



REPUBLIC OF KENYA



Kumar & another v Director of Public Prosecutions & 2 others (Miscellaneous Application E124 of 2022) [2022] KEHC 11532 (KLR) (Crim) (28 July 2022) (Ruling)

Neutral citation: [2022] KEHC 11532 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CRIMINAL

MISCELLANEOUS APPLICATION E124 OF 2022

LN MUTENDE, J

JULY 28, 2022

BETWEEN

SHAILESH RAI KUMAR 1ST APPLICANT

RANJEETA RAI PANDEY 2ND APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATIONS 3RD RESPONDENT

RULING

1. Shailash Rai Kumar and Ranjeeta Rai Pandey, the 1st and 2nd Applicant, respectively, through an application dated April 26, 2022, seek to be admitted to anticipatory bail/bond on reasonable terms pending plea-taking in any court of competent jurisdiction. This is in respect of matters involving Heritage Flowers Limited and the applicants.
2. The application is premised on grounds that the applicants, directors of African Heritage Limited, a registered company dealing in export of Rose flowers, due to stakes held in the company are apprehensive following an incident where their houses were raided by five armed police men who ransacked the company's trailers, detained the company driver and a customer, seized 35 boxes of rose stalks lawfully sold to a customer, Mary Waithera without any cause.
3. That on April 24, 2022, the applicants were summoned to appear before the 2nd respondent on April 25, 2022. Subsequently, there were further summons requiring them at the Police Station on April 26, 2022, which they viewed as threats and intimidation, despite their willingness to cooperate. It turned out that the customer Mercy Waithera was questioned on handling stolen property which were the



- 35 blocks she had purchased, therefore, the applicants are apprehensive of their probable arrest and detention that will cause grave prejudice to their liberty and freedom.
4. It is urged that the 2nd and 3rd respondents' investigations, though within their mandate is actuated by malice since the matters are commercial in nature and are pending in court, in Nairobi HCCCOM E894/2021; which they reasonably believe have been instigated by one Punjani Riyaz, their co-director.
 5. That the Board of Directors chaired by the 1st applicant have not received any formal complaint of theft of the company's properties from either Punjani or any other person.
 6. That the 2nd respondents action is contrary to Section 996 of the *Companies Act* and Articles 47 and 49 of *the Constitution*, on fair administrative action; According to Section 23 of the *Penal Code*, a person cannot be charged unless he permitted the offence, participated in it and failed to take necessary steps to prevent it, and, the person should have been aware of the offence and failed to take necessary steps to prevent it.
 7. The applicants contend that: their rights have been violated and it would be prejudicial if they were to be charged on the basis of evidence obtained; the respondents have exercised their mandate in a manner that violates their fundamental rights and freedoms; the respondents have not discharged their mandate according to the principles governing body corporate since a complaint can only be received by the Company's Board and /or from its Directors, and , more so, since the complainant who is a share-holder and the applicants have outstanding issues pending in court.
 8. The application is supported by an affidavit deposed by applicants. They rehash the grounds on the face of the application, and, further depone that the respondents have made unjustified and unreasonable attempts to arrest and detain them, and, may detain them beyond the limitation of the law.
 9. In response to the application, the 3rd Respondent, through a replying affidavit sworn by No. 2XXX42 C.I Martin Munene, the Investigation Officer in the matter, deponed that he was investigating a money laundering case contrary to Section 3, 4 and 7 of the *Proceeds of Crime and Anti-Money Laundering* (POCAML) Act, following a report made by Punjani Rihaz Muhamandan, a director of the company and in the course of investigations they intercepted the driver of the lorry with empty boxes and a few reject flowers after deliveries at the airport, and the remainder to Mercy Waithera, whom they found stuffing the consignment in her vehicle, and, the trailer and the boxes were immediately released.
 10. That the driver, conductor and Mercy Waithera were escorted to DCI Headquarters and after recording statements they were released unconditionally and not detained. That following summons issued, the applicants appeared before the DCI with their advocate, Mr Mwangi and were duly informed of the allegations by the complainant, and they recorded statements.
 11. That the complaint concerned the applicants' sale of flowers to Mercy Waithera without the co-director's knowledge and selling them in the pretext of delivering flowers to the temple, roses costs that Kenya Shillings Thirty Million (Ksh.30 Million) which were sold at the expense of the company and the respondent intercepted the customer as she transported the packaged roses to her shop at City Market and not to the temple Ram Mandina.
 12. That the investigations are not concluded and there is no apprehension of arrest until the DPP gives directions after perusal of the file; there has been no infringement of rights since the applicants were treated in a humane manner, which upon the court has to strike a balance between the claims on infringement of rights and the police duty to investigate.



