



REPUBLIC OF KENYA

HIGH COURT AT KISUMU

HIGH COURT REVIEW 5 OF 2011

THE REPUBLIC THRO' KENYA POLICE BANKING FRAUD INVESTIGATION
DEPARTMENT..... RESPONDENTS

-VERSUS-

SUSHILA ARORA MOHANLAL ARORA APPLICANTS

RULING

On the 3rd of March, 2011 the court in Winam upon the application of **Sushila Arora & Mohanlal Arora** (applicants) seeking to be admitted to bail pending their being arraigned in court to answer any charges likely to be preferred against them (if any) admitted them to personal bond of Ksh 50,000/= each, pending their arraignment in court to answer any charges which may be preferred against them.

The above arrest and release by the Winam Court was pursuant to an application by the above mentioned on the grounds that, their liberty is at stake; the applicants were subjected to harassment, threats and intimidation on what are civil matters and not criminal, the anti fraud Investigation Department had no jurisdiction in a civil matter and not capable of carrying out independent and impartial investigations.

On the 18th of March, 2011 the State Law Office in Kisumu wrote a letter seeking the intervention of this court in exercise of its Revisionary Powers under Section 123, 362 and 364 of the Criminal Procedure Code. Reasons given for the revision are that the bail terms given by the Winam Court are by all means unreasonable, unjust and unrealistic considering that the accused persons are a flight risk hence jeopardizing investigation which is ongoing.

The applicants in their supporting affidavit dated 3rd March, 2011 annexed to their application, in paragraph 8 & 9 thereof gave reasons that informed their stoppage of cheques leading to the altercation herein. In paragraph 13 & 14 they depone that their counsel wrote letters to the seller's counsel complaining about the transaction and informing him of the stoppage of the cheques. Also enclosed to the affidavit was the agreement between the parties.

The letter from the State Law Office to this court states in part:-

“ On the 20th of July, 2010, the accused persons having registered a company by the name East Africa Converters Limited entered into an agreement with the complainants trading as Kakamega Paper Converters Limited. East Africa Paper Convertors were to buy land, vehicles, building, plant and machinery of Kakamega Paper Converters Limited at Kshs 120,000,000/= ----“

“The East Africa Paper Converters Limited confirmed having taken over Kakamega Paper Converters Limited on the 29th October, 2011. Thereafter, they proceeded to sell finished products and used raw materials for three months until 11th January, 2011 when they wrote to the bank to stop payment of all the cheques they had issued --- {emphasize provided}

All the parties appear to agree that the parties had entered into an agreement got into some disagreement and the applicants stopped payment of post dated cheques that they had issued to the complainants. Both parties have cited separate section of the

criminal procedure code in pursuit of their different prayers.

The applicants relied inter alia on Sections 39 & 123 of the Criminal Procedure Code which provides as follows:-

“S. 39. A magistrate may at any time arrest or direct the arrest in his presence within the local limits of his jurisdiction, of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant.”

S. 123 provide:

“(1). {In repeal by the new Constitution S. 49 (h).}

(2) The amount of bail shall be fixed with regard to the circumstances of the case and shall not be excessive.

(3) -----“

In the application for revision the State relied on Sections 123, 362 & 364.

“ S. 362. The High Court may call for and examine the record of any criminal proceedings before any subordinate court for 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”.

“S. 364 (1) in the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders or which have otherwise comes to its knowledge, the High Court may:-

a) In the cause of a conviction, exercise any of the powers conferred on it as a Court of Appeal by Sections 356, 357 & 358, and may enhance the sentence.

b) In the case of any other order other than an order of acquittal with or reverse the order.

c) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence.

Although the State Law Office refers to the applicants as accused persons indeed they are not. They remain applicants for purposes of this ruling as no charges have been preferred against them so far. The cheques were stopped in January, 2011 this seemingly started the altercations between the parties and the involvement of Bank Anti Fraud Investigators. It is close to 3 months down the line since then and no charges have been preferred against the applicants. Even if there are investigations ongoing it is not clear what crime the applicants are suspected of having committed.

The amounts mentioned in the transaction are colossal but it is to be noted that the applicants as stated above have not been charged. In his ruling the learned magistrate gave the applicants a bond pending their arraignment to answer charges if any. The application before the trial court was by the applicants citing harassment by the Bank Anti Fraud Unit.

It is my view therefore that the State cannot now be heard to ask the court to interfere with the above order due to the huge sums involved in a civil transaction between the parties. I see no reason to interfere with the order of the magistrate as no cogent reasons have been brought before court to necessitate the same.

For the above reasons, I decline the request for revision of the bond terms.

DATED AND DELIVERED IN KISUMU THIS 8TH DAY OF APRIL, 2011.

**ALI-ARONI
JUDGE**

In the presence of:

..... present for Plaintiff

.....present for Defendant