



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
MISC. CR. APPLICATION NO. 358 OF 2015

JOHN OTIENO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

By Notice of Motion dated 1st October, 2015, brought under Section 128(1) and (2), Article 47 Of the Constitution of Kenya 2010 and all other enabling provisions of the law, the Applicant prays for the following reliefs;

- a. **That the Applicant be relieved of his duties unconditionally as a surety in the Criminal Case No.1530 of 2013 filed at the Chief Magistrate's Court at Milimani.**
- b. **That the Title Deed to the Applicant's property being Mavoko town Block2/13167 based in Mavoko be released to him.**

The application is premised on the grounds that the Applicant who stood surety for the accused in the aforesaid criminal case no longer wished to continue with the arrangement. According to the Applicant, in the course of the trial, he noted that the accused, one Syvester Ojiambo Okello was avoiding him. On 14th March, 2015 he informed the court that he intended to withdraw as the surety. The court requested him to return to the court at 12.00 noon so that he could make his application. When he returned the accused was not in court. A warrant of arrest was issued but the court declined to discharge him as a surety. His case is that the trial magistrate failed to appreciate the fact that the accused ought to have been arrested once he sought to be relieved as surety. He has now tried to trace the accused without success.

The application is further supported by the affidavit of the Applicant sworn on 1st October, 2015. While emphasizing the grounds on which the application is premised, the Applicant added that he has engaged the services of a private investigator, Casino Associates. He contends that although they are getting closer to netting the accused, he can no longer afford their fees.

The application was canvassed before me on 4th November, 2015. Learned counsel Miss Muhanda for the Applicant emphasized that immediately the Applicant informed the court that he wished to withdraw as a surety, the court ought to have arrested the accused pursuant to Section 128 of the Criminal Procedure

Code. She submitted that the Applicant had written a letter to the court informing it of his intention to withdraw but he could not trace it. Further, that the mere fact that the prosecution had informed the court of the Applicant's intention to withdraw as a surety was sufficient reason why the court ought to have arrested the accused and discharged him.

Learned State Counsel Miss Atina opposed the application. She submitted that the fact that the Applicant stood surety for the accused committed himself that he would ensure that the accused would at all times attend the trial. He was explained to the consequences of his obligation as a surety which bound him to avail the accused to court at all times. In any case, the application for his withdrawal could not be made in the absence of the accused. That was the purpose for which the file had been placed aside.

I have accordingly considered the application and the respective submissions and I take the following view of the application. Under Section 128 of the Criminal Procedure Code, the obligation to apply for discharge of a surety entirely lies with the surety himself. The same provides as follows:

“(1) All or any of the sureties for the appearance and attendance of a person released on bail may at any time apply to a magistrate to discharge the bond either wholly or so far as it relates to applicant or applicants.

(2) On an application being made under subsection (1) the magistrate shall issue his warrant of arrest directing that the person so released be brought before him.

(3) On the appearance of the person pursuant to the warrant issued under subsection (2) or on his voluntary surrender, the magistrate shall direct the bond to be discharged either wholly or so far as it relates to sufficient sureties, and if he fails to do so may commit him to prison.

From the proceedings provided to this court for 14th March, 2014, it is clear that it is the prosecutor who intimated to the court that the surety intended to withdraw. The matter was mentioned again at 12.00 noon. Again, the prosecutor addressed the court and informed it that the accused person had fled the court on realising he would be arrested. The court accordingly issued a warrant of arrest against him as well as summons to the surety to attend court on 15th April, 2014. From those proceedings, apparently, it is not clear whether or not the surety was in court when the prosecutor informed the court that he intended to withdraw. That can be discerned from the order of the court issuing the summons to the surety for attendance in court on 15th April, 2014. As such, I conclude that the surety was not properly represented in the application to withdraw. But that notwithstanding, it must be borne in mind that when the Applicant stood surety for the accused, he was sworn to the attendant consequences. Those consequences are that he bound himself to ensure that the accused person would attend the court at all times during the trial proceedings. More so, that in the event that the accused failed to attend court, he would forfeit the sum of the secured bond to the court. In that regard, the Applicant ought to bear the responsibility of what he bound himself to by conceding to stand surety for the accused.

It is encouraging from his Supporting Affidavit that he is getting closer to nabbing the accused through the help of a private investigator. It is important to emphasize that a surety secures bond for an accused person who is deemed to be either closely related to him or well acquainted with him. In the present case, the court is unable to fathom how a person who was well known to the Applicant cannot now be found. Furthermore, were the application to be granted, it would set a bad precedent whereby sureties come to court as a matter of formality. Once the bond is secured, an accused person would abscond with the assurance that after all, the surety would be discharged. That is why the surety is sworn to the obligation to ensure that an accused attends court throughout the entire trial. And if an application for withdrawal is made, that should be done when an accused is in court so that the court can secure his attendance by detaining him.

For the above enunciated reasons, I am unable to find for the Applicant and the application is hereby dismissed.

DATED AND DELIVERED IN THIS 3RD DAY OF DECEMBER, 2015

G. W. NGENYE- MACHARIA

JUDGE

IN THE PRESENCE OF:

1. M/s Muhanda for the Applicant

2. M/s Atina for the Respondent