



Ucelli v Office of the Director of Public Prosecutions (Miscellaneous Criminal Application E041 of 2022) [2022] KEHC 16440 (KLR) (24 November 2022) (Ruling)

Neutral citation: [2022] KEHC 16440 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CRIMINAL APPLICATION E041 OF 2022**

A. ONG'INJO, J

NOVEMBER 24, 2022

BETWEEN

STEFFANO UCELLI APPLICANT

AND

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

RULING

Application

1. *Vide* notice of motion application dated September 26, 2022, brought under articles 24, 39, 47, 159 and 165 of the Constitution of Kenya, section 362 of the Criminal Procedure Code and any other enabling provisions of the law, the applicant seeks for the following orders from the honourable court: -
 - a. That this application be certified as urgent and service therefore be dispensed with in the first instance.
 - b. That this honourable court be pleased to review the terms of release of the applicant's passport Number xxxx provided in its orders issued on May 20, 2022 and substitute with an order for deposit of a title deed as security for bond or any other reasonable term the court might deem fit.
 - c. That in the alternative, this court be pleased to review the terms of release of the applicant's passport Number xxxx provided in its order issued on May 20, 2022 and substitute with an order for release of the said passport on condition that the applicant provides two (2) sureties being members of his own family who will guarantee through the Italian Embassy in Kenya his appearance in court when required to.



- d. That in the alternative, this court be pleased to review the terms of release of the applicant's passport number xxxx provided in its orders issued on May 20, 2022 on the same bond terms issued in Mombasa Cr 854 of 2020.
 - e. That the cost of this application be provided for.
2. The said application was supported by grounds on its face and the affidavit of the applicant, Stefano Ucelli sworn on September 26, 2022.
 3. The applicant indicated that pursuant to the order issued by the court on May 20, 2022, the applicant set off to obtain a guarantee from the Italian Embassy through the Kenyan foreign office that the applicant will return to the country for hearing and determination of his petition and the criminal charges against him. That the embassy wrote back *vide* letter dated June 6, 2022 indicating that they are not authorized, in their capacity, to issue personal guarantees on behalf of citizens for their return to foreign jurisdictions unless through a formal extradition request upon conviction.
 4. The applicant pointed out that the conditions placed to the order for an undertaking to originate from the Italian Embassy in Kenya has proved futile and impossible to attain. That implementation of the court order that appreciated the applicant's plea for medical attention and his father's situation to travel and address them has proved to have an opposite effect from its object.

Submissions

5. The issue for consideration according to submissions in respect to the application dated September 26, 2022 was whether the applicant has made out a case for reviewing the bond terms granted on May 20, 2022. The applicant submitted on imposition of bond terms and the High Court's power in reviewing the same by citing section 123 (2) and (3) of the *Criminal Procedure Code* respectively. The applicant also relied on the case of *Republic v Joseph Kuria Irungu alias Jowie and Another* (2019) eKLR and *Ramathan Iddi Ramathan & 5 Others v R* (2019) eKLR to support its position on the court's powers to review bond terms.
6. The applicant further submitted that various correspondences between the Embassy and the Kenyan authorities in attempting to secure a guarantee hit a brick wall and that the realization of the said objective is facilitated by this court in exercising its wide powers to review the conditions.
7. The applicant cited the case of *Cyril Kipruto Serem v Republic* (2020) eKLR with respect to the accused person's medical condition where it was held as follows: -

‘The health status of the accused ... must dictate such reasonable terms of bail as the accused is able to meet to ensure that he receives the prescribed medical care and treatment.’
8. The applicant submitted that being an Italian national, he is entitled to universal healthcare that the Italian government guarantees all its nationals and there can be no debate on the quality of healthcare in Italy compared to Kenya. That it may appear very insensitive to insist that he gets medical attention in Kenya when there is the option of quality affordable healthcare as an alternative.
9. In submitting, the applicant states that the court should not find any difficulty in seeing through the substratum of the offences the accused is facing in Mombasa Cr 854 of 2020 as a case founded on malice and whose objective is not to secure criminal conviction per se, but to advance personal parochial interest of one of the protagonists in a protracted dispute over ownership of interests in a private property. The applicant further submitted that there is no evidence that he is a flight risk or that he may fail to attend court when required. That on the contrary, the evidence shows that he will



be more than willing to remain in the country and deal with the battle to secure his interests in a multi-billion shillings investment he has made in Kenya among other investments.

10. The applicant submits that contrary to allegations, he demonstrated that in a previous proceeding relating to the ownership dispute in one of his high-end properties, he has been charged in absentia when he was away in Italy and in fact flew back to the country and took plea and successfully cleared his name by securing an acquittal.

Analysis and determination

11. Having considered the application for review of orders made on May 19, 2022 to enable the applicant to travel to Italy on medical grounds, this court is of the view that it should strike the balance between safeguarding proper administration of justice and protecting the individual's liberty. This court is guided by the reasoning expressed in *Jimi Wanjigi v Inspector General of Police and 3 Others* (2018) eKLR where Mwita J held: -

“The petitioner's right to movement is undoubtedly granted by the *Constitution*, is unlimited and must be enjoyed to the greatest extent. This court as a state organ is bound by the *Constitution* and must obey the constitutional command in article 4(1). It is also bound by Article 20(1) which states that the bill of rights applies to all law and binds all state organs and all persons. This court sitting as a constitutional court is the custodian of the *Constitution* and enforcer of rights and fundamental freedoms in the bill of rights. It is the ladder citizens must scale to reach the fountain of justice. Conscious of the values and principles of our constitution, this court must not be the one to assist in the curtailment of rights and fundamental freedoms.”

12. The applicant had been granted authority to travel out of the jurisdiction of this court on condition that the Italian Embassy in Kenya undertakes to the Kenyan foreign office that it will guarantee the return of the applicant to the country for hearing and determination of his petition and criminal charge against him.
13. It has been indicated that the Italian embassy was not able to execute those orders and the applicant has prayed that the same be substituted with an order for two sureties with security similar to the one in Criminal Case No 854 of 2020. This court finds that to be a reasonable suggestion in the circumstances and makes an order that the applicant will execute a bond of Kshs 2,000,000 (Kenya Shillings two million) with two Kenyan sureties of similar amount. The investigating officer in the criminal case No 854 of 2020 to be involved in the verification of security and sureties.
14. Upon release of the passport to the applicant, he will be required to return the same within 3 months of the date of the release. Order accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 24TH DAY OF NOVEMBER, 2022.

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Ms. Kambaga for Respondent

Mr. Anangwe Advocate for applicant



Applicant present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

Ms. Kambaga: I apply for certified copy of ruling

Order: Application for certified copy is allowed

HON. LADY JUSTICE A. ONG'INJO

JUDGE

