## REPUBLIC OF KENYA

IN THE HIGH COURT AT …………….

CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION NO…… OF 20….

IN THE MATTER OF: AN APPLICATION FOR BAIL PENDING ARREST (ANTICIPATORY BAIL) UNDER THE COURT’S INHERENT ORIGINAL JURISDICTION BY ABC

IN THE MATTER OF: CHAPTER 10 AND ARTICLES 20, 22, 23(1), 27 (1), 29, 165 (3) b, 258(1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: SECTIONS 39, 123, 124 OF THE CRIMINAL PROCEDURE CODE CHAPTER 75 OF THE LAWS OF KENYA

IN THE MATTER OF: COMMON LAW AND ALL OTHER ENABLING PROVISIONS OF THE LAW

BETWEEN

ABC ………...…................................................................................................EXPARTE APPLICANT

VERSUS

OFFICE OF THE DIRECTOR OF PROSECUTIONS.............................................1st RESPONDENT

INSPECTOR GENERAL OF POLICE ……………..………….................................... 2ND RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS …….……………………………3RD RESPONDENT

AND

CDE………………… ……………….……………..…………….........................................INTERESTED PARTY

## CERTIFICATE OF URGENCY

I WAKILI ADVOCATE, an Advocate of this Honourable Court practising as WAKILI ADVOCATES LLP do hereby certify that this matter is urgent and should be heard and determined instantly on the GROUNDS THAT:

1. On the 6th of August 2019, the 3rd Respondent through its twitter handle published the name of the Applicant; a sitting Member of Parliament representing Nairobi County at the Senate as being sought for arrest for the offence of forgery of title documents and fraudulent acquisition of property Land Reference Number 209/2098.
2. The Applicant being a public figure and a state officer took steps to visit the 3rd Respondent’s offices on Kiambu Road in the company of his Counsel Messrs.Wakili Advocates LLP to inquire into the allegations published on the 3rd Respondent’s social media handle.
3. An officer in charge of investigations known as ……………. of number ……….. in the company of another officer known as ………………of number ……………………. in charge of media relations informed the applicant and his Counsel that the information communicated on their media handle was not verified. They promised to verify and revert through contact details given to them by applicant and Counsel.
4. Armed with the assurance that the 3rd Respondent would communicate if need be, the Applicant went back home only to find his residence ransacked with household items strewn all over. His farmhand was also on the floor nursing injuries sustained from an altercation with persons purporting to be police officers from …………… Police Station who had forced their way into the property.
5. The Applicant drove to the …………………………… Police Station to report the incident. While recording his statement, the officer in charge named ……………of number ………… kept threatening the applicant with arrest for forgery and fraudulent acquisition of the interested party’s property.
6. Thereafter the Applicant has continued to receive threats through social media on his impending arrests. Similarly, this threats have been directed to the Applicant’s immediate family members and close political supporters.
7. Due to the said threats the applicant has had to minimises his movements and limit his stay to the house for fear of arrest for an offence which he has no knowledge about.
8. The Applicant is apprehensive that if this court does not grant him anticipatory bail, his right to liberty may at any time be infringed on despite his innocence having not been impugned by a competent court of law.
9. If arrested and not granted bail he risks losing his parliamentary seat for failure to attend sittings without justifiable cause.
10. It is only fair and just that this application be heard and determined urgently, and orders sought herein granted; otherwise the Applicant stands to suffer utmost prejudice and undue hardship and injustice at the hands of the Respondents and Interested Party.

