the threshold of serious breach of her rights by the respondents as alleged or at all.

11. The 2nd and 3rd respondents did not file any response despite having been served with the application and the hearing notice, notifying them that the application was coming for hearing. They made no appearance in court.

12. The court has carefully considered the application and the affidavits both in support and in reply to the application. I have also considered the brief oral submissions that were made by counsel when the application came up for hearing.

13. I do note that the applicant seeks anticipatory bail and that the same is not opposed by the 2nd and 3rd respondents but that notwithstanding, this court has a duty to consider the merit of the application.

14. As rightly pointed out by Gikonyo, J., in the case of **Paul Ole Kuyana & Another Vs Director of Public Prosecution & 2 Others (Misc. Criminal Application No 2 of 2021)**, anticipatory bail is a special relief in criminal cases and the core, character and the scope of anticipatory bail may be problematic requiring a careful stitching of the relief.

15. In Kenya, there are no specific provisions on anticipatory bail save for the constitutional provisions under the Bill of Rights.

16. The Constitution of Kenya 2010 provides for;

a) Bail of arrested person under Article 49(1)(h)

b) Appropriate relief under Article 23(3) for breach of the Bill of Rights

17. In India a common law jurisdiction upon which our criminal procedure code is premised has a specific Section 438 on anticipatory bail which states as follows;

(1) where any person has a reason to believe that he may be arrested on accusation of having committed a non bailable offence, he may apply to the High Court or to the court of session for a direction under this section that in the event of such arrest he shall be released on bail and the court may after taking into considerations, interalia the following factors namely;

1) *The incident and gravity of the accusations*

2) *The antecedents of the applicants including the facts as to whether he has previously undergone imprisonment or conviction by a court in respect of any cognizable offence*

3) *The probability of the applicant to flee from justice and*

4) *Where the accusation has been made with the object of injuring or humiliating the applicant by having him arrested, either reject the application forthwith or issue an interim order for grant of anticipatory bail.*

18. The Constitutional Court of India went further to consider the fundamental aspects of anticipatory bail to be of such importance and anchored on the right to life and liberty of a person.

19. As earlier stated, in Kenya, there are no specific provisions on anticipatory bail. However, where the remedy has been considered, the courts have applied the threshold for an application for violation or threatened violation of rights under Article 23 and 165(3) of the Constitution.

20. Under Article 29 of the Constitution, 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.

21. The applicant herein contends that the officers of the 2nd respondent have been threatening to arrest her over the same offence that she was previously arrested for, and charged in Chuka court. She avers that there is no reason why the officers of the 2nd respondent did not investigate the offence at the same time when she was arrested earlier.

22. In her submissions, counsel for the 1st respondent stated that the applicant is being investigated for a different offence but the fact is not contained in her replying affidavit.

23. In dealing with an application of this nature, it is the constitutional duty of this court to go to the lengths and breadths of the constitution to protect the rights and fundamental freedoms of Kenyans where need be, but it should be alive to its obligation not to curtail the other organs of state from carrying out their constitutional mandate. It is a very delicate balance which this court is expected to carry out.

24. **Republic Vs Chief Magistrate Milimani & Another Exparte Tusker Mattresses Limited & 3 Others [2013] eKLR** states as follows;

“However, before going to the merits of the instant application it is important to note that what is sought to be prohibited is the continuation of investigation other than a criminal trial. The court must in such circumstances take care not to trespass into the jurisdiction of the investigators or the court which may eventually be called upon to determine the issues hence the court ought not to make determinations which may affect the investigations or the yet to be conducted trial...., the High Court ought not to interfere with the investigative process conferred upon the police or the Director of Public Prosecutions unless cogent reasons are given for doing so.”

25. In the case of **Mandiki Luyeye Vs Republic [2015] eKLR**, the court held thus;

“Similar sentiments were observed in the case of Eric Mailu Vs Republic and 2 Others Misc. Criminal 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 the 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 of fundamental right must demonstrate the breach by acts and facts constituting the alleged breach”.

26. In this application before me, it is clear that the applicant had been previously arrested, detained and charged with a criminal case that is pending before the Chuka court. She deposes that the offices of the 1st respondent have been threatening to arrest her and detain her for the same offence. This was not denied by the 1st respondent in the replying affidavit filed in court.

27. In my considered view, this would be a violation of the applicants right to freedom under Article 29 of the Constitution. It is also not disputed that the applicant is facing a criminal charge in Chuka court and she is currently out on bond which charge she deposes, is related to what the officers of the 2nd respondent are threatening to arrest and detain her for. It has not been alleged that she is likely to interfere with investigations in any way. Further, she deposes that she is ready to cooperate with the investigators and visit their offices whenever she is summoned to do so.

28. On basis of the above, the court hereby grants anticipatory bail to the applicant on the following terms;

- 1) *The Applicant is hereby admitted to anticipatory bond.*
- 2) *The applicant to execute a bond of Kshs. 1,000,000/= which shall expire five months from the date of this ruling.*
- 3) *The applicant is hereby ordered to avail herself for interrogation by the officers of the respondents when and as requested and cooperate with the investigators.*
- 4) *The police should finalize their investigations and make a determination whether to charge the applicant within a period of five months from today.*

29. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU THIS 14TH DAY OF DECEMBER, 2021.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondents



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