



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 66 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

AJAK.....1ST ACCUSED
GARANG JOHN

SOLOMON.....2ND ACCUSED
GAAK CHOL

BARACH.....3RD ACCUSED
MABIOR YAAK

RULING

The applicants herein, Garang John Ajak, Gaak Chol Solomon and Mabior Yaak Barach filed the Notice of Motion dated 24/11/2011 seeking two orders namely:-

- 1. The court be pleased to review and/or set aside its order and ruling issued on 2/11/2011 dismissing the applicant's application for bail/bond;**
- 2. That the court do admit the applicants to bond on reasonable terms pending the trial.**

The grounds upon which the application is brought are that the applicants' right to bond is guaranteed by **Article 49(1) (h) of the Constitution**; that the applicants have been in custody since 22/8/2011; that their application to bail was dismissed on grounds that they had not disclosed their actual place of abode and were a flight risk. The applicants claim to have been residents of Kenya for the last ten years, have Kenyan sureties and custodians that are ready to avail them to the court when required; that their continued detention until trial dilutes the presumption of innocence until proven guilty; that liberty of a citizen is a cherished right which is inalienable and indefeasible and should not be curtailed. The application is supported by the affidavit of Akoi Yar Deng, who describes herself the guardian and step mother of Gaak Chol Solomon. She deposed that she resides at Plot 2/586, Freehold Estate, within Afraha Sub-location, Nakuru Country. Her landlord is Francis Murugo Mbaria; that the accused are facing murder charges similar charges and trial in Sudan and the possibility of jumping bond is unlikely; that they are students in different institutions and their continued incarceration will prejudice their opportunity to education. It was also urged that the applicants will be willing to abide by any condition that the court will impose. The Chief of the area wrote a letter (AYD2) in which she confirms that the applicants reside in her area of jurisdiction and have conducted themselves well.

The application was opposed. Ms Idagwa urged the court to ignore a replying affidavit, purportedly sworn by Cpl Charity Kagwira dated 20/2/2012, because it did not emanate from their office. Ms Idagwa said that she still relied on the affidavit of Charity Kagwira in support of the earlier application dated 20/9/2011; that the case is fixed for hearing on 21st and 22nd May 2012 and the prosecution will be ready for hearing.

This court considered the applicants' application dated 20/9/2011 in which the applicants sought to be released on bond. The court found that they had not disclosed their place of abode, their landlord, chief or plot number were a flight risk and rejected that application.

In the instant application, the applicants have introduced the deponent, Deng, who claims to be a relative of Solomon, 2nd applicant. She has sworn that she is the guardian to all the applicants and a resident of Freehold Estate. What I find curious is that in this application, Deng now claims to be a resident of Freehold Estate, Afraha sub-location. It contradicts what the applicants had earlier stated in their earlier affidavits in support of the application dated 20/9/2011, that they live in Racecourse area, Nakuru. These are two different areas. The question is, when did the deponent move to her current place of abode because it is only on 20/9/2011 that the applicants claimed to be staying in Racecourse.

It is also curious to note that the purported landlord of the plaintiff, Murugo Mbaria did not swear any affidavit to confirm that indeed Deng has rented premises from him.

Although the Chief of the area, one Rosemary Mwangi wrote a letter to the effect that she knows Deng

and the applicants, the contradiction in the applicants' place of abode raises doubt as to whether the chief's letter is truthful.

He who seeks the exercise of this court's discretion should come with clean hands. It seems that the applicants have not come with clean hands. The court cannot confirm the applicants' place of abode.

I find that once again, the applicants have not demonstrated that they have a fixed abode in Nakuru. It is obvious from the contradictions in the two sets of affidavits sworn in this matter that they are not truthful about their true place of abode. That confirms the court's fears that they are unlikely to turn up for trial because it is not known where they can be traced. They are a flight risk and for that reason I decline to review or set aside my order of 2/11/2011. This matter is slated to be heard on 21st and 22nd May 2012. The prosecution says that they will be ready to proceed.

In the end I decline to grant the prayer sought and the application is hereby dismissed.

DATED and DELIVERED this 16th day of March, 2012.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Wabeyi for the accused/applicants

Mr. Kenyi holding brief for complainant

Mr. Nyakundi for the state

Kennedy – Court Clerk