

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISC. CRIMINAL APPLICATION NO. 13 OF 2016

REPUBLIC

VERSUS

HAMISI ALI MBWALAME & 97 OTHERS

RULING

The application dated 19.5.2016 is seeking to have the bond terms issued by the lower court in Kilifi Cr. Case No. 176 of 2016 R. vs Hamisi Ali Mbwalambe & 97 Others be varied or be reduced to reasonable amount. In the alternative the applicants would like to be released on their own recognizance. The application is supported by the affidavits of the 1st accused. The state opposed the application and filed a replying affidavit sworn by Cpl. Dancan Mokayaon 25.5.2015.

Dr. Khaminwa, counsel of the applicants, relied on the application Counsels submitted that the applicants are in occupation of the land in dispute which is located in Kilifi. The purported owner of the land filed a civil suit before the Malindi Land Court this being ELC No. 94 of 2016. The court granted orders that status quo be maintained. The alledged owner is now using the court in a criminal process to evict the accused persons. The accused were arrested on 18.5.2016 and were arraigned in court. The trial in Kilifi released them on a cash bail of Kshs. 15,000/= each for a security bond of Kshs.50,000/= each. Counsel maintains that the accused are poor people who cannot afford that amount. This is a large number of people and their continued stay in remand can lead to violence. Counsel urged the court to release all the accused on their own recognizance.

Mr. Fedha, prosecuting counsel, opposed the application. Counsel relies on the replying affidavit. It is further submitted that the bond terms of Kshs. 15,000/= given by the trial court is reasonable. The applicants ought to have gone to the same court and seek a review of the terms instead of coming to the High Court.

The main issue for the determination of this court is whether the bond terms issued by the trial court should be reviewed. The applicants are charged with the offence of forcible entry contrary to section 90 as read with section 36 of the Penal Code. The particulars are that the appellants on diverse dates between 9.4.2016 and 18.5.2016 violently entered the land in dispute which is owned by the complainant. The applicants are also charged in count II with the offence of trespass upon private land contrary to section 3(1) as read with section 11 of the trespass Act. Cap 204 of laws of Kenya. Section 123 of the Criminal Procedure Code allows an accused person to be released on bond or bail pending the hearing of the case. Section 123 (2) states the amount of bail shall not be excessive. The applicants herein indicate that they are poor people who cannot afford the amount of Kshs.15,000/= fixed by the trial court. They live in the suit property and will not run away. Emphasis was put on their being released on their own recognizance. Given the number of the accused persons, I do find that it would be better if accused are released from custody on reasonable bond terms so that they can carter for their families. The sum of Kshs. 15,000/= is quite .excessive in the circumstances. Since the trial court fixed that amount, the applicants could have as well approached the same court for the review of the terms or apply to the High Court for the same orders. I do find that the application is properly before the court.

Section 123 (1) of the Criminal Procedure Code contains a proviso which states as follows: -

Provided that the officer or court may, instead of taking bail from the person, release him on his executing a bond without sureties for his appearance as provided hereafter in this Part.

Section 124 of the Criminal Procedure code provides for release of an accused on his own recognizance. The law therefore allows the court to release an accused person upon his executing a bond without sureties. The underlying objectives of bond or bail is to secure the attendance of an accused person in court during the hearing of his case. Given the big number of the accused, it would not be prudent for each of them to be released on his own recognizance. Article 49 of the Constitution provide that an accused person shall be released on reasonable bond or bail conditions. I will set aside the bond terms issued by the trial court and replace them with a cash bail of Kshs.500/= each or bond of Kshs.5,000/= with one surety of similar amount. Each of the accused person is hereby released on a cash bail of Kshs.500/=. In the alternative each accused can be released on a bond of Kshs.5,000/= with one surety of similar amount. This is in line with prayer two (2) of the application herein. The application dated 19.5.2016 is hereby allowed on those terms.

Dated and delivered this 25th day of May, 2016.

S.J. CHITEMBWE

JUDGE