



**REPUBLIC OF KENYA**

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

**HCCR. REVISION NO. 10 OF 2017**

**REPUBLIC .....APPLICANT**

**VERSUS**

**JOSEPH OLE NAIRA KAREI.....RESPONDENT**

**RULING**

1. By revision application dated 17/10/2017, the accused/Applicant seeks the order and sentence in Kilungu SRM Court Criminal Case No. 574/2015 made on 12/10/2017 to be set aside.
2. The applicant lays the background of his complaint in his revision vide Paragraph 2-12 to wit;
  - a. **That** he stood a surety for the Accused, Katindi Ole Taine Lekari in a Criminal Case No. 574 of 2015 at Kilungu Law Courts.
  - b. **That** applicant became a surety on 22/10/2015.
  - c. **That** he deposited my title deed No. Kajiado/Kaputiei South/3270 (4.05Ha).
  - d. **That** the accused absconded during the pendency of his trial.
  - e. **That** the surety was arrested but released on condition he produces the accused person.
  - f. **That** he was given two chances in two weeks hence matter was mentioned twice.
  - g. **That** on third occasion, 12/10/2017, he requested for more time but the Court declined and instead imprisoned him for **six (6) Months** on 12/10/2017 contrary to Section 131 (4) of Criminal Procedure Code.
  - h. **That** the applicant is dissatisfied with the procedure the Court adopted because;
    - a. He made an explanation.
    - b. He made serious attempts.
    - c. He was still willing to look for the Accused.
  - i. **That** Applicant had deposited a security land Parcel No. Kajiado/Kaputiei South/3270 (4.05 Ha) worth 10 Million.
  - j. **That** the Learned Magistrate failed to follow the procedure under Section 131 of the Civil Procedure Court.
3. On 28/10/2017, the court ordered the applicant to be released on cash bail of Kshs. 20,000/= pending the hearing and determination of the instant revision.
4. The Respondent/Prosecution had intimated that it intended to put a reply to the revision but has not done so since 28/10/2017.
5. On 16/01/2018, the prosecution did not contest the application. From the record, the same shows that the court invoked the provisions of Section 131 CPC Cap 75 to deal with the applicant which provides;-

***“The court found that since the security deposited was immovable property, the court could not result into attachment and sale of the same as the provision of deals with movable properties only.”***

6. Thus the court ordered the applicant to deposit the bail amount Kshs. 2 Million. The return of the security deposited and in default the Applicant to serve a jail term of 6 months.

7. The Applicant now complains that:-

**i. He made explanation on NTSC hearing.**

**ii. He demonstrated serious attempt to get the accused who absconded.**

**iii. He is still willing to continue looking for the accused.**

**iv. The Court could still attach his security Kajiado/Kaputei South/3270 (4.05 Ha) worth 10 Million to recover Kshs. 2 Million of the Bail surety.**

8. The Court has perused the record and the Applicant complaints.

9. The issues arising are:-

**a. Whether the trial court order and sentence was justified in Law?**

**b. Is the revision sought merited?**

10. But before I venture into issues concerning the substance of the application, I must first consider whether or not the application is properly before me, through the process of revision.

11. Pursuant to the provisions of section 362 of the Criminal Procedure Code, the High Court is mandated to call for and examine the record of any criminal proceedings before any subordinate court. The purpose for which the High Court is so mandated is to satisfy itself as to the following;

***“Correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”*** See the case of **Livingstone Maina Ngare v Republic [2011] Eklr.**

12. The powers of the High Court on revision are spelt out in **section 364 of the Criminal Procedure Code**. Of relevance to the matter before me is **section 364 (1) (b)** which clothes the High Court with power;

***“In the case of any other order other than an order of an acquittal, (to) alter or reverse the order.”***

13. The learned trial magistrate found;

***“The court found that since the security deposited was immovable property, the court could not result into attachment and sale of the same as the provision of deals with movable properties only.”***

14. Clearly, that was an order of the court. Therefore, it falls within the ambit of **section 364 (1) of the Criminal Procedure Code**. And this court can inquire into its correctness, legality or propriety. In other words, this court has the requisite jurisdiction to inquire into the findings and the orders made by the learned trial magistrate, with a view to revising it, if the court should find it necessary to do so.

15. The applicant/surety states that,

***“The Court could still attach his security Kajiado/Kaputei South/3270 (4.05 Ha) worth 10 Million to recover Kshs. 2 Million of the Bail surety.”***

16. There is no law prohibiting attachment and sale of the surety property including immovable deposited in court as surety and especially where the surety asks the court to do the same in lieu of jailing him.

17. The title deed or title documents are in court and the surety signed papers to authorize sale of the same in event the accused herein absconds bond. The court therefore finds it fair and equitable to review and set aside trial court’s order sentencing surety to 6 months in default of payment of Kshs. 2 million security amount, and also the order for release of the deposited title and substitutes same with order for attachment and sale of the land in whose title documents were deposited in court.

18. Thus the court makes the following orders;

**i. The executive officer law courts Kilungu shall with immediate effect lodge prohibitory order with registrar of land Kajiado**

county on title Kajiado/Kaputei South/3270 (4.05 Ha).

ii. The executive officer above shall execute all documents required to facility the processes of sale and transfer of the land subject herein.

iii. He shall instruct an auctioneer to proceed with process of advertisement and sale of the same land to recover surety amount Kshs. 2 million and all attendant expenses including auctioneer expenses.

iv. The applicant shall cooperate with the court and the auctioneers in the process aforesaid and shall abide with bond terms until he is discharged by this court.

SIGNED, DATED AND DELIVERED THIS 30<sup>TH</sup> DAY OF APRIL, 2018.

C. KARIUKI

JUDGE

.....