



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CRIMINAL CASE NO. 32 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**GEREVASIO MWENDA.....1<sup>ST</sup> ACCUSED**

**DANIEL MUGAMBI ALIAS KIRU.....2<sup>ND</sup> ACCUSED**

**GEOFFREY MWITI.....3<sup>RD</sup> ACCUSED**

**RULING**

1. By an application by Notice of Motion dated 26<sup>th</sup> August 2020, the surety to an accused who has absconded and whose property which had been offered as security for the accused's attendance to court has been forfeited sought orders as follows:

“1.....

2. *THAT the respondent be restrained from selling land parcel ABOTIUGUCH I/RUIGA/3303 pending interparty hearing of this application.*

3. **THAT the Honorable court do allow/direct the applicant to deposit Kshs 500,000 in court in exchange for the release of Title ABOTHUGUCHI/RUIGA/3303.**

4. **THAT after the deposit of Kshs.500,000 the Honourable court do direct the land registrar to lift inhibition placed on Land Parcel ABOTHUGUCHI/RUIGA/3303.**

5. *THAT cost be provided for.”*

2. The application was supported by an affidavit sworn by the surety ELIAS MUGUNA MWITI, who deponed that he is a cousin to the accused John Muthinja M'Ibere, and on grounds set out in the application as follows:

a. *THAT the applicant stood surety of one of the accused named JOHN MUTIINJA who had been given bond of Kshs 500,000 and the applicant deposited his title ABOTHUGUCHI/RUIGA/3303 in court for his release.*

b. *THAT the accused went missing and the applicants title A80THUGUCHI/RUIGA/33303 was forfeited to the state.*

c. *THAT the applicants parcel is now in danger of being advertised for sale.*

d. *THAT if the applicant parcel is sold he will be rendered homeless as his family live on the said parcel.*

3. The court (Mabeya J.) forfeited the land parcel subject of this application, and on 29/1/2020 further directed that

a. ***The warrant of arrest in force is extended.***

b. ***An order of inhibition hereby issues against title No. Abothuguchi/Ruiga/3303 pending the realization of the security/ sale of property by the state.”***

4. Upon filing of the application herein dated 26<sup>th</sup> August 2020 for an order of substitution of Ksh.500,000/= ***“in exchange for the release of Title ABOTHUGUCHI/RUIGA/3303”*** the court on 16<sup>th</sup> September 2020 while giving directions for the DPP to file a response and reserving ruling thereon said:

*“In the meantime, plot known as Abothuguchi/Ruiga/3303 is not to be sold.”*

5. The DPP by Replying Affidavit sworn by Brenda N. Nandwa Prosecution Counsel on 21/9/20, opposed the application and deponed that-

*3. That the applicant stood surety for his cousin John Muthinja and thus he committed himself to ensure that the accused would attend court at all times.*

*4. That the surety has not shown any kind of effort he has made or is currently making towards looking for the accused person as he is required to, yet John Muthinja is a person very well known to him.*

*5. That by bringing his application to court the same would be conclusively buying the freedom of John Muthinja.”*

6. Section 131 of the Criminal Procedure Code provides for the procedure for dealing with property given in security for accused's attendance at his trial as follows:

***“131 Forfeiture of recognizance***

***(1) Whenever it is proved to the satisfaction of a court by which a recognizance under this Code has been taken, or, when the recognizance is for appearance before a court, to the satisfaction of that court, that the recognizance has been forfeited, the court shall record the grounds of proof, and may call upon any person bound by the recognizance to pay the penalty thereof, or to show cause why it should not be paid.***

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

***(3) A warrant may be executed within the local limits of the jurisdiction of the court which issued it; and it shall authorize the attachment and sale of the movable property belonging to the person without those limits, when endorsed by a magistrate within the local limits of whose jurisdiction the property is found.***

***(4) If the penalty is not paid and cannot be recovered by attachment and sale, the person so bound shall be liable, by order of the court which issued the warrant, to imprisonment for a term not exceeding six months.***

***(5) The court may remit a portion of the penalty mentioned and enforce payment in part only.***

***(6) When a person who has furnished security is convicted of an offence the commission of which constitutes a breach of the conditions of his recognizance, a certified copy of the judgment of the court by which he was convicted may be used as evidence in proceedings under this section against his surety or sureties, and, if the certified copy is so used, the court shall presume that the offence was committed by him unless the contrary is proved.”***

7. The High Court has in addition power under section 133 to order levy on an amount of recognizance for appearance before it as follows:

*“133. Power to direct levy of amount due on certain recognizances*

*The High Court may direct a magistrate to levy the amount due on recognizance to appear and attend at the High Court.”.*

**Orders**

8. Accordingly, for the reasons set out above, the court makes the following orders

**1. The applicant surety will pay ksh.500,000/- into court as penalty in terms of section 131 of the Criminal Procedure Code for the failure to secure the attendance of the accused John Muthinja M'Ibere.**

**2. For avoidance of doubt, the sum of Ksh.500,000/- is paid to the state in forfeiture for failure to secure the attendance of the accused and not as a deposit which may be returned upon a specified future event.**

**3. The title to the parcel of Land Abothugichi/ Ruiga/ 3303 previously deposited as security for the accused 's attendance in court will be released to the depositor and the surety discharged.**

**4. The warrant of arrest against the said accused John Muthinja M'Ibere shall remain in force.**

*Order accordingly.*

**DATED AND DELIVERED THIS 11<sup>TH</sup> DAY OF MARCH 2021.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

Mr. Igweta, Advocate for the Accused.

Ms. Nandwa, Prosecution Counsel for the Prosecution.