



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL MISCELLANEOUS APPLICATION E025 OF 2022**

**EDEL SUM.....APPLICANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**Coram: Hon. Justice R. Nyakundi**

**M/S Nabasenge & Co. Advocates for the applicant**

**RULING**

What is before this court is a Notice of Motion Application dated and filed on 16<sup>th</sup> March 2022 expressed to be brought under Articles 49(1), (h), 50(2)(a) & (2), 165(6) and 258(1) of the Constitution of Kenya and sections 123(2)(3) and 364(1)(b) of the Criminal Procedure Code. The applicant seeks the following orders;

**1. Spent**

**2. The Honourable court be pleased to review bond terms given by Hon. Wairimu, Senior Principle Magistrate on 2<sup>nd</sup> February 2021 in Eldoret Chief Magistrate's Court Criminal Case No. E673 of 2021 – Republic v Edel Sum**

**3. The Honourable court be pleased to grant the applicant an alternative bond for cash bail on favourable terms in Eldoret Chief Magistrate's Court Criminal Case No. E673 of 2021 – Republic v Edel Sum.**

**4. The Honourable court be pleased to order for the release of the title deed LR Kapsaret/Kapsaret Block 10 (Lamayuet/29 to the owner Veronica Chepsat Sum held by the Eldoret Chief Magistrates' court upon payment of the said cash bail.**

**5. The Honourable court be pleased to direct the Eldoret Chief Magistrates' court to remove the restriction registered at the lands registry Uasin Gishu County against the said title deed, LR Kapsaret/Kapsaret Block 10 (Lamayuet/29 in respect of the surety herein.**

The Application is premised on the grounds therein and the affidavit in support of the application. The applicant contends that the surety is not proportionate to the bond as the value of the surety is excessive in so far as the bond terms are concerned. Further, the trial court did not give the applicant alternative terms for bond contrary to article 49(1)(h) of the Constitution. The application is unopposed.

**LAW, ANALYSIS AND DETERMINATION**

Article 49(1)(h) of the constitution of Kenya provides;

**An arrested person has the right –**

**(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.**

Section 123(3) of the Criminal Procedure Code provides;

**The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced.**

Section 123A of the Criminal Procedure Code provides;

**(1) Subject to Article 49(1)(h) of the Constitution and notwithstanding section 123, in making a decision on bail and bond, the Court shall have regard to all the relevant circumstances and in particular—**

**(a) the nature or seriousness of the offence;**

**(b) the character, antecedents, associations and community ties of the accused person;**

**(c) the defendant's record in respect of the fulfilment of obligations under previous grants of bail; and;**

**(d) the strength of the evidence of his having committed the offence;**

**(2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person -**

**(a) has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;**

In reviewing the bond granted by the trial court it is essential that the court succinctly brings out the purpose of bail and bond. In **Mohamood Chute Wote & 2 others v Republic [2021] eKLR** Hon. Grace Nzioka expressed herself on the Article 49(1)(h) and section 123 of the Criminal Procedure Code as follows;

*The key word is; “reasonable.” Thus, the question that arises is: what criteria should be used in determining what is reasonable? In my considered opinion, the starting point is the recognition of the fact that, under Article 50(2) of the Constitution of Kenya, 2010, every accused person is presumed innocent until proved guilty. The purpose of bail and bond terms is to ensure therefore that the accused attends the trial. Further, the provisions of section 123A of the Criminal Procedure Code provides the relevant circumstances to be considered, including; nature and seriousness of the offence, character of the accused, record of compliance with previous bail and bond terms and strength of the evidence to be adduced.*

At Paragraph 3.1. (d) of the Bail and Bond Policy Guidelines (at page 9) it is provided that:

**d) “...Bail or bond amounts and conditions shall be reasonable, given the importance of the right to liberty and the presumption of innocence. This means that bail or bond amounts and conditions shall be no more than is necessary to guarantee the appearance of an accused person for trial. Accordingly, bail or bond amounts should not be excessive, that is, they should not be far greater than is necessary to guarantee that the accused person will appear for his or her trial.**

**Conversely, bail or bond amounts should not be so low that the accused person would be enticed into forfeiting the bail or bond amount and fleeing. Secondly, bail or bond conditions should be appropriate to the offence committed and take into account the personal circumstances of the accused person. In the circumstances, what is reasonable will be determined by reference to the facts and circumstances prevailing in each case.”**

From a reading of the charge sheet the applicant is accused of two counts of attempted arson contrary to section 333(a) of the Penal Code. The trial court did not show what the compelling reasons were with regards to the decision to award the bond in the manner the it did. There is no explanation as to why it did not give an alternative of cash bail.

The surety provided is valued at kshs. 28,500,000/-. Clearly, this is far in excess of the bond that was imposed by the court. Failure to grant the applicant an alternative of cash bail is contrary to the provisions of Article 49(1)(h) of the Constitution as the bail and bond terms are unreasonable. To some extent it constructively amounts to denial of bail.

I find no reason not to grant the alternative of cash bail. I reiterate the purpose of bail and bond is to ensure the accused person attends court and to safeguard his/her freedom.

In the premises, the accused's bail and bond terms are reviewed as follows

1. The bond order for kshs. 200,000/- is hereby set aside.
2. The accused shall execute a bond for kshs. 200,000/- with one surety of the same amount or,
3. In the alternative, the accused shall deposit a sum of kshs. 200,000/- as cash bail.
4. The title deed for LR Kapsaret/Kapsaret Block 10 (Lamayuet/29) be released to the owner Veronica Chepsat Sum upon payment of the cash bail.
5. Eldoret Chief Magistrates court remove the restriction registered at the lands registry on the said title deed LR Kapsaret/Kapsaret

Block 10 (Lamayuet/29 in respect of the surety herein upon payment of the cash bail.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 25<sup>th</sup> DAY OF MARCH, 2022.**

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**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

1. M/S Nabasenge Advocate