



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

HCCRA 112 OF 2011

JARED OJALA

DHUYA.....APPELLANT

VERSUS

THE

STATE.....RESPONDENT

RULING

The appellant / applicant herein was charged in the lower court with the offence of obtaining money by false pretences contrary to Section 313 of the Penal Code in that **“on the 22nd November 2008 and 14th December 2008 at 5:00 p.m. in Nyandiwa Sub Location in Siaya District within Nyanza Province obtained falsely Kshs. 200,000/= from Manasses Owande being the payment of land parcel number 336 Nyandiwa knowing that you are not the owner”**.

This appellate court has been informed that the appellant / applicant had been admitted to bail in the lower court and allegedly dutifully observed the terms of the bail.

The appellant /applicant was found guilty, convicted and sentenced to serve two years imprisonment. He has become aggrieved of the said conviction and sentence and has preferred an appeal to this court. On the said appeal, he has anchored an application by way of notice of motion brought under Section 357 of the Criminal Procedure Code seeking bail pending appeal.

The grounds in support are set out in the body of the application, supporting affidavit and oral highlights in court. The major ones are that:-

- (i) The appellant / applicant has been aggrieved by the conviction and sentence of the lower court and has preferred an appeal.**
- (ii) They intend to challenge the findings on conviction as well as sentence.**
- (iii) If released on bond he will dutifully observe the terms of the bail/bond as previously done.**
- (iv) The subject matter of the charge will be protected.**
- (v) He has a genuine health complication which requires proper medical attention which he cannot access in prison.**

The state has no objection to bail pending appeal save that the terms be revised considering that the appellant /applicant is now serving sentence. They are in agreement that bail can be granted on account of health grounds. Further that the subject matter of the proceedings should be protected.

Counsel for the appellant assured the court that the subject matter of the proceedings has not been interfered with since the mitigation of the criminal proceedings as there is a restriction placed on the title and they have no intention of removing the same.

This court has considered the rival arguments on the application and the same considered in the light of the statutory provisions on the basis of which the application is premised as well as the constitutional provisions in the bill of rights namely article 49, 50 and 51 of the current constitution and the court proceeds to make the following findings on the same:-

- 1. There is both statutory and constitutional jurisdiction to grant bail / bond pending appeal.**
- 2. Right of appeal as well as bail pending appeal is also a fundamental right.**
- 3. The appellant / applicant is therefore properly before this court.**
- 4. The jurisdiction to grant and / or withhold bond from an applicant is a matter within the discretion of the court which this court has judicial notice that the said discretion is required by trite law that it be exercised judiciously by not capriciously and with a reason.**
- 5. The appellant has given reasons for seeking the courts intervention to admit him to bail/bond pending appeal. The state has no objection to the said bail/bond being granted save that terms be tightened.**
- 6. He appellant / applicant has previously been accorded the same terms during the criminal trial in the lower court and he observed the same.**

7. He has assured the court that he will continue observing the same terms if accorded the facility. He has also assured the court that the subject matter will not be interfered with as previously observed.

For the reasons given in the assessment the court is inclined to admit the appellant / applicant to bail/bond pending appeal on the following terms:-

- 1. He may be released on cash bail of Kshs. 50,000.00.**

- 2. In the alternative bail / bond of Kshs. 200,000/- (Two Hundred Thousand) shillings with one surety of like amount**

- 3. If option 2 is taken then the surety will be approved by the Deputy Registrar in the normal way under the applicable rule surety in the presence of both sides.**

- 4. To give a written undertaking not to interfere with the subject matter of the proceedings.**

Delivered, dated and Signed at Kisumu this 28th day of September 2011

R. N. NAMBUYE

J U D G E

RNN/aa0