DATED at NAIROBI this \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20…

WAKILI ADVOCATES LLP

ADVOCATES FOR THE APPLICANT

(WAKILI ADVOCATE, Practice No. **LSK/…../…….)**

DRAWN AND FILED BY:

TO BE SERVED UPON:

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INSPECTOR GENERAL OF POLICE ……………..………….................................... 2ND RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS …….……………………………3RD RESPONDENT

AND

CDE………………… ……………….……………..…………….........................................INTERESTED PARTY

NOTICE OF MOTION

*(Under Articles 20, 22, 23(1) and 27 (1) of the Constitution of Kenya, Sections 39, 123, and 124 of the Criminal Procedure Code CAP 75 of the Laws of Kenya and all enabling provisions of the Law)*

*EXPARTE*

TAKE NOTICE that this Honourable Court will be moved on the \_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_, 20…. at 9.00 O’clock in the forenoon or soon thereafter for the hearing of an Application by Counsel for the Exparte Applicant FOR ORDERS THAT:

1. This application be certified urgent and be heard forthwith and *ex-parte* in the first instance;
2. **This Honourable Court do grant leave to the applicant to be heard during vacation;**
3. This Honourable Court be pleased to admit the Applicant to anticipatory bail or bail pending arrest or charge on such terms as the court may deem fit;
4. This Honourable Court be pleased to admit or appoint and or grant the Applicant to anticipatory bail or bail pending arrest for any bailable offence consequent or arising from the alleged complaint by the interested party touching on property Land Reference Number 209/2098;
5. **This 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 interfering with the Applicant herein pending the hearing and determination of this application in the matters related to Property Land Reference Number 209/2098;**
6. **This Honourable Court be pleased to issue a conservatory order restraining the respondents, their servants, juniors, officers and/or anybody whosoever acting under their directions or departments or offices from arresting, harassing or otherwise interfering with the applicant herein pending the hearing and determination of this application; or**
7. The 3rd Respondent be ordered to expedite and/or conclude investigations on the matters reported by the interested Party relating to the acquisition and ownership of Property Land Reference Number 209/2098;
8. The Respondent be prohibited from releasing to the media any further adverse information regarding the alleged investigations touching on property Land Reference Number 209/2098 against the Applicant;
9. That the Respondents whether acting by themselves, their agents, representatives and/or all other officers subordinate to them be restrained from summoning, arresting, holding, detaining, incarcerating and/or in any other way interfering with the Applicant’s liberty and/or in any other way without following the due process of the law in matters related to property L.R. No. 209/2098 pending the inter-parties hearing and determination of this application;
10. A day be appointed by court for the applicant to appear before the police officers attached to …………… Police Station Nairobi or any other officer together with his counsel to enable the police undertake normal procedures including charge or caution if necessary and any other necessary matter without the applicant being confined into custody;
11. Other order and/or directions as this Honourable Court deems fit and just to grant;
12. The costs of this application be provided for.

WHICH APPLICATION is supported by the Supporting Affidavit of ABC and other or further grounds to be adduced at the hearing hereof

DATED at NAIROBI this \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20….

WAKILI ADVOCATES LLP

ADVOCATES FOR THE APPLICANT

(Wakili Advocate, Practice No. **LSK/…………………….)**

DRAWN & FILED BY:

TO BE SERVED UPON:

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IN THE MATTER OF: AN APPLICATION FOR BAIL PENDING ARREST (ANTICIPATORY BAIL) UNDER THE COURT’S INHERENT ORIGINAL JURISDICTION BY MKENYA HALISI MKENYA

IN THE MATTER OF: CHAPTER 10 AND ARTICLES 20, 22, 23(1), 27 (1), 29, 165 (3) b, 258(1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: SECTIONS 39, 123, 124 OF THE CRIMINAL PROCEDURE CODE CHAPTER 75 OF THE LAWS OF KENYA

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THE DIRECTOR OF CRIMINAL INVESTIGATIONS …….……………………………3RD RESPONDENT

AND

CDE………………… ……………….……………..…………….........................................INTERESTED PARTY

SUPPORTING AFFIDAVIT

I ABC of c/o P.O. Box 11000 - 00100, Nairobi within the Republic of Kenya do hereby make oath and state as follows:

