

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI
ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ANTI-CORRUPTION APPEAL NO. E006 OF 2025

FERDINAND NDUNGU WAITITU
BABAYAO....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....

RESPONDENT

RULING

Background

1. The Applicant was convicted and sentenced in ACC No. 22 of 2019. Upon filing an appeal, this Court, presided over by Hon. L. Njuguna J.(as she then was) on 31st July 2025 admitted the Applicant to bail pending appeal on condition that he furnishes a Bank Guarantee of Kshs. 53.5 million, being the equivalent of the entire fine imposed by the trial court.
2. Approximately 7 months after the Applicant was admitted to bail pending appeal, he filed the present application dated 21st January 2026 that is the subject of this ruling. In the said application, the Applicant seeks review and variation of the bail terms by substituting the Bank Guarantee with a cash deposit of Kshs. 20 million or such other reasonable terms as the Court may deem fit.

3. The application is supported by the Applicant's affidavit and is based on the grounds that: -

- 1. THAT on 31st July, 2025, this Hon. Court was sufficiently convinced that the Applicant was deserving of its mercy and thereby exercised its discretion to admit him to bail pending appeal upon his procuring a Bank Guarantee for the payment of the entire fine imposed by the Subordinate Court, amounting to Kshs. 53.5 million.**
- 2. THAT despite all reasonable efforts, the Applicant has been unable to secure a Bank Guarantee for the stated amount, and it is now more than 6 months since the issuance of the said Order.**
- 3. THAT it is quite clear that the Applicant will not be able to secure the said Bank Guarantee and the Order of the Court will be in vain.**
- 4. THAT the reasons that persuaded the Court to admit the Applicant to bail persist to date, and thus the Applicant's renewed plea to the Court to admit him to a reasonable cash bail.**
- 5. THAT the fact that the Applicant has been unable to secure a Bank Guarantee for the past 6 months is prima facie evidence that he is incapable of doing so, and granted that the Court was sufficiently satisfied that he ought to be admitted to bail, it behoves this Court to lessen the conditions it set for his release on bail.**
- 6. THAT whilst it is true that that it was the Applicant who proposed the Bank Guarantee of Kshs. 53.5 million as a condition for his release, the circumstances of this case are such that to hold him to his now impossible**

bargain (pacta sunt servanda) is to fail to appreciate that since the English case of TAYLOR V CALDWELL (1863) 122 Eng. Rep. 309, the law has evolved to exempt persons from an obligation to perform impossible contracts.

7. THAT the decision by Lord Blackburn J. is a foundation for the doctrine of impossibility (also known as the doctrine of frustration) as an exemption to the fast rule that agreements / promises must be kept.

8. THAT conditions for admission to bail ought not to be unsurmountable, oppressive or unattainable, as the spirit behind admission to bail pending appeal is an appreciation of the fact that a conviction appealed against may be overturned and an Appellant ought to be granted the opportunity to retain a semblance of freedom before a final determination on his Appeal.

9. THAT the High Court's power to review its decisions is cast in both statute and case law, and ought not to be confused or negated by misapplication / misapprehension of the Doctrine of Functus Officio.

10. THAT this Court, in Kiswili v Republic [2023] KEHC 25494 (KLR), has stated that the High Court has powers to review previous decisions on bail, whether from the trial court or at the appellant stage. The Court stated:

“However, on a question of bail, a Notice of Motion for review of bail terms by the trial court or the appellate in accordance with provisions on bail would be sufficient.”

11. ***THAT the cornerstone of the justice system is that no one will be punished without the benefit of due process, including the right to exhaust the right to appeal. Incarceration before trial or pending hearing of an appeal cuts against this principle. (Please see the Court of Appeal case of Gerald Macharia Githuka vs Republic.)***
12. ***THAT as earlier demonstrated at the time of his admission to bail, the Appellant has an arguable appeal with high chances of success.***
13. ***THAT the Appellant, for over 5 years, faithfully observed the terms and conditions imposed by the trial court and is therefore clearly not a flight risk.***
14. ***THAT no prejudice will be suffered by the Respondent if the bail terms imposed upon the Applicant are eased somewhat, but should the Appellant succeed in this Appeal (having not secured release on bail on account of impossible bail terms) he will have been punished unfairly and no amount of recompense or damages can undo the damage that incarceration will have wrought upon him, bearing in mind his advanced age and ill-health.***
15. ***THAT the circumstances of this case behove the Court to exercise its discretion in favour of the Appellant.***

