REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
(Coram: Ojwang, J.)

MISC. CRIMINAL APPLICATION NO. 7 OF 2011
(AN APPLICATION FOR BOND BY AN ACCUSED PERSON)

ALI MCHENI ALI alias SHEE LAKO……APPLICANT

- VERSUS -

REPUBLIC…… RESPONDENT

RULING

The charge of "disguising proceeds of drug trafficking contrary to Section 49 (1) (a) (6) of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994 (Act No. 4 of 1994)", which confronts the applicant, is set out in six separate counts. The first four counts relate to alleged masked registration of properties in Mombasa, of varying values; and the remaining two relate to similarly masked registration of motor vehicles — all these items suspected to represent the proceeds of illicit drugs.

On the occasion of arraigning the applicant in Court on **7th December, 2010**, the prosecutor applied, on the basis of Article 49 (1) (h) of the **Constitution of Kenya, 2010**, and s. 22 of the Narcotic Drugs and Psychotropic Substances (Control) Act, to have the accused remanded in custody for seven days, to facilitate the completion of investigations. After hearing the objection raised on behalf of the accused by learned counsel, **Mr. Ombetta**, the learned Chief Magistrate reserved ruling for **8th December, 2010**, but in the meantime ordered that the accused be remanded in custody.

In her ruling of **8th December, 2010** the Chief Magistrate took into account the content of an affidavit sworn by one Inspector of Police **Nicholas Murgor**, as well as the submissions by counsel for the accused, and by the prosecutor (**Supt. Mate**); and she considered the question of a bond for the accused, as follows:

"Mr. Ombetta in his response does not oppose the application but asserts that his client is entitled to bond and assures the Court that if bonded and the respondent meets the terms, he will present himself to the investigators as and when required to do so. His submission is that there is no allegation by the prosecution that the respondent will abscond and/or interfere with investigations. He has then proceeded to give personal details about the respondent, to support his contention that the respondent will not abscond if granted bail".

The learned Chief Magistrate took the position that it was for the purpose of investigating further leads on the offence charged, that the Police wanted to keep the applicant herein in custody; and she found justification in the stand taken by the police:

"The investigations, it is not controverted, involves real property. This Court… appreciates that acquisition and ownership of such property entails documents that [take] time to obtain and examine…. I find myself in agreement with the prosecution … that it would be prudent that the police not only have more time … but also have the respondent in their custody."

The Court ordered that the applicant be held in Police custody; and his order was subsequently extended indefinitely.

By his Notice of Motion of **14th January, 2011** the applicant sought release on bond, on such terms as the Court may deem fit. The grounds are thus stated: the applicant is in custody awaiting trial in Criminal Case No. 3839 of 2010, before the Chief Magistrate's Court; the trial Court has ordered that the applicant is to be in custody till the determination of the case; the prosecution has not demonstrated that the applicant is unwilling to attend trial; the applicant will suffer irreparable damage, as he stands to lose his job if he remains in custody. The application is supported by the applicant's affidavit sworn on **13th January, 2011.**

This matter was heard on **19th January, 2011**, learned counsel **Mr. Kamoti** representing the applicant, and learned counsel **Mr. Muteti** representing the respondent.

Mr. Kamoti rested his client's case on Article 49 (1) (h) of the Constitution, and urged that the applicant be released on bond, or granted bail on terms deemed fit by the Court. That Article and those clauses read as follows:

"49 (1) An arrested person has the right –

…….

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released".

Counsel urged that all persons held in custody on criminal charges, have a right to be released on bond or bail, save that the Court is to consider if there is any "compelling reason" dictating the contrary.

"Compelling reason", in this regard, was the subject of the High Court's decision which learned counsel invoked in this instance: **Republic v. Danson Mgunya and Kassim Sheebwana Mohammed**, Mombasa H.C.Cr. Case No. 26 of 2008 (**Ibrahim, J.**). The learned Judge held that:

"The primary consideration is whether the accused person [will] attend Court and be available at the trial. All factors, and facts and circumstances must be considered with this central principle in mind".

The Judge, relying on the persuasive authority of the Supreme Court of Nigeria case, **Alhaji Mujahid Dukubo Asari v. Federal Republic of Nigeria,** S.C. 20A/2006, listed as relevant considerations in determining availability or non-availability, the following:

(i) the nature of the charge;
(ii) the strength of the evidence which supports the charge;
(iii) the gravity of the punishment in the event of a conviction;
(iv) the previous criminal record of the accused, if any;
(v) the probability that the accused may not surrender himself for trial;
(vi) the likelihood of the accused interfering with witnesses, or that he may suppress any evidence such as incriminates him;
(vii) the likelihood of further charges being brought against the accused;
(viii) the probability of a finding of guilt;
(ix) detention for the protection of the accused person;
(x) the necessity to procure a medical or social report, pending the disposal of the case.

While it was recognized that the foregoing considerations are by no means exhaustive, they do provide, in my opinion, a reliable framework within which the Court should consider the appropriateness of bail; but more significantly in terms of any "compelling reasons" which, by virtue of Article 49 (1) (h) of the Constitution of Kenya, 2010 would justify non-grant of bond/ bail, the spirit of **Ibrahim, J's** Ruling, in my opinion, is that the several considerations are relevant to varying degrees, but they coalesce into the most crucial factor, namely, ***whether or not the accused will come before the Court on the scheduled trial date.*** This should be the basis for determining that there are "compelling reasons" for not granting bail/bond as contemplated under the Constitution.

