



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**REVISION CASE NO. 17 (E013) OF 2021**

**ELIASA SAMOEI KEBENEI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant, Leboi Kebenei stood surety for his son Elias Samoei Kebenei (accused) who had been charged in Kitale Chief Magistrate's Court Criminal case No. 4406 of 2017 with a criminal offence. The Applicant offered the title of his parcel of Land registered As LR. No Chepsiro/Kibuswa Block 1/Tuigoin/154 as security. The accused absconded from court during the pendency of the delivery of Judgment by the trial court. This was 3<sup>rd</sup> October 2018. A warrant of arrest was issued. The Applicant, as surety, was called upon to produce the accused. He failed to do so. The trial court ordered the security to be forfeited to the State on 13<sup>th</sup> February 2021.

A week after the forfeiture order was made i.e on 23<sup>rd</sup> February 2021, the Applicant produced the accused. The Judgment was duly read and the accused sentenced to serve two years imprisonment.

The Applicant made an application for the forfeiture order to be reviewed but the trial court rejected the application. The Applicant has now made an application before this court under **Section 362 of the Criminal Procedure Code** for the forfeiture order to be set aside. The Applicant further prayed for the security that he had deposited in court to be returned now that the accused has been convicted and is serving sentence. The Applicant explained that he had fulfilled what was required of him as a surety and therefore the order of forfeiture was uncalled for in the circumstances.

Mr Bungei for the Applicant reiterated the contents of Application during the hearing. Mr Nderitu for the State opposed the Application. In essence, he stated that the trial court was justified in making the forfeiture order when the Applicant persistently failed to produce the accused when he was so required to do. There was no basis in law upon which this court can exercise its revisionary jurisdiction under **Section 362 of the Criminal Procedure Code**.

This court has carefully considered the rival submission made by the parties herein. **Section 131 of the Criminal Procedure Code** provides the circumstances under which a security offered to secure the release of an accused on bail pending trial may be forfeited. Under **Section 131 (2) of the Criminal Procedure Code**, the surety is required to be given sufficient cause to pay the amount provided in the surety in default the property that has been offered as security may be legally attached and then auctioned to recover the amount provided as surety.

In the present application, it was evident that the Applicant was not given the opportunity to pay the amount that he undertook to forfeit should the accused fail to attend court. That amount, according to the court records, is Kshs 50,000/=. Due process demanded that the Applicant be given the opportunity to pay the amount before the forfeiture order was made. In the premises therefore, this court agrees with the Applicant that the forfeiture order was prematurely made. However, the Applicant is not out of the woods. Although he produced the accused before the trial court after a period of nearly two and half years, he failed in his duty as a surety to produce the accused in court when he was required so to do. In that regard, the trial court acted within its jurisdiction in calling upon the Applicant to account for the surety that he had offered to secure the release of the accused on bail pending trial.

Having so found, the orders that commends itself to this court are as follows:-

- i) The Applicant shall forfeit to the State the sum of kshs 50,000/= that he stood surety for the accused.
- ii) The said amount shall be paid within thirty (30) days of today's date.
- iii) Upon payment of the said sum, the security deposited by the Applicant in court shall be released to the Applicant.

It is so ordered.

**DATED AT KITALE THIS 24<sup>TH</sup> DAY OF JUNE 2021.**

**L. KIMARU**

**JUDGE**