



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISCELLANEOUS CRIMINAL APPLICATION NO 18 OF 2015

ABDALLAH SWALEH SAAIB alias DULAAPPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONSRESPONDENT

RULING

This is an application for reinstatement of bond with new surety (ies) by the applicant.

The application, according to the grounds in support of the applicant, the affidavit sworn by the Applicant and submissions by counsel, Mr.Nabwana before court, Is based on the following grounds.

- 1.the applicant who is charged with the offence of attempted murder contrary to section 207 as read with section 205 of the penal code vide criminal case No 1625 of 2014, was released on a bond of ksh 500,000/= with two sureties of a similar amount on 17th October, 2014.
- 2.that the said bond terms were cancelled by the trial court on January, 29,2005 when the applicant failed to attend court.
3. that there were application to have the bond termsreinstated which were rejected by the High court due to misrepresentation by the Applicant's counsel on record who told court that the Applicant was sick when indeed he was out of the country.
- 4.that by continuing to languish in prison the applicant suffers ill health (diabetes and hypertension) and caused family to suffer too

The application was opposed by M/s Ocholla, counsel for the state, who submitted that the prison authority has adequate medical facilities with qualified doctors to attend to the applicant.

And on the issue of having been misrepresented by his advocate, M/s Ocholla submitted that the applicant filed a similar application before Justice Muya on 23.2.2015 and it was dismissed. That in factcounsel on record then did not inform court that the applicant had been misrepresented by his counsel, Mr. Makasembo.

She also submitted that the applicant has not shown to this court what action he took against his said advocate for misrepresenting hm. She further stated that the applicant's sureties even applied to be discharged on the ground that he did not inform them that he was leaving this court's jurisdiction.

She urged the court to dismiss the application.

I have carefully read through the records of proceedings with regard to the applicant's application before me.

It is evident from the records that Honourable Gicheru cancelled the applicant's bond terms after he failed to attend court and his sureties having applied to be discharged.

The applicant then by way of notice of motion application dated 18.2.2015, applied for reinstatement of the said terms, which was dismissed by Justice Muya on 30th April, 2015.

I find the orders being sought before this court similar to the ones which were sought for in the notice of motion application dated 18th February, 2015 before Hon. Justice Muya.

This being the case, the jurisdiction of this case comes to question. It is improper from the applicant to come to this court and to purport to make an application for reinstatement of bond, which application was dismissed by a court of similar or equal jurisdiction. This, in essence would amount to asking this court to sit on appeal or exercise revision any of powers over a court of similar jurisdiction, which is not in tandem with the provisions of 165 of the Constitution and 362 of the criminal Procedure Code. Section 123 (3) of the Criminal Procedure Code would only have applied to this court in a case where the applicant had not approached the High court in any other manner.

A reading of the grounds upon which the application is based on and a consideration of the arguments that have been advanced before me, I find that the applicant has raised issues which were not brought to the attention of the trial court at the time of applying for reinstatement of his bond there.

On the issue of bond, the trial court does not become "functus officio"

and neither does the issue become "res-judicata" as cited by Justice Muriithi in High Court Miscellaneous Criminal Application No 55 of 2014, Mombasa, Republic vrs Adlina Suleiman Said and another. He stated as follows;

"Article 49 (1) of the Constitution entrenches to the right of arrested person to be released on bond pending charge on trial unless there are compelling reason for refusing bail". Such compelling reason may arise before the accused is arrested, during or after the arrest or after he has been granted or denied bond. In short, compelling reason may arise at any stage of the proceedings".

The trial court (a court of first instance) always has residual jurisdiction to reverse its decision on bail terms only that the jurisdiction has to be exercised cautiously so as to provide fair administration of justice and enhance public confidence in the rule of Law.

I find the issues which have been canvassed before are in support of or against the application can be properly addressed before the trial court for consideration on whether to reinstate the bond terms which had been granted to the applicant.

I therefore decline to grant the applicant's orders as prayed.

Ruling delivered, signed and dated this 28th day of February. 2017.

D. O .CHEPKWONY

JUDGE

In the presence of:

M/s Ocholla for the state

Mr. Nabwana for the Applicant

C/clerk- Kiarie