



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION**  
**ACEC MISC APP. NO. E027 OF 2021**

**KIOKO MIKE SONKO GIDION**

**alias MBUVI GIDION KIOKO SONKO.....APPLICANT**

**-VERSUS-**

**THE DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT**

**RULING**

**Introduction**

1. The applicant who is the accused in Milimani Chief Magistrates Court Anti-Corruption Criminal Case No. 31 of 2019, No.32 of 2019 and No.1 of 2020 has moved this court for an order to allow him to substitute the cash bail of Kshs. 15,000,000 deposited in CM ACC 1 of 2020 with a security bond in terms of the order of the same court dated 11<sup>th</sup> September 2019. He also prays that upon grant of the order and upon the satisfactory processing of the security, this court do order that the cash bail be released to P.G Kaingu & Company Advocates Client Account at KCB Bank, Moi Avenue Branch, Account No. xxxxxx.

2. The application is expressed to be made under Article 165(3) (a) of the Constitution, Sections 124 and 126 of the Criminal Procedure Code and all other enabling provisions of the law. The main grounds for the application are firstly, that the applicant is in dire need of finances to enable him attend to his health, pay fees for his school and university going children, pay his legal fees and generally meet his and his family's daily needs and secondly, that there is a stay of proceedings in CM ACC No. 1 of 2020 and the magistrate is unable to deal with the application. Thirdly his accounts were frozen and that the trial court had in any case admitted him to a bond of Kshs. 30 million with one surety of a similar amount or in the alternative a cash bail of Kshs. 15,000,000. The applicant avers that the prosecution will not suffer any prejudice if the order is granted and that it is in the interest of justice that the orders are granted.

3. The application is supported by the affidavit of Phillip Kaingu, Counsel on record for the applicant and a supplementary affidavit sworn by the applicant on 30<sup>th</sup> September 2021. In his submissions the applicant states that he is the 1<sup>st</sup> accused in ACC 1/2020, 31 and 32 of 2019 which were consolidated for purposes of setting the bail terms. On 11<sup>th</sup> December 2019, he trial court released him on a bond of Kshs. 30 million with one surety of a similar amount or a cash bail of Kshs. 15 million. Consequently the applicant paid Kshs. 15 million consisting of Kshs. 5 million from his bank account and Kshs.10 million contributed by his family and friends which amount was channeled to and deposited by Ann Kananu Mwenda for purposes of good order. The applicant avers that Ann Kananu Mwenda did not contribute any monies towards the bail and that she only acted as an agent in depositing the Kshs. 10 million. He stated the Anne Kananu Mwenda was not the beneficial owner of the said amount and that the relationship between them has irretrievably broken down hence the money should not be released to her. The applicant prays that the money be released to him as opposed to Ann Kananu Mwenda which ordinarily would be the case and states that she will suffer no prejudice as she was only an agent. The applicant further contends that having exercised his right to deposit cash bail for his release, he equally has the right to choose the alternative and deposit security instead of the cash already deposited in court. He asserts that he needs to access the cash to meet his financial obligations as all his bank accounts were frozen immediately he was released from custody and he now has no source of income; that, moreover, his friends and family members who lent him the money are now in dire need of it owing to the harsh economic times currently plaguing the country.

4. The applicant cites **Article 49(1) (h) of the Constitution** which provides for an accused person's right to be released on bond or bail on reasonable conditions. He avers that he has religiously attended the court proceedings in Chief Magistrate ACC 1 of 2020, 31 of 2019 and 32 of 2019; That, he has never absconded or absented himself without the permission of the court and that he has managed to secure security in form of motor vehicles whose logbooks the registered owner is willing to deposit as security in place of the cash bail. He stated that the motor vehicles have been valued and are comprehensively insured. Lastly he asserts that this court has supervisory jurisdiction to determine this application by dint of article 165 (6) of the constitution.