4. The Application was also supported by the Affidavit on Security sworn by the Applicant's sister **Ms. Esther Njoki Waititu**, who avers that she is the registered and absolute proprietor of all that parcel of land known as **L.R.**

No. 76/312, situate within Thindigua Area, Kiambu County and registered at the Central Registry in Nairobi.

5. She further depones that the said property has been valued at **Kshs. 55,000,000/=**, as per a Valuation Report annexed as Exhibit “ENN-1.” She adds that she is ready, willing and able to offer the aforementioned property as security for the release of the Appellant on bail pending appeal.
6. She acknowledges that in the event the Appellant fails to comply with any conditions imposed by the Court, the State may forfeit her property and dispose of it in order to recover the amount of security bond set by the Court.
7. The Respondent opposed the application through the Replying affidavit **dated** sworn by **Ms. Faith Mwila**, a Principal Prosecution Counsel, who states that the Applicant has not made out a case for the granting of the orders sought in the application.
8. The application was canvassed by way of written submissions which I have considered.

The Applicant's Submissions

9. The Applicant reiterates the grounds listed in his application and submits that he has made all reasonable efforts to secure the Bank Guarantee but has not been successful. He states that his continued incarceration demonstrates that it is practically impossible for him to

comply with the bail terms issued by this court. He contends that this court has jurisdiction to review its own bail orders and is not functus officio.

10. It is the Applicant's case that bail pending appeal is meant to preserve liberty where the appeal is arguable and that he is not a flight risk.
11. The Applicant relied on the doctrine of impossibility/frustration and cited the decision in **Taylor vs. Caldwell (1863) 122 ER 309**, where the doctrine of frustration was first articulated, recognizing that performance may be excused where it becomes impossible without fault of either party.
12. He further relied on **Davis Contractors Ltd vs. Fareham U.D.C. [1956] AC 696**, where Lord Radcliffe stated that: -

“Frustration occurs whenever the law recognizes that, without the default of either party, a contractual obligation has become incapable of being performed ...”

and further:

“The doctrine of frustration is in all cases subject to the important limitation that the frustrating circumstances must arise without fault of either party; that is, the event which a party relies upon as frustrating his contract must not be self-induced.”

13. The Applicant also cited ***Ogongo vs. Kamau [2024] KEHC 15598 (KLR)***, where the High Court adopted the reasoning in ***Davis Contractors*** case (supra) and reaffirmed that impossibility without fault may discharge an obligation.
14. He argued that while bail terms are not strictly contractual, the principle that the law does not compel performance of an impossible obligation is applicable.
15. On the court's power to review bail, the Applicant cited the case of ***Kiswili vs. Republic [2023] KEHC 25494 (KLR)***, where the Court held that an application for review of bail terms by the trial court or the appellate court in accordance with provisions on bail would be sufficient. It was therefore submitted that this court is not functus officio.
16. On the principles governing the granting of bail pending appeal, the Applicant relied on the decision in ***Gerald Macharia Githuka vs Republic [2007] eKLR*** for the argument that incarceration pending appeal must be balanced against the right to exhaust the appellate process and that punishment should not precede final determination where an appeal is arguable.
17. He reiterated that this Court (differently constituted) had already found that the appeal is arguable with high chances of success, that he is not a flight risk and that he

complied with bond terms before the trial court for over five years during trial.

The Respondent's Submissions

18. The Respondent submitted that that no change of circumstances has been demonstrated and that the alleged inability to secure a Bank Guarantee is unsubstantiated. In this regard, the Respondent argued that the Applicant has not exhibited correspondence from financial institutions or evidence of attempts made to procure the Bank Guarantee.
19. The Respondent maintained that review requires new considerations not previously presented before the Court and that submissions cannