



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISCELLANEOUS CRIMINAL APPLICATION NO. 25 OF 2017

MARTIN MUKIRA.....APPLICANT

V E R S U S

REPUBLIC.....DEFENDANT

RULING

1. On 18<sup>th</sup> November, 2013, MARTIN MUKIRA (hereinafter “the Applicant”) was arraigned before the Tigania Senior Resident Magistrate’s Court and charged with the offence of forcible entry contrary to Section 90 of the Penal Code.

2. It was alleged that on 1<sup>st</sup> October, 2013, at Ngeyu Village in Tigania East District within Meru County, in order to take possession thereof, the Applicant entered in the farm of Bosco Gatuma in a violent manner by brandishing a “panga” and uprooting Kai apple that was used as a fence. The Applicant denied the charge and was released on bond of KShs.20,000/= with a surety of a similar amount.

3. The record shows that the trial commenced on 23<sup>rd</sup> October, 2014 whereby two witnesses testified against the Applicant. On the same date, the Prosecution applied that the Applicant’s bond be cancelled on the allegations that he was still interfering with the land, the subject of the case. An Affidavit was sworn by one CPL Hosman Abdi in support of that application. The same was however dismissed. In dismissing the application the trial Court held:-

***“In order for the Court to cancel the accused’s bond, the Court must be satisfied that there are compelling reasons to deny him his Constitutional right to bond. The mere fact that the accused person is interfering with the suit land may not be a compelling reason to deny him bond. This is because, the complainant instead of reacting as alleged by the prosecution, should weigh other left means to prevent the accused person from continued interference with the suit land.***

***The complainant should institute a civil suit to injunct the accused person from interfering with the suit land. Otherwise, denying the accused bond so that he does not interfere with the disputed land would amount to abuse of the criminal justice system.***

***For the foregoing reason, I find that there are no sufficient reasons to cancel the accused’s bond. The application is disallowed but the accused person is warned to abide by the term of his bond.” (Emphasis added).***

4. The record shows that after PW4 had concluded his testimony on the 27<sup>th</sup> March, 2017 the Court, suo motto, ordered that the Applicant do procure fresh sureties as the one on record was not sufficient. Further, the Court issued Summons to CPL Osman Abdi **“to shed light on allegation of interference by**

**Accused**” and fixed the matter for mention on 3<sup>rd</sup> April, 2017. On the said date, CPL Osman Abdi appeared with an Affidavit which he swore on the same day alleging that the Applicant had continued to interfere with land P/No. 86 under the ownership of one John Bosco Gathuma measuring approximately 0.15 acres Athinga/Athanja Adjudication Section, the subject of the criminal case. That the Applicant was doing so in gross violation of the conditions and terms of being out on bond. He urged the Court to cancel the Applicant’s bond and to remand him until the case was determined. The Applicant’s answer was that the land was his and if the Court wished to remove him therefrom so be it. The Court thereupon proceeded to cancel his bond and fix the matter for hearing on 14<sup>th</sup> June, 2017.

5. It is on this background that on 13<sup>th</sup> April, 2017, the Applicant lodged in this Court a Motion on Notice praying for re- instatement of his bond **“pending the hearing and determination of the Appeal”**. The same was expressed to be brought under Order 51 of the Civil Procedure Rules Section 1, 1A, 3 and 63 of the Civil Procedure Act. Firstly, there is no appeal pending. I will therefore ignore that part of the prayer and deal with the substantive part, that of re- instating the bond. Secondly, the Civil Procedure Act and Rules do not apply in criminal matters. To that extent the application is defective. However, I will save the Motion under Article 159 (2) (d) of the Constitution of Kenya as no prejudice was suffered by the Respondent by those mistakes or shortcomings.

6. The grounds for the Application were contained in the body of the Motion as well as the Supporting Affidavit by the Applicant sworn on 12<sup>th</sup> April, 2017. These were that; he was not given time to defend himself against the allegations of interference with the subject land; that his bond was cancelled on the false evidence of Cpl Osman Abdi of Muthara Police Station and that he was condemned unfairly, unjustly and against the principles of natural justice. The application was not seriously opposed by the Respondent.

7. The granting or denying bond is a power bestowed upon the trial Court. The same Court has the power, for good reason, to cancel the bond it has granted. Some of the reasons for which such a Court can cancel bond are that the circumstances obtaining at the time of granting the bond have changed and there are compelling reasons that have arisen to warrant the cancellation of the bond. To my mind, these may be such as; where an accused has breached the terms of his bond such as failure to attend Court when required and for no good reason; the accused being a flight risk; the accused interfering with the witnesses; the accused being likely to repeat the offence or his security being at risk because of the case pending before Court.