5. The application was vehemently opposed. Counsel for the Respondent submitted that the jurisdiction to hear this application does not lie

with this court but with the trial court as Section 5 of the Magistrates Courts Act as read with article 165 of the Constitution only grant this court appellate or supervisory jurisdiction. Counsel submitted that Article 165(3) (a) of the Constitution as read with **Sections 6(1) and (2) of the Criminal Procedure Code** confer the Chief Magistrates Anti-Corruption Court with the original jurisdiction to determine matters of bail. The respondent also cited Sections 3 and 4 of the Anticorruption and Economic Crimes Act on the original jurisdiction of special magistrates dealing specifically with corruption, bribery, economic crimes and related offences. Counsel for the respondents further submitted that as the trial court is the one that granted the bail sought to be substituted it is that court but not this court that has jurisdiction to hear and determine this application. To this end Counsel for the respondent cited the case of **Tomito Alex Tampushi v Patrick Sosio Lekakeny & 3 others [2018] eKLR** in which the court stated as follows:

***“Before I examine the merits of the application, I must deal with the issue of jurisdiction, for the simple reason that if none exists, then I will have to down my tools. See The Owners of Motor Vessel Lilian “S” vs Caltex Oil Kenya Ltd [1989] KLR 1. The Supreme Court in the case of Macharia and Another vs Kenya Commercial Bank Ltd & 2 Others [Civil Appl. No. 2 of 2011] (UR), underscored the primacy of jurisdiction as follows:-***

***“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus a Court can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. ....Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon parliament to set the jurisdiction of a court of law or tribunal, the legislature will be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”***

6. Counsel for the respondent contended that moreover the application cannot be granted as framed because the order issued by the trial court on 11<sup>th</sup> December 2019 granting the applicant bail has not been set aside or appealed and that the applicant can only seek release of the cash bail upon successful examination of the proposed surety and consideration of the security proposed to be deposited by the trial court. Counsel contended that granting the prayers sought would amount to usurping the jurisdiction and discretion of the trial magistrate. In support of this application Counsel cited the case of **Daniel Njuguna Mwicigi vs Republic (2015)eKLR** where the court stated:

***“Strictly speaking, the court is not reviewing or varying bond terms as set out in the Ruling of 9<sup>th</sup> December 2014. The applicant was given two options to choose from, to deposit cash bail or to post bond with surety. He chose to deposit cash instead of bond with a surety. If it were not for the necessary order from this court to enable the release of the cash held by the court, this application would not have been necessary. I therefore order that the cash amounting to Kshs.500,000 deposited to this court by the applicant as cash bail be released to him upon his satisfaction of the second option of the bail terms. This order is subject to this court through its Deputy Registrar satisfying itself that the title in question is a genuine one and is valued as alleged, this being a requirement in situations where a land title or log book is deposited in court in respect to surety or bond.”***

7. Counsel for the respondent also raised the issue of ownership of the cash bail and submitted that the averments by the applicant as to how the bail was collected and deposited in court are triable private and civil transactions between the applicant and the depositor Ann Kananu Mwenda but does not involve the respondent as they do not fall within its mandate under Article 157 of the Constitution. Counsel contended that Articles 47 and 50 of the constitution accord every person the right to be heard and the right to fair administrative action. The respondent contends that in the application and affidavits sworn by the applicant he has made adverse statements against the depositor of the bail, one Ann Kananu Mwenda to which the respondent is a stranger and the depositor ought to concede or dispute the same. Counsel contended that the applicant has failed to include the said Anne Kananu Mwenda and other well wishers who have a stake in the Kshs. 15, 000,000 to enable this court to make a just decision.

8. Counsel cited the Supreme Court case of **Trusted Society of Human Rights Alliance vs Mumo Matemu (2014)eKLR** where the court observed that an interested party is one who has a stake in the proceedings, though he or she was not a party in the first place and who stands to be affected by the decision of the court when it is made. Counsel asserted that to avoid a possible claim against the State and the Judiciary by the depositor and alleged contributors they ought to have been included in this application. The respondent also cited the case of **Republic vs Thomas Kipkemoi Kipkorir vs 2 Others (2015) eKLR**, where the court stated:-

***“This court directed that Rael attends court in the presence of the 1<sup>st</sup> accused to clarify who paid the money in order for this court to make an order for release of the same....I will and hereby order that Kshs.500,000 paid to the court as cash bail in respect of the 1<sup>st</sup> accused in this case be released to Rael Cherop of National Identity Card No. xxxxxx..”***

Counsel urged this court to dismiss the application.

