



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI- CORRUPTION & ECONOMIC CRIMES DIVISION

ACEC APPEAL N0.7 OF 2020

JOHN KOYI WALUKE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Appellant/ Applicant John Kopi Waluke was by a judgement delivered on 22nd June 2020 convicted and sentenced to a fine/imprisonment for various corruption related charges. He is however out on bond pending appeal pursuant to a ruling delivered on 28th September 2020. One of the conditions imposed by the court in that ruling was that the Applicant would **deposit his passport and/ or all travelling documents in court prior to his release**, a condition which he duly complied with. On 23rd September 2021 the Applicant who is a Member of the National Assembly wrote a letter to the Deputy Registrar of this court seeking the release of the passport to travel abroad for parliamentary business. The Deputy Registrar then referred that application to this court and when the appeal came up for mention Mr Elisha Ongoya, learned Counsel for the Applicant made the application orally. Senior Principal Prosecution Counsel Miss Kimiri however urged this court to require that a formal application be filed so that the respondent could respond. The Applicant therefore filed the **Notice of Motion dated 18th October 2021** filed herein on 21st October 2021.

2. The application seeks an order for the release of the passport to enable the Applicant to process a visa to travel out of the country. The grounds for the application are that:

- “1. The 1st Appellant intends to travel out of the Country from 5th November, 2021 to 18th November, 2021 on official duty.**
- 2. Leave of the Court is required to enable the 1st Appellant get his passport and travel to discharge the official business.**
- 3. The 1st Appellant has at all material terms complied with the existing bond terms and has not done anything that is adverse to the said bond terms.”**

3. These grounds are echoed in the Applicant’s supporting Affidavit sworn on 18th October 2021. It is the Applicant’s contention that during the trial he was faced with the same condition but he occasionally successfully applied for release of the passport to travel outside the country for official duty; that, upon release of the passport he did not even once fail to abide by the conditions imposed by the trial court; that he has at all times complied with the directions of this court and in good time which includes filing and serving the Petition and the Record of Appeal and has always been ready to have the Appeal heard and determined expeditiously and has never sought an adjournment. Further, that he needs the passport to be released so that he can attend to official government business and his travelling out of the country will not in any way jeopardise the progression of this appeal the same having been fixed for hearing on 15th February 2022. He further stated that he is ready and willing to abide by whatever conditions that may be imposed by this court regarding return of the passport once he comes back. Learned Counsel for the applicant submitted that it is in the best interest of justice and fairness that the orders sought are granted. A Memo from The Clerk of the National Assembly evidencing that the Applicant is a member of a delegation that is scheduled to undertake a fact finding visit of the Kenya Missions in New York, Washington DC and Los Angeles from 5th November to 18th November 2021 and a ruling of the trial court by which his passport was released for a similar purpose are annexed to the supporting affidavit.

4. The application is vehemently opposed. In the Grounds of Opposition filed on 21st October 2021, the respondent states:

- “1. THAT the Applicant was convicted of serious economic crimes and the sentence meted out has not been set aside on appeal and this poses him as a serious flight risk should he be allowed to leave the jurisdiction of this Honourable Court.**
- 2. THAT the circumstance highlighted in “annexure 1” attached to the supporting affidavit have changed because the**

Applicant is no longer presumed innocent as he is now a convict whose conviction and sentence have been set aside on appeal.

3. THAT it is in bad faith and in conflict with public interest for persons who have been convicted and sentenced to be allowed to enjoy freedoms of travel outside the courts' jurisdiction at public cost."

5. At the hearing of the application Mr Ongoya, Learned Counsel for the applicant reiterated the grounds for the application and the depositions of the applicant in the supporting affidavit and urged this court to release the passport so as to give effect to the bond given and to allow the applicant to live his life as fully as possible.

6. On her part Miss Kimiri continued to oppose the application. She submitted that one of the conditions of the bond granted to the applicant was that he would not leave the country until the appeal is heard and determined; that the respondent is apprehensive that should the application be granted the applicant will leave the country and abscond noting that he is a convict and his innocence is no longer presumed. Miss Kimiri urged this court to reject the application.

7. In reply Mr Ongoya urged this court to take note of the steps taken by the applicant to expedite the hearing of the appeal and hence find that does not depict a person keen on running away. Mr Ongoya submitted that there is nothing to demonstrate that the applicant is a flight risk and contended that the applicant complied with all the conditions of the bond granted to him during the trial in the lower court. Counsel contended that moreover this court has itself dispensed with the condition for the Applicant to report to the Deputy Registrar once every month meaning that the conditions imposed by this court can be dispensed with whenever it is expedient to do so. He beseeched this court to allow the application.

8. I have considered the application, the grounds thereof, the supporting affidavit, the annexures thereto, the Grounds of Opposition and the rival submissions of the Learned Counsel for the parties. It is indeed correct that the deposit of the passport the subject of this application was one of the conditions imposed by Onyiego J when he released the applicant on bond pending appeal. The ruling dated 28th September 2020 is reported as **John Koyi Waluke & another v Republic [2020] eKLR**. In addition to the order for deposit of the passport the court ordered that the applicant was **not to move out of (leave) the country until the appeal is heard and determined**. As was correctly submitted by Ms Kimiri, Learned Counsel for the respondent, there is nothing to show that this condition was set aside or appealed. It is therefore, firstly, very surprising that the applicant would so casually treat the matter as to write to the Deputy Registrar to release the passport yet she has no jurisdiction to set aside any order made or condition imposed by the court.

9. Secondly I am not persuaded that the ground that the Applicant intends to travel on parliamentary business is a good enough reason to grant the application. As was stated by Onyiego J, in the ruling dated 28th September 2020 **"Being a member of parliament is not an exceptional ground to warrant his release."** Similarly, in this application the mere fact that the applicant is a member of the parliamentary delegation that is scheduled to travel abroad does not automatically entitle him to the order sought. In my considered opinion the main issue is whether the applicant can in the first place travel out of the country.

10. It is my finding that the applicant cannot leave the country. This is because firstly, there is an order that he cannot do so before the conclusion of this appeal and that order has not been set aside. It is my finding that the order having not been appealed and noting that the order was made by a court of competent jurisdiction against whose decision this court cannot sit on appeal the applicant cannot leave the country. An order for release of the passport would therefore serve no useful purpose.

11. I am not persuaded that travelling out of the country can be equated to a mention before the Deputy Registrar the fact being that even though such a mention is dispensed with the applicant still remains within the jurisdiction of this court which would not be the case were he to go abroad.

12. Secondly the fear expressed by Miss Kimiri that the applicant is a flight risk is very real given the sentences meted upon the applicant by the trial court and the fact that being a convicted person he no longer enjoys the presumption of innocence as he did during the trial. The argument that the applicant complied with the conditions imposed by that court cannot hold given that his status has changed.

13. I do also agree with Miss Kimiri that it would be against public interest to allow a convicted person to travel abroad at tax payers expense.

14. In the upshot the application is found to have no merit and it is dismissed.

SIGNED, DATED AND DELIVERED ELECTRONICALLY THIS 28TH DAY OF OCTOBER 2021.

E. N. Maina

Judge