



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 501 of 2007

SEAN FRANCIS JONES.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Before me is an Originating Summons purported to be brought under section 362 and 364 of the Criminal Procedure Code (cap. 75). The substantive order sought in the application is that this court do recall and examine the record of the criminal proceedings in criminal case No. 1508 of 2004 – REPUBLIC –VS- SEAN FRANCIS JONES.

The grounds of the application were that the applicant was seeking revision of the orders issued by Hon. Mrs. Odero on 11/3/2005 wherein the magistrate ordered that warrant of arrest be issued against the applicant, and on 12/4/2005 wherein the magistrate ordered that the surety issued be forfeited. The second ground was that the orders were made in error as the applicant's counsel had earlier on 6/12/2004 informed the court that the applicant had obtained a stay of proceedings in Misc. Civil Case No.1660 of 2004 after which the court lifted the warrants of arrest. Another ground is that the surety is an old and frail lady who is the mother in-law of the accused who gave bond of Kshs.100,000/= and deposited her title deed for her land known as Dagoretti/Riruta/3244 and stands to suffer great loss as that is where she resides.

At the hearing of the application Ms. Chelagat for the applicant submitted that the application was for review of the orders issued by Hon. Mrs. Odero. Counsel contended that on 6/12/2004 the applicant had obtained stay of proceedings orders in Miscellaneous Application No. 1660 of 2004. The court however went ahead to order the arrest of the applicant despite these orders. Counsel submitted that the applicant was seeking lifting of the warrant of arrest orders, and release of the surety.

Learned State Counsel, Ms. Gateru submitted that the orders of the High Court were made on 21/9/2005, while the orders complained of were issued much earlier. Since there were no prohibition orders from the High Court at the time the magistrate issued orders, the subordinate court was entitled to issue the orders complained of. Counsel also submitted that the subordinate court was not served with any orders, and was therefore justified in issuing the orders.

I have considered the application and submissions of counsel for both parties. I have perused the proceedings in Nairobi Chief Magistrates Criminal Case No. 1508 of 2004. On 12/4/2005, the record reads ?

“Investigating Officer – I have been unable to trace the surety

Court: Warrant of arrest to remain in force surety documentary forfeited to state. File close pending arrest of accused.

Court: Mention on 30/5/2006.

On 28/11/2006 the court record reads ?

“Court: This court has been stayed from dealing further with this matter vide court order of 6/12/2006.”

The copy of the High Court order issued by Hon. Justice Nyamu restraining the magistrate from trying or determining Nairobi Criminal Case No.1508 of 2004 was actually issued on 21st September 2005, not 6th December 2006. Whichever way, the criminal proceedings before the subordinate court could not proceed any further. It is clear to me that the orders of the High Court stopping the criminal proceedings were issued after 12/4/2005, when the orders of the magistrate complained of were actually issued.

Can this court review the orders of the magistrate as requested? Under section 132 of the Criminal Procedure Code (cap.75) orders of a subordinate court relating to bail made under section 131 are appealable and revisable by the High Court. The learned magistrate on 12/4/2005 forfeited the security, that is the land of the surety. Thereafter, further proceedings in the criminal case were stopped by the High Court, and the case did not proceed further. My reading of section 131(2) of the Criminal Procedure Code (cap.75) gives me the understanding that the learned magistrate did not have powers to forfeit security in the form of land property as such. The law provides ?

“131(2) If sufficient cause is not shown and the penalty is not paid, the court may proceed to recover it by issuing a warrant of attachment and sale of the movable property belonging to that person, or his estate if he is dead”.

In my view, there had to be a penalty imposed by the court, which could be the amount of bond or bail granted, and the magistrate was only mandated to issue a warrant of attachment for that amount of penalty on the movable property of the surety, or on her estate if she was dead. The magistrate did not have powers to forfeit the land of the surety. I will therefore revise the magistrate’s orders on forfeiture of the land security.

On the warrant of arrest, in my view, the magistrate had powers to issue those orders as the surety had failed to attend court. The case having subsequently been terminated by the High Court in the Constitutional references that warrant of arrest was spent and I will therefore lift the same.

Consequently, I order as follows ?

- 1. I revise and quash the order of forfeiture of the land of the surety issued by the magistrate in Nairobi Chief Magistrate’s Criminal Case No. 1508 of 2004.***
- 2. Warrant of arrest issued against the surety is also lifted.***

Dated and delivered at Nairobi this 20th February 2008.

George Dulu

Judge

In the presence of ?

Ms. Chelagat for applicant - Mr. Swaka holding brief

Ms. Gateru for State - absent

Mwangi – court clerk