9. There is no dispute that the applicant was granted bond with surety in lieu of the cash bail which he now wishes to withdraw and replace with bond with surety. The only issue for determination is whether this court is the right forum to make the application.

10. The application is brought under Article 165(3)(a) of the Constitution which gives the High Court unlimited original jurisdiction in criminal and civil matters. In his submissions however Counsel for the applicant calls upon this court to exercise its supervisory jurisdiction under Article 165(6) and (7) of the Constitution.

***“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.***

***(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to***

*ensure the fair administration of justice.”*

11. The circumstances under which this court can exercise its constitutional supervisory jurisdiction arose in the case of **Director of Public Prosecutions v Perry Mansukh Kansagara & 8 Others [2020] eKLR**, where Mwangi J. stated:-

*“Supervisory Jurisdiction and its application in the circumstances of the case*

*150. The question that now needs an answer is: under what circumstances can the High Court in a criminal matter call up the record of proceedings of a criminal case and intervene in exercise of its constitutional Supervisory Jurisdiction? I can readily identify the following as situations which would merit the court’s intervention and in which the court should not hesitate to invoke its constitutional supervisory power. I can think of several situations:*

*a. Where there are special or exceptional circumstances that cannot be addressed through the statutory revisional powers of the court without undue expense or delay;*

*b. Where there is clear and irrefutable evidence of a violation of the rights of a person whose representation is permitted in law;*

*c. Where the public interest element of the case is so substantial that the court would be deemed as abetting an injustice if it did not intervene to correct the situation.*

*d. In any event, the overriding principle in all cases is that the court must act only with the objective of ensuring “the fair administration of justice”;*

*This list showing rationale for intervention is of course not exhaustive.*

*151. Where, or if, it is intended to exercise Supervisory Jurisdiction under the Constitution, I think the following safeguards should be observed:*

*i. A balance has to be struck in the exercise of constitutional Supervisory Jurisdiction to ensure there is no appearance that its object is to micro- manage the trial court’s independence in the conduct and management of its proceedings*

*ii. Ideally, constitutional Supervisory Jurisdiction should be exercised only after the parties are heard on the subject matter in question*

*iii. Supervisory Jurisdiction should not be used where the option of revision is appropriate or applicable;*

*iv. Supervisory Jurisdiction should not be used as a shortcut for an appeal where circumstances for appeal clearly pertain and are more appropriate;*

*v. Supervisory Jurisdiction should be exercised to achieve the promotion of the public interest and public confidence in the administration of justice...” (Emphasis mine)*

12. I have considered this application carefully and I am not persuaded that this court is the proper forum to grant the orders sought by the applicant. Indeed it is my finding that invoking the supervisory jurisdiction of this court is an abuse of the court process. This is because in the first instance bail and bond are within the jurisdiction of the trial court and only come to this court on appeal. No special or exceptional circumstances have been demonstrated to warrant this court to exercise its supervisory jurisdiction in regard to the applicant’s bond. To do so would be tantamount to interfering with the discretion of the trial court and would lead to micro-managing the trial court. It is also my finding that this application ought to have been made in the trial court in the first instance. I say so while alive to the applicant’s averment that he could not do so as there is a stay of the proceedings in the lower court case CM ACC No.1 of 2020. That to me is no good reason for the application being made here as the applicant himself has stated that there are two other cases which were consolidated with CM ACC No. 1 of 2020 for purposes of considering bail/bond and he has not told this court why he could not make this application in those other two cases. That there is a stay in the criminal cases is therefore not a good ground for this court to entertain the application for substitution of the bond/bail terms. The issue of whether the cash bail ought to be released to the applicant or to the depositor is also an issue of the trial court but not this court.

In the upshot it is my finding that there is no basis for this court to entertain the application and that the same should be made in the trial court.

The application is dismissed.

**SIGNED, DATED AND DELIVERED ELECTRONICALLY THIS 16TH DAY OF DECEMBER, 2021.**

**E.N. MAINA**

**JUDGE**