



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KERUGOYA**  
**CRIMINAL REVISION NO.1 OF 2006**

**STEPHEN GITHINJI KANYUNJU.....APPLICANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**RULING**

1. **Stephen Githinji Kanyunju** the applicant in the application dated 28<sup>th</sup> January, 2016 has moved this court under **Sections 362 and 364** of the **Criminal Procedure Code** and **Article 47** of the **Constitution** for the following orders namely:

- i. That the application be certified urgent and be heard exparte in the first instance.*
- ii. That this hon. Court be pleased to revise the orders made on 11<sup>th</sup> May, 2015 by hon. J. A. Kasam in Kerugoya Chief Magistrate's Court criminal case No. 284 of 2011.*
- iii. That an order of prohibition be issued on land registration No. MUTIRA/KIRUNDA/1664 pending the hearing and determination of this application.*
- iv. That the surety be allowed to pay a sum of Kshs.100,000 which was the bond term granted to the 2<sup>nd</sup> accused – Stephen Kuria Wanyiri.*

**A - Background**

2. The basis for the application for revision was that the applicant herein had stood surety for one Stephen Kuria Wanyiri in **Kerugoya CMCR Case No. 284/11** and deposited a title deed for parcel No. L.R. **MUTIRA/KIRUNDA/1664** as security. Later the said accused absconded and the applicant as the person who had stood surety for him, was summoned to show cause why the security deposited could not be sold in order to realize the amount the surety had undertaken to pay if the accused absconded.

3. The surety in his affidavit sworn on 28<sup>th</sup> January, 2016 deposed that he duly attended court and informed the trial court that he was making efforts to trace the accused person. He was unable to trace the accused and the trial court ordered the forfeiture of security to the state and eventual sale of the same by public auction.

4. That parcel of land was sold by public auction to a 3<sup>rd</sup> party and the applicant has deponed that he learnt about the same when he visited the lands office to conduct a search which revealed that the land

had changed hands. He came to court to check the court record and realized that orders of forfeiture and sale were issued by the trial court on 11<sup>th</sup> May, 2015. He has now come to this court to revise the said orders.

### **B – Grounds upon which relief is sought**

5. The main ground for revision is that the applicant was absent in court on 11<sup>th</sup> May, 2015 when the adverse orders were made and that he was not served personally to attend court to show cause. He has faulted one Chief Inspector Sammy Mbarani for effecting service on one James Muriithi Kibanya. The applicant alleged that James Muriithi Kibanya was a stranger to him and not a son in law as deponed in the affidavit of service. He has asserted that the orders made in his absence were prejudicial to him and he should have been given a chance to be heard.

6. The applicant further pointed out in his affidavit that the amount reflected on bond was Kshs.100,000/= and not Kshs.300,000/=. The applicant's learned counsel M/S Kabeti however, noted that the correct amount was actually Kshs.300,000 when this court drew her attention to the court proceedings where the 3<sup>rd</sup> accused was granted bond and when the applicant stood as surety for the said accused person now a fugitive of law.

7. The applicant has contended that the property or security in question is an ancestral land and it was only fair that the new owner is prevented from taking possession.

8. The applicant's learned counsel contended that the trial court should have insisted on personal service given that the service was effected on another person other than the applicant arguing that the applicant had left behind all his details when he stood surety for the 2<sup>nd</sup> accused person. She further submitted that the applicant was ready to pay Kshs.300,000/= which was the amount he stood surety for and that this court was seized with jurisdiction to revise the order.

9. **Mr. Omooria** for state did not oppose the application but noted that the sale of the property had been done and that the property has already changed hands. He contended that the orders being sought at this stage was beyond the criminal jurisdiction of this court.

### **C – Issues and Determination**

10. I have considered the application and the grounds upon which it is made and the submissions made by the applicant through learned counsel M/S Kabeti. I have also considered the sentiments made by the Office of the Director of Public Prosecutions through learned State Counsel Mr. Omooria. The application before court raises the following issues for determination:

*i. Whether the order made by the trial court on 11<sup>th</sup> May, 2015 can be revised by this court in exercise of its revisionary powers under Section 362 and 364 of the Criminal Procedure Code.*

*ii. Whether the sale having taken place can be reversed through an application for revision or whether there are other available remedies.*

*iii. Whether the applicant stood surety for the attendance of accused at the trial court for Kshs.300,000/=.*

11. I will begin with the question of the actual amount or value of the surety that the applicant stood for the 2<sup>nd</sup> accused at the trial court. The proceedings at the trial court particularly the proceedings of 7<sup>th</sup> April, 2011 clearly show that both the accused persons were granted a bond of Kshs.300,000/= with one surety each. On 20<sup>th</sup> March, 2012, the applicant personally presented himself to the trial court and indicated that he would ensure that the 2<sup>nd</sup> accused person, **STEPHEN KURIA WANYARIRI** would attend court whenever required and that he would forfeit Kshs.300,000/= to the state if the accused absconded. This court pointed this fact to the applicant's learned counsel at the hearing of this

application and she conceded that that was the correct position and hence her application to amend prayer 4 of the application to read Kshs.300,000/= instead of Kshs.100,000/=. It does appear that there was an error when the bond was processed because the sum reflected on the bond form is Kshs.100,000/= instead of the correct figure of Kshs.300,000/=. The error however, does not affect the substance of this application and that is why this court allowed the applicant to orally amend his application at the hearing.

