



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT BUNGOMA**

**CRIMINAL REVISION NO. E120 OF 2021**

**EDWIN SIMIYU MAINA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

By a letter dated 21<sup>st</sup> June, 2021, the applicant sought orders for the revision of the decision of the Bungoma Chief Magistrates court in Criminal Case No. 1215 of 2009 where the trial court gave orders for the forfeiture of the applicant's parcel of land known as East Bukusu/ South Nalondo/4086 deposited in court as security for Godfrey Omusungu.

As can be gathered from the record; the applicant stood surety for accused who was facing charges of Defilement. The bond terms were Kshs 50,000 with one surety. The case proceeded before that court until judgement when the said Godfrey absconded never to be seen again. It is stated that the surety/applicant did not know that the accused had absconded court after he secured employment in Nairobi and lost contact with him.

The applicant states that he was summoned to the Assistant County Commissioner's Office Nalondo on 15<sup>th</sup> June, 2021 where he was informed that the land had been sold by Eshikhoni Auctioneers to one Everett Wafula through public auction on the authority of the court.

The application was canvassed by way of written submissions. Both parties have complied. The same has been given due consideration.

The issue to be addressed in this matter is whether this is a proper case where the court is called upon to exercise its powers under Article 165 (6) and (7) of the Constitution and Section 362 of the Criminal Procedure Code. Article 165(6) provides;

***(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.***

***(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.***

The legal provisions relating to forfeiture of security is found in section 131 of the Criminal Procedure Code. The section provides;

***(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.***

In *Nelson Simiyu Wanyama Vs Republic & Moses Suveria Simiyu, Crim Revision No. E122/2021*, this court gave the following guidance regarding the procedure to be adopted upon the accused absconding court;

***1. Upon the accused absconding, the surety is summoned to court to explain the whereabouts of the accused.***

*2. If the surety appears in court and gives a satisfactory explanation on the whereabouts or brings the accused before the court and wishes to be discharged from the bond, he should then be discharged and the accused's bond is consequently cancelled.*

*3. If the surety is unsuccessful in apprehending the accused, he should then be called upon to show cause why the security should not be forfeited.*

*4. If at the show cause hearing, the surety fails to give a satisfactory explanation, a warrant of attachment then issues for the forfeiture of security.*

*5. If for a reason, the warrant of attachment and sale cannot be executed or the security cannot be traced, a warrant of arrest should then issue against the surety who can then be imprisoned for a period of Six months.*

From the submissions, the applicant has not disputed the following facts;

1. That Godfrey Omusungu was charged with the offence of defilement on 4/6/2009.
2. That the accused was granted bond of Kshs 50,000/= with surety.
3. That the applicant stood surety for the accused by depositing his title deed for E. Bukusu/S. Nalondo/4086.
4. As part of his obligation he undertook to produce the accused in court and in case he fails to attend court, he shall forfeit the sum of Kshs 50,000/= to the state.
5. That the accused absconded court as from 26/9/2011 to date.
6. That the applicant states he does not know where the accused Godfrey Omusungu is.
7. That he has not discharged his obligation to produce the accused in court to date.

The applicant's main contention is that he was not summoned to court to show cause why his security should not be sold. However, the proceedings of 3/2/2012 clearly show that summons were issued to the surety. The matter was fixed for mention on 5/3/2012 when, even then, the surety did not appear and directions issued for realizing the security.

The applicant has not even on the date of this application, that is, 22/6/2021 produced the accused whom he stood surety to court. It is now 10 years and he has not fulfilled his obligations or to even appear in court to explain the accused's whereabouts.

Having failed to produce the accused or explain his whereabouts, he cannot in my view claim that the sale or realization of his security was unlawful. It was a natural and legal consequence of his undertaking to produce the accused in court or, if he fails, his security be realized by sale of the property he deposited in court.

I therefore find no ground for revision of the orders of the magistrate. This application for revision is hereby dismissed.

**DATED AT BUNGOMA THIS 5<sup>TH</sup> DAY OF NOVEMBER, 2021.**

**S.N. RIECHI**

**JUDGE**