8. In considering whether to cancel the bond, the trial Court must not only give a hearing to the prosecution but it must also give the Accused adequate opportunity not only to defend himself but also to challenge the allegations laid by the Prosecution. To my mind, since the Accused already has vested rights to the bond, those rights cannot be trampled upon peremptorily or on feeble unsubstantiated allegations. The Accused being on the verge of losing his liberty which he is enjoying as a result of the right to bond which he has already secured, that right cannot be taken away from him without ensuring that the principles of fair hearing set out in Article 50 of the Constitution are adhered to. The allegations must be proved beyond peradventure of doubt. These include; being given adequate time to defend the allegations; to choose to be represented by Counsel; to be informed of the evidence of the existence of such compelling reasons that have arisen, to adduce and to challenge evidence amongst others.

9. In the present case, the record shows that Mr. Mwenda, Advocate was on record for the Applicant. He had appeared and cross-examined PW3 and PW4 on 27<sup>th</sup> March, 2017. On the 3<sup>rd</sup> April, 2017, when the bond was cancelled, the Advocate was absent and there are no reasons on record why the Court was in a hurry to conduct that trial (**hear and determine the application for cancellation of the bond**) without ascertaining the Advocate’s whereabouts or whether the Applicant wished to continue in the absence of his Advocate.

10. Secondly, the record does not show whether the Applicant was given in advance the evidence the Prosecution was to rely on to have the bond cancelled. The Affidavit of Cpl Osman Abdi was sworn on 3<sup>rd</sup> April, 2017, the same day he appeared before the trial Court, testified and had the Applicant’s bond

cancelled. Further, there is no evidence to show that the Applicant was given an opportunity to test the evidence of Cpl Osman Abdi through cross-examination. What the record shows is that the Applicant was asked only to respond and he stated:-

***“That is my land and if the court wants to remove me from it so be it.”***

11. Thirdly and most important and which informed this Court’s decision to overlook the technical deficiencies above cited on the Motion, is the manner in which the issue of cancellation of bond was initiated, conducted and concluded:-

(a) As already stated, the record shows that a similar application was made by the Prosecution and dismissed in October, 2014. The very same Cpl Osman Abdi swore an Affidavit on 23<sup>rd</sup> October, 2014 on the very similar grounds as those in his Affidavit of 3<sup>rd</sup> April, 2017. The trial Court then differently constituted declined the application on the grounds that there were no compelling reasons that had been disclosed. Why the Court again acted on the very same grounds two years later to overturn that decision is unclear. It amounted to overturning an order of a Court of concurrent jurisdiction on the very same grounds.

(b) The events of 27<sup>th</sup> March, 2017 are disturbing:-

(i) on that day, Mwenda Advocate came on record for the Applicant. He applied for witness statements and an adjournment to familiarize himself with the matter. The Prosecution strenuously opposed the application. The Court ruled as follows:-

***“The Court concurs with the prosecution and declines the adjournment sought. Reasons to be assigned after today’s hearing.”*** (Emphasis added).

(ii) After PW4 finished testifying, the Court directed as follows:-

***“Accused to procure fresh surety as the one on record is insufficient. Summons to issue to CPL OSMAN ABDI to shed light on allegations of interference by Accused. Mention on 3.4.2017.”***

(iii) On 3<sup>rd</sup> April, 2017, after the Accused had responded to the allegations of Cpl Osman Abdi, the Court ordered:-

***“Bond is cancelled. Hearing 14.6.2017. Mention 19.4.2017 at Kangeta.”***

12. I have carefully considered the record. There is no evidence that anyone had complained about the insufficiency of the surety on the 27<sup>th</sup> March, 2017 or any other time. There is no indication that anyone had complained about interference with the case by the Applicant. There is no one who applied for summons to issue to Cpl Osman Abdi to come and shed **“any light”** on anything. All these emanated from the Court itself. This, coupled with the fact that at the beginning of the hearing on that day, the Court had denied the Applicant’s Advocate who had come on record an adjournment and stated that it would give reasons at the end of the hearing of that day, casts serious doubt on the whole proceedings that culminated with the cancellation of the bond. Since no reasons were given at the end of the hearing of 23<sup>rd</sup> March, 2017 as promised, the issue of enhancement of surety and summoning of Cpl Osman Abdi can safely be concluded to be **“the reasons”** the Court had alluded to earlier when declining adjournment. A serious issue of failure to accord a fair hearing under Article 50 can arise.

13. In any event, on 3<sup>rd</sup> April, 2017, the trial Court fell into serious error when it cancelled the Applicant’s bond without assigning any reasons whatsoever. It is clear that after hearing CPL Osman and the Applicant’s sentiments, the Court proceeded to cancel the bond without assigning any reasons therefor. A Court must give reasons for every decision that it renders. It is a regrettable situation. I think I have said enough to show that there were not only serious errors on the summoning of CPL Osman

Abdi and the consequent cancellation of the bond to warrant the granting of the Motion but also to review the orders and proceedings under Section 362 of the Criminal Procedure Code.

14. Accordingly, the Motion is allowed, the Applicant's bond in Tigania SRM's Criminal Case No. 1669/2013 is hereby reinstated and he should be released forthwith. This ruling should be served upon the trial Court.

**DATED and DELIVERED** at Meru this **30<sup>TH</sup>** day of **MAY**, 2017.

**A. MABEYA**

**JUDGE**

**30/05/2017**