



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISCELLANEOUS CRIMINAL APPLICATION NO.573 OF 2003**

**JOHN MBURU MUIRURI ..... APPLICANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**RULING**

The applicant herein has applied to this court to be granted bond/bail pending the hearing of his appeal – No.680 of 2003. He filed the appeal and the present application in person on 28.07.03.

The applicant’s prayer for bail pending appeal was accompanied by an alternative prayer for this court to hear his appeal instead if bail cannot be granted.

With regard to the applicant’s alternative prayer, I am constrained to revisit, for the record, what this court had to say about this type of request in High Court Criminal Application No.426 of 2003, to wit:

***“... Several such prayers have come before the High Court in the recent past and the impression has been created that the applicants are calling upon the court either to grant bail (pending appeal) or else they must hear the applicant’s appeals on priority basis. If this is the intention, it is misconceived. An applicant cannot dictate to the court in this manner. The court will fix hearing dates convenient to it and all parties.”***

The above observations are reiterated in respect of the present applicant’s alternative prayer.

I now advert to the substantive prayer for bond/bail pending appeal.

Under count 1, the applicant was charged with and convicted of making a document without authority, contrary to section 357(a) of the Penal Code (Cap.63). The particulars of the offence said of the applicant that he :

***“On the 28 th day of May 2001 at Nairobi within Nairobi Area with intent to defraud and without lawful authority made a certificate of registration of company number 336200 purporting it to have been written and signed by Senior Assistant Registrar of Companies and Societies Mr. M.W. Mutamu.”***

Mr. Mutamu did not testify at the applicant’s trial. However, one Joseph Kamau Gathina gave evidence as P.W.2 and basically said he was from the companies registry and that two entities were registered there under the same name, i.e. Ngethu Marketing and Supplies. The first was registered under

certificate number 3179143 on 15.06.2000. Its partners were: Francis Wanjohi, Othniel Ndirangu and John Mburu Muiruri, who is the applicant herein. The second was registered under the certificate cited in the particulars of count 1, i.e. certificate number 336200 registered on 28.05.2001. This second Ngethu Marketing and Supplies had only one proprietor, i.e. John Mburu. The two entities bearing the same name shared a common Post Office Box No.79322, Nairobi. Otherwise their physical locations were different, one being on Parliament Road and the other on Biashara street, Nairobi.

Other prosecution evidence pointed to the applicant as having been a partner in the first Ngethu Marketing and Supplies registered on 15.06.2000 and the sole proprietor in the second Ngethu Marketing and Supplies registered on 25.05.2001.

The central complaint against the applicant was about his alleged diversion of Kshs.1,999,800/= from the first Ngethu Marketing and Supplies, in which he was in partnership with P.W.1 and another to the second Ngethu Marketing and Supplies, in which he was the sole proprietor. This complaint formed the essence of count 3, i.e. stealing by director, contrary to section 282 of the Penal Code.

The charge against the applicant under count 2 was one of altering a false document contrary to section 353 of the Penal Code. The subject document was the certificate of registration of the second Ngethu Marketing and Supplies. The applicant was convicted on all three counts and sentenced to four years on each count, sentences to run concurrently.

It is clear from the foregoing summary that the case against the applicant under all the three counts was centered around the certificate of registration of the second Ngethu Marketing and Supplies. The issues for the determination of the court in this application, and eventually in the applicant's appeal are:-

- (a) Whether Registration Certificate No.336200 of 28.05.01 was made by the applicant purporting it to have been written by Senior Assistant Registrar of Companies and Societies in contravention of section 357 (a) of the Penal Code as charged in count 1;
- (b) Whether the certificate is a false document within the meaning of section 353 of the Penal Code; and
- (c) Whether the applicant was a director and that as such director he stole Kshs.1,999,800/= being the property of the first Ngethu Marketing and Supplies within the meaning of section 282 of the Penal Code.

P.W.2, he of the companies registry, testified that both certificates were issued by the companies registry and were genuine. He attributed the double registration to the fact that the first registration took place before the era of computerization in the companies and societies registry while the second registration took place after computerization and that the transition made it difficult to detect double registration.

In view of the evidence summarised above, it is doubtful whether a conviction for making a false document can be sustained under section 357 (a) of the Penal Code. Had the prosecution charged the applicant for procuring execution of a document by false pretences under section 355 of the Penal Code, the prospects of getting a sustainable conviction might well have been higher. A negative finding on the conviction under count 1 is bound to have an adverse effect on the conviction under count 2. As regards count 3, doubts linger as to whether the applicant was a director such as to have capacity to commit the offences of stealing from the first Ngethu Marketing Supplies by director as charged under that count.

It appears to me that the applicant's appeal may well succeed but the final decision must await full arguments when the appeal gets under-way.

The applicant's application for bond/bail pending appeal is hereby granted. The applicant may be released on his own personal bond in the sum of Kshs.300,000/= with one surety in the like amount.

Order accordingly.

**Delivered at Nairobi this 9th day of September , 2003.**

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**B.P. KUBO**

**JUDGE**