1. THAT I am a male adult of sound mind resident in Nairobi, the applicant herein, well versed with the facts of this case hence competent to swear this affidavit.
2. THAT I am the current Member of Parliament representing the County of ……………… at the Senate.
3. THAT on the 6th of August 2021, while outside the precincts of Parliament during a short recess, a colleague showed me a tweet message published by the 3rd Respondent indicating that the 2nd respondent was seeking to arrest me for forgery of title documents and fraudulent acquisition of Property Land Reference Number 209/2098. **Attached and marked MHM- 1 is a screen shot print out of the said tweet message in proof.**
4. THAT being a public figure with a known place of abode and work place, I had a legitimate expectation that the Respondents would have sought me out or summoned me for investigations instead of sensationalising the issue by posting allegations on social media.
5. THAT on the 7th of August 20…, I went to the 3rd Respondent’s offices on Kiambu road in the company of my counsel on record to establish the genesis of the tweet and if need be shed further light on the issue.
6. THAT upon arrival, we were met by two officers namely …………………. of number …………………. and ………………… of number …………………in charge of investigations and media relations respectively.
7. THAT counsel explained the reason for our visit which was the tweet message published by the 3rd Respondent on its twitter handle purporting to seek for my arrest for forgery of title documents and fraudulent acquisition of Property Land Reference Number 209/2098.
8. THAT the two officers were appalled by our visit and the reason for the visit. informed counsel and I that they will verify the information published on their twitter handle and revert to both of us.
9. THAT counsel went ahead to give them our full contact details and also left a copy of a letter protesting the adverse and false information contained in the social media publication by the 3rd Respondent and requesting for an unconditional apology. The letter was received on the same day by the 3rd respondent’s officers. **Attached and marked MHM-2 is a copy of the letter duly received in proof.**
10. THAT after the visit to the 3rd Respondents offices and armed with the assurance that the 3rd Respondent would communicate if need be, I went back home to find my residence ransacked, household items strewn all over. **I have attached and marked MHM-3 copies of photographic evidence as well as videos of CCTV footages in proof.**
11. THAT I also found my farmhand in pain having sustained injuries from an altercation and shoving by persons purporting to be police officers attached to the ……………….. Police Station. **Attached and marked MHM-4 are bundles of treatment sheets and medical scans on account of my farmhand’s treatment at the KNR hospital.**
12. THAT I went to the ………. Police Station to report the incident at my residence. The police officer manning the help desk directed me to the Officer in the Division of Criminal Investigation (DCIO) who informed me that the interested party, the owner of Land Reference Number 209/2098 had made a complaint about forgery of title documents over his land. **I have attached and marked MHM-5 a copy of the complaint received in proof.**
13. THAT I asked the officer if the interested party had tendered any documents to back his allegation of having ownership of the property. The officer coyly avoided the question and insisted that I record a statement which I did and called for copies of title documents from home to support the statement. **I have attached and marked MHM-6 a copy of the statement I recorded together with supporting documents.**
14. THAT in my statements I have demonstrated how I legally acquired the property and adhered to all the pre-requisite process for land transactions such as execution of a sale agreement, terms and conditions stipulated thereof, obtaining of a letter of consent from the land control board, paying of stamp duty and causing the transfer in the normal way.
15. THAT I am apprehensive that the interested party is using the police service to disposes me of my legally acquired property using the criminal justice system.
16. THAT from that incident onwards, my family members and I have continued to receive threats of arrest and calls of intimidation with wide spread campaigns on social media branding me a land grabber and calling for my immediate arrests. **Attached and marked MHM- 7 are bundles of statements from the media campaigns.**
17. THAT yesterday the 5th of September 2021, a group of police officers tried to gain entry without search warrants into my home to conduct a search but were repelled by my security apparatus. **I have attached and marked MHM-8 a video copy of a CCTV footage in proof.**
18. THAT incident has caused members of my immediate family and relatives apprehensive, anxious and/or fearful for their safety and lives generally to the extent that I have had to procure for them temporary accommodation. **I have attached and marked MHM-9 a short term tenancy agreement in proof.**
19. THAT the power of arrest by the police service is being used by the interested party to harass, intimidate and oppress me unnecessarily yet am a law abiding citizen of this country and equally entitled to the secure and equal prosecutions of the law as proved for in Articles 49(1) and 50(1) of the Constitution of Kenya.
20. THAT the intended arrest and/or prosecution by the police officers is for extraneous purpose intended to settle personal vendetta and political scores. It is malicious, vexatious and oppressive perpetrated by the interested party.
21. THAT I have not been able to leave my house for fear of arrest for an offence which I have no knowledge about. I am apprehensive that my right to liberty may at any time be infringed yet I remain innocent until proved guilty by a competent court of law.
22. THAT this state of affairs has left me unable to attend to my duties as a legislator in the last six consecutive sittings and if I am not granted anticipatory bail, I not only risk losing my freedom of movement but my parliamentary seat as well as I have no justifiable cause for missing six sittings already.
23. THAT I am a permanent resident of Nairobi Kenya and there is no chance of absconding from the course of justice.
24. THAT I undertake to present myself before the court or police whenever required to.
25. THAT I further undertakes that I will not, directly or indirectly, make any inducement, threat or any promise to any person acquainted with the facts of the case so as to dissuade them from disclosing any such facts to the court or the police officer.
26. THAT I am willing and ready to accept any other condition the court or police officer willing to impose in relation with the case
27. THAT it is only fair and just that this application be heard and determined urgently, and orders sought herein granted; I stand to suffer utmost prejudice and undue hardship and injustice at the hands of the Respondent.
28. THAT all that I have deponed to herein are true to the best of my knowledge and belief save those based on information, the sources of which I have disclosed.