13. In a supplementary affidavit deposed by the applicants in reply, it is urged that the averments of the respondents were aimed at justifying the unjustified violation of the applicant's fundamental rights as the complainant had resigned as a director of the company. And, there is the question of forcing them to buy his shares at an exaggerated sum of Kenya Shillings Two Hundred Million (Ksh. 200,000,000/-) instead of Kenya Shilling Thirty Two Million Two Hundred and Sixteen Thousand Two hundred and Thirty (Ksh. 32,216,230/-) per the valuation, therefore, he is using investigators to witch-hunt them and gain leverage in the commercial matter and also to deprive them of freedom and liberty.
14. The application was canvassed through written submissions.
15. It is urged by the applicants that the substratum of the 3rd respondent is based on the offence of Stealing by Company Directors Contrary to Section 282 of the *Penal Code*, that is being pursued in the absence of a lawful complainant and that the shareholders' dispute is purely civil and rightly before the commercial court.
16. That summons issued by the 3rd respondent requiring the applicants to record statements were unlawful. In this regard they relied on the case of *Director of Public Prosecutions vs. Attorney General & 12 Others* (2016) eKLR where the court held that there was no merit of the complaint in the absence of a complaint by from the Board of Directors.
17. Further, that the criminal justice system should not be used as a pawn in civil disputes, and, that the investigations are manifestly unlawfully, vexatious and abuse of process.
18. The respondent submitted that anticipatory bail is a redress for constitutional violations, infringement or threat to fundamental freedoms. That care ought to be taken not to adopt amorphous practice of issuing anticipatory bail. That the court ought not to trespass the jurisdiction of the police on issues that may affect investigations.
19. The respondents cited the case of *W'Njuguna vs. Republic* (2004) eKLR, where it was stated that where there are circumstances of serious breaches of a citizen's rights by an organ of the State which is supposed to protect the same, then the court can interfere by issuance of the orders.
20. That anticipatory bail cannot issue where the applicant acts under apprehension on an unfounded claim. That the fear must be real and demonstrable.
21. The respondents also cited the case of *Richard Makhanu vs. Republic* (2014) eKLR where the court held that anticipatory bail should not be used to pre-empt the outcome of investigations.
22. I have considered the application, affidavits in support and opposition, and, rival submissions of Counsels for the parties.
23. On the face of the application, the applicants seek anticipatory bail. Ideally, anticipatory bail, a special relief, should be granted where a person is anticipating arrest, more so, where charges may be trumped up and bail opposed. I say so, because an arrested person has a right to be released on bail pending a charge or trial (See Article 49(1)(h) of *the Constitution*). The right to liberty is unquestionable as it is a fundamental right of an individual.
24. The applicants who have alleged that there was need for issuance of anticipatory bail, were duty bound to demonstrate that there was eminent threat to their right to liberty. It has been demonstrated that the applicants were summoned by the DCI to record statements following a complaint raised which culminated into the arrest and release of an employee of the Company and a third Party. The applicants were however not incarcerated and may be required to make a further appearance to clarify other or further issues at a later time, if the DPP so directs.



25. It has also been demonstrated that the complaint was raised by a shareholder of the company and that there is a pending legal dispute between them in a commercial court. However, the allegations being investigated concern the applicant's sale transactions with Mary Waithera. The question begging would be whether this court should encroach onto the mandate of the 1st Respondent?
26. In the case of *Republic vs. Chief Magistrate Milimani & Another Ex parte Tusker Mattresses Ltd & 3 Others* [2013] eKLR, it was stated as follows:
- “... 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. That this Court has power to quash impugned warrants cannot be doubted. However, it is upon the *ex parte* applicant to satisfy the Court that the discretion given to the police to investigate allegations of commission a criminal offence ought to be interfered with. It is not enough to simply inform the Court that the intended trial is bound to fail or that the complaints constitute both criminal offence as well as civil liability. The High Court ought not to interfere with the investigative powers conferred upon the police or the Director of Public Prosecution unless cogent reasons are given for doing so.”
27. The applicants' arguments are bent towards nipping the respondents investigations against them; it has not been suggested that they were intimidated or harassed after they turned up to record statements, with their advocate. Being summoned by DCI to record a statement is not a violation of constitutional rights. The argument put forward by the applicants regarding purported unlawful investigations should have been challenged either through a Constitutional Petition or Judicial Review process where the court could determine the process and ultimate decision to pursue investigations.
28. What has been emphasized is the fact that issues being investigated are commercial in nature or are related to the commercial dispute already in court. This, is not a ground for grant of anticipatory bail, and, the fact that the complaint having been brought by a party who did not have power under the law would also not be a ground for granting anticipatory bail.
29. In the result, the application herein fails. Accordingly, it is dismissed.
30. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI, THIS 28TH DAY OF JULY, 2022.

L. N. MUTENDE

JUDGE

In the presence of

Mr. Githui for Applicants

Ms. Kibathi for Respondents

Mutai - Court Assistant

