

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CRIMINAL DIVISION
MISC. CRIMINAL APPLICATION NO. E480 OF 2023

VITAL QUEST INTERNATIONAL LIMITED.....1ST APPLICANT
RICHARD TSADO BALA2ND APPLICANT
LOT ZIKO TSADO.....3RD APPLICANT

=VERSUS=

DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT
INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT
DIRECTOR OF CRIMINAL INVESTIGATIONS.....3RD RESPONDENT

AND

ANN WAMBUI NDUNGU.....INTERESTED PARTY

RULING

1. This is a Ruling on the Applicants' Application a Notice of Motion dated 28th December 2023. Although it is principally an Application for anticipatory bail, it has also raised critical issues on extortion by DCI officers and which this court cannot ignore. It should be noted that the war against corruption and this court's obligation to uphold respect for fundamental rights as well as constitutional principles and values, are alive all the time, and are not a preserve of the Constitutional Division of the Court.
2. The Application is by a Chamber Summons, and is stated to have been brought under the provisions of Articles 22(1), 23, 29 (a) and 165 of the

Constitution of Kenya 2010. As well as Sections 39, 123 and 124 of the Criminal Procedure Code (Cap 75 Laws of Kenya). The Application states that the 2nd and the 3rd Applicant are Nigerian Nationals who through their Kenyan incorporated Company VITAL QUEST INTERNATIONAL (the 1st Applicant) are merchants health supplements.

3. Their grievance in this Application have complained that the officers from the DCI have in the pretext of investigating them and the said company used one of the Company's local directors (ANN WAMBUI NDUNG'U the Interested Party to extort from them a sum of Ksh 2,000,000= (Kenya Shillings Two Million) and are continuing to threaten and harass them. That although the DCI and the said ANN WAMBUI NDUNG'U are now claiming that the money was MR DUNSTAN OMARI's legal fees.
4. The Applicants have in their Application stated that Mr Omari's agreed legal fees was a mere Ksh 50,000= (Kenya Shillings Fifty Thousand). They have further stated that the said Two Million was on Mr Omari's instructions paid by Electronic Money Transfer, in three tranches. With each tranche going, the to a different person/Bank Account. One to Mr Omari's Bank Account; the second one to the Bank Account of one Ms SWIGA an Advocate in Mr Omari's law firm; and the third one to the Bank Account another person.
5. To support their averments, they have annexed to their Affidavits, a huge bundle of documents comprising emails, letters, phone text messages as well as a bank statement of Account from the Diamond Trust Bank, T-Mall Branch, Account No. 000689570, in the name of VITAL QUEST INTERNATIONAL LTD the 1st Applicant.

6. The Interested Party has in her Affidavit denied those allegations. Interestingly despite the Applicants' damning allegations and Affidavits, the Respondents casually responded to the Application by way mere Grounds of Opposition hence have not answered the questions and issues raised by the Applications. Which are serious and weighty.
7. The Application having been canvassed by way of oral arguments/oral submissions, I have considered the passionate submissions by the Applicants' Counsel Mr Ochiel, the Respondent's Counsel Ms Ntabo (Prosecuting Counsel - ODPP), as well as the Interested Party's Counsel Mr Dunstan Omari. I have also read the Application and its Supporting Affidavit, as well as the Applicants' Supplementary Affidavit sworn by RICHARD TSADO BALA the 2nd Applicant. I have also read the Interested Party's Replying Affidavit as well as the Respondents' Grounds of Opposition.
8. I start by disagreeing with Mr Omari's submission that this Court should in determining this Application limit itself only to the facts relating to bail. This Court is not persuaded that it should proceed mechanically, blindly and naively, as to confine itself to facts relating only to bail, and close its eyes and ears to other relevant and/or connected facts stated in the Application and the responses.
9. A court unlike a dog on a leash, has in arriving at a just and legally sufficient determination, the right to consider all the relevant matters and facts pleaded or proffered by the parties in the pleadings.

Determination

10. There are basically two issues for determination in this Application, namely, (a) Whether the Applicants have in this Application justified a

grant of anticipatory bail, and (b) What should be done to the serious accusations the Applicants have made on the conduct and actions of the DCI Officers that have been dealing with this matter; particularly the allegations of extortion alleged by the Applicants in the Application?

11. Those issues touch on the integrity of the entire investigations right from inception. This Court will neither keep its hands off such actions nor shut its eyes and ears to that. Disregarding those allegations will encourage impunity. The DCI being a public institution, the actions of its officers and staff should be subjected to scrutiny and need to be objective, professional, civil and just. It should be accountable for the actions and omissions of such officers.

12. It does not matter that the subjects are foreign nationals who as Mr. Dunstan Omari has argued have no work permits. That is no licence for the DCI or other state operatives to treat them unfairly and/or extort them. Protection by law is not confined to Kenyan Nationals only. It is to all that enter Kenyan Borders or reside within Kenya, irrespective of the legality of their presence in Kenya. They should neither be harassed or extorted. Not even in the manner narrated by the Applicants in this Application. I will address this issue in my final orders, after making a determination on whether I am persuaded to grant anticipatory bail.

13. From the material on record I am satisfied that this is a proper case for grant of anticipatory bail, and do hereby make the following orders:

- a)** The 2nd and the 3rd Applicants are each hereby admitted to anticipatory bail; on the condition that each deposits in this court within forty eight hours (48 hours) the sum of Ksh

300,000/= (Kenya Shillings Three Hundred Thousand) as security therefor. For the 3rd Applicant this shall include sum of Ksh 50,000/= (Kenya Shillings Fifty Thousand) the DCI is already holding as cash bail. The same should be surrendered this Court to form part of the 3rd Applicant's deposit.

- b)** The Applicants shall also deposit in this Court within the same time, their passports. The 3rd Applicant's passport being in the custody of the DCI should within similar time be transmitted, by the DCI, to the custody of the Court.
- c)** During these 48 hours in (a) above and thereafter upon an Applicant fulfilling the conditions of his anticipatory bail, he shall not be arrested, and shall if required by the DCI or the Police, be escorted by his Advocate to DCI Headquarters or any other Police facility, for purposes only of recording a statement and taking of fingerprints should any charges be preferred.
- d)** Should any charges be preferred, the Applicants being on anticipatory bail shall be summoned to appear in court for plea-taking without being arrested.
- e)** I further direct the Director of the Ethics and Anti-Corruption Commission (EACC) forthwith to take statements from the Applicants and thoroughly investigate and take action on the extortion allegations that the Applicants have in this Application made against the DCI officers who have been handling the Applicant, including the allegations regarding the Ksh 2 million paid by the Applicants.

- f) This order be extracted and served on the Director of Criminal Investigations as well as the Ethics and Anti-Corruption Commissions (EACC).
- g) This matter shall be mentioned on 6th February 2024 for directions before the Presiding Judge, Kimondo, J.

DATED and DELIVERED at NAIROBI this 10th day of January 2024.



PROF (DR) NIXON SIFUNA

JUDGE

DELIVERED IN THE PRESENCE OF:

Mr Ochiel for the Applicants.

Ms Ntabo for the Respondents.

Mr Omari and Ms Swiga for the Interested Party.