12. To address the first issue framed above, it is instructive to look at the provisions of **Section 362** of the **Criminal Procedure Code** which has been invoked by the applicant herein. The section provides as follows:

***“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the 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.”***

The applicant’s major issue with the order of the trial court made on 11<sup>th</sup> May, 2015 is not about the legality or the correctness of the order *per se* but the fact that the order was made without proper notice to the applicant. He has faulted the affidavit of service that was used at the trial court to prove service saying that the same was misleading.

13. The applicant in my considered view is not questioning the legality of the order for forfeiture and sale of his property that had been offered as security but rather he has faulted or questioned the process that led to his property being sold by public auction to a 3<sup>rd</sup> party. The law under **Section 131** of the **Criminal Procedure Code** has laid down clear guidelines regarding forfeiture. Before forfeiture is ordered it is a mandatory requirement under the law to call upon the surety to pay the penalty thereof or show cause why the same should not be paid. **Subsection 2** of **Section 131** is clear. It provides as follows:

***“If sufficient cause is not shown and the penalty is not paid, the court may proceed to recover it by issuing a warrant for the attachment and sale of the movable property belonging to that person or his estate if he is dead.”***

14. The applicant has deponed that he was not given a chance to be heard which is a legitimate concern in so far as the above provision is concerned. I am however, inclined to find that the applicant has perhaps not been candid enough. This is because he has deposed in his affidavit that he was made aware that the 2<sup>nd</sup> accused had absconded and he has further deponed that he in fact came to court to ask to be given time to look for him. He however, has not given details of when and how he learned of the disappearance of the accused and when did he ask for time and how much time did he request the trial court to grant to enable him trace the 2<sup>nd</sup> accused. I also find the reasons that the land he offered as security was ancestral land to be less than satisfactory. When one is offering a property as security, he should be knowing the consequences. I find it unacceptable for a surety to later come to court when the person he had given assurance and undertakings to avail to court does abscond and when called upon to show cause says that the security he had offered should not have been offered for being dear to him or for other similar reasons. When a surety is unable to avail a person he/she stood surety for when he is required in court he/she should be ready to forfeit his security unless he is ready to pay the amount indicated on the bond. In the case of **WILSON KIPROTICH CHEPKAIROR SHOLLEI [2003] eKLR** an applicant who was a surety for an accused person sought to review orders of forfeiture. The court held that the trial magistrate acted correctly in forfeiting the surety stating as follows:

***“In a case where one has offered to stand surety for an accused person it’s the duty of the surety to ensure that the accused person turns up in court every time the court requires him. If the accused does not do it for whatever reason the court has no option but to call upon that surety to forfeit his security.....”***

15. This Court finds that it is in the interest of justice to hold a surety accountable for availing an accused person whom he has stood surety for in court. This is not only for public good but for attainment of law

and order in the society. This, however, does not mean that a surety does not have a right to be heard. Far from it. The laid procedures regarding forfeiture are elaborate and mandatory in nature.

16. I have weighed my mind on the concerns expressed by the applicant and though they could be legitimate, I have come to the conclusion that appropriate remedy may not lie on the revisionary powers of this Court in view of the circumstances obtaining here. Both parties to this application conceded that the sale took place and that the property has already changed hands with the resultant effect being that the property is now in the hands of a 3<sup>rd</sup> party who is an innocent purchaser with no notice or hand in the process of forfeiture and sale of the property done through public auction. For this reason my considered view is that allowing this application as prayed will have undesired effect of condemning a party unheard which is the very basis upon which this present application has been made. Furthermore I am satisfied that as demonstrated the order of forfeiture is not challenged on its correctness or on its legality but the process leading upto the order of forfeiture and sale of the property is faulted. Under such circumstances in my view, this Court's revisionary or supervisory powers are not appropriate remedies. I agree with the respondent that this court in its exercise of criminal jurisdiction cannot be asked to reverse entries that have been effected on the register at the lands office and cancel or revoke the title that has already been issued to a 3<sup>rd</sup> party.

17. The appropriate remedy in my view will answer or address the 2<sup>nd</sup> issue framed in this ruling. The appropriate remedy available to the applicant could have been a judicial review application that would bring on board all the interested parties so that a party does not feel that he has been condemned without being given a chance to be heard. The applicant has the opportunity through Judicial Review to seek redress if he felt that the process that led to his property being sold was unfair to him. That way the court would have been able to interrogate the process and perhaps find out how much was realized during the public auction and how the auction was conducted. This is not possible in an application for review because the same is in my view limited in scope. However, in view of lapse of time, the applicant may perhaps face legal and technical challenges in commencing judicial review proceedings at this stage but other legal options are available for seeking redress for example instituting a constitutional petition to seek the same remedies is an option available among other viable options.

In the light of the above, I find that the application dated 28<sup>th</sup> January, 2016 is devoid of merit. The same is disallowed.

***Dated and delivered at Kerugoya this 16<sup>th</sup> day of March, 2016.***

**R. K. LIMO**

**JUDGE**

16.3.2016

Before Hon. Justice R. Limo J.,

State Counsel Sitati

Court Assistant Willy Mwangi

Applicant absent

Interpretation

Maina holding brief for Kabeti for applicant

Sitati for State

**COURT:** Ruling signed, dated and delivered in the open court in presence of Maina holding brief for Kabeti for applicant and Sitati for State/Respondent.

**R. K. LIMO**

**JUDGE**

16.3.2016