Learned counsel submitted, correctly in my view, that the task of the accused is only to cite the relevant provision of the Constitution, and make the prayer for bail or bond; but the **burden then shifts** to the State, to urge the "compelling reasons" which should make for the Court limiting the right claimed.

Mr. Kamoti, in the instant application, submitted that the prosecution had not satisfied the burden of proving that "compelling reasons" existed for denying the applicant bail or bond: and therefore, it was urged, the learned Chief Magistrate had not rightly declined the accused's prayer.

The trial Court had relied on the affidavit of **Inspector Nicholas Murgor** in refusing bail; but that witness when cross-examined by counsel (page 3 of the **Proceedings** of 16th December, 2010), stated as follows:

"I am not aware that he [accused] has even been arrested … before with respect to a similar case. We have not availed to him the list of witnesses and contacts. If accused finds out the witnesses, he will interfere with the witnesses. He has been in Police custody for eight days. So far he has not [interfered with witnesses], and I do not have information that he will do so. He never attempted to abscond. I do not have any evidence that he will abscond. I am not speculating. He has not attempted to interfere with the case".

From this evidence, **Mr. Kamoti** submitted that it was not factual, for the trial Court to refuse the application for bail on the ground that the accused was likely to interfere with witnesses.

Counsel noted that the trial Court, not being satisfied with the applicant's case for admission to bail, had sought a probation report as a basis for deciding the question. The Probation Officer, **Mr. Nick M. Makuu** availed his report to the Court on **23rd December, 2010**: in the preparation of the report he had visited the applicant's working station, the applicant's residential neighbourhood, and the Police station. The employer was only concerned about loss of the employee's service; the Police had not completed investigations, but raised no objection to a release on bond. However, the trial Court, on **4th January, 2011** refused the application for bond.

Counsel submitted that, from the proceedings and the Ruling, the denial of bond was based only on speculation and allegation, but not on "compelling reason". Counsel submitted that the applicant's right to a fair hearing, as provided for in Article 50 (2) of the Constitution, was likely to be contravened if his application for bail or bond was not allowed.

Mr. Muteti, learned counsel for the respondent, like the appellant's counsel, drew from the facts in the proceedings the inference that the applicant was not likely to abscond, and so should be granted bail. Counsel noted the following passage in the trial Court's Ruling of **4th January, 2011:**

"The prosecution, it is evident, has not given specific reasons why it is apprehensive…the accused person would interfere with witnesses in the event he is admitted to bail".

And he urged that there was no reason for denying bail.

Mr. Muteti, however, had a related application, in the event bail was granted: that a conservatory order be made securing the properties alleged to have been acquired from the proceeds of illicit drugs – for, by

s. 26 of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994 (Act No. 4 of 1994), orders may be made for forfeiture, if the applicant should be found guilty. Taking precaution that the applicant if released on bond could interfere with the properties in question, learned counsel asked that restraint orders be registered against the proprietary titles; and, by s. 49 of the Act, any dealings with the titles to such properties in an offence.

The issues of merit in this application have emerged quite clearly. The Court, which is the primary agency for the implementation of the rights safeguarded in the Constitution, must pay heed to the terms of Article 49 (1) (h), regarding grant of bail/bond, constantly having in view the object of fair hearing (which itself is the subject of Article 50 (2)).

But for "compelling reasons", this Court will, on a *prima facie* basis, grant bail or bond to any accused person who presents his or her case. The burden rests on the respondent to demonstrate the existence of any such compelling reasons. In this ruling the beacons of such "compelling reasons" have been indicated; but on the facts, the Court has no doubt that no such reasons have been shown; and so, the application is for allowing.

Allowing the application, even as it gives fulfilment to the terms of the Constitution, is not to compromise the public interest in other respects, as specified in the large body of statutes in force. In this instance, the relevant statue is the **Narcotic Drugs and Psychotropic Substances (Control) Act, 1994 (Act No. 4 of 1994)**, which makes provision with respect to the control of the possession of, and trafficking in, narcotic drugs and psychotropic substances.

I will make *Orders* as follows:

(1) I grant bail to the applicant, in the sum of Kenya Shillings Two Hundred Thousand, which shall be paid into this Court's cash office.

(2) In the alternative, I grant a personal bond, of the value of Kenya Shillings Five Hundred Thousand, together with two sureties of like amount, the sureties each to submit recognizances to be verified by the Deputy Registrar.

(3) I hereby impose a prohibition on any dealings with each and all of the properties specified in the six counts of the charge facing the accused/applicant; the Deputy Registrar shall secure the prominent registration of this prohibition at each of the administrative registries where the said properties are lawfully registered; and the prohibitions shall remain in force until further orders of the Court.

(4) The applicant shall deposit his passport with the Deputy Registrar, and the same shall remain in force subject to Orders of the Court.

(5) Trial shall proceed on the basis of priority, as directed by the learned Chief Magistrate.

DATED and **DELIVERED** at **MOMBASA** this **28th day of January, 2011.**

J. B. OJWANG
JUDGE

Coram: ***Ojwang, J.***
Court Clerk: ***Ibrahim***
For the Accused/Applicant: ***Mr. Kamoti***
For the Respondent: ***Mr. Muteti***