SWORN at NAIROBI

By **ABC** \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Deponent

This \_\_\_\_ day of \_\_\_\_\_\_\_\_\_, 20…

BEFORE ME:

COMMISSIONER FOR OATHS

DRAWN & FILED BY:

**Explanatory Notes of Anticipatory Bail**

**Legal regime governing grant of bail and bond**

The right to bail and bond is drawn from the Constitution of Kenya, 2010, the Criminal Procedure Code (Cap. 75 of the Laws of Kenya), the Bail and Bond Policy Guidelines, 2015 a developed by the National Council on the Administration of Justice (NCAJ), case law or judicial precedents.

The policy guidelines are not intended to fetter the discretion of police officers and judicial officers in bail and bond decision-making.

**Anticipatory bail**

It is granted to a person pending their arrest. Applicant must demonstrate that their right to liberty is likely to be compromised or breached unlawfully by an organ of the state that is supposed to protect this right as enshrined in Article 258(1) and 165(3) (b) of the Constitution. Anticipatory bail, by its very nature preempts arrest thus cannot have basis under Article 49 of the Constitution.

Persons admitted to anticipatory bail are free from any arrests but are mandated to report and cooperate with the investigative authorities.

Jurisdiction

Although subject of debate the court with powers to grant anticipatory bail is the High Court as noted in Paragraph 4.29 of the Judiciary Bail and Bond Guidelines states as follows:

"The High Court may grant anticipatory bail, that is, bail pending arrest, provided the applicant demonstrates that his or her right to liberty is likely to be compromised or breached unlawfully by an organ of the state that is supposed to protect this right. Further, the applicant must demonstrate that the apprehension of arrest is "real and not imagined or speculative."

**Grounds for grant of anticipatory Bail**

Its discretionary as observed in the case of **Hon. Martin Nyagah Wambora –Vs- Attorney General, Inspector General of Police and Director of Public Prosecution (DPP), Embu High Court Criminal Miscellaneous Application Case No.3 of 2015** the court observed that Article 23 gives wide discretion to the court to grant anticipatory bail.

**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 as was held inW’Njuguna versus Republic, Nairobi Misc. Cr. Case No. 710 of 2002, [2004] 1 KLR 520.**

Will be denied **where the allegedly threatened violation is remote and unlikely as was held i**n the case of **Martin NyagaWambora vs. Speaker of The CountyOf Assembly of Embu& 3 Others (Supra)**, **Mwongo, J** expressed himself as follows:

***“To those erudite words I would only highlight the importance of demonstration of “real danger”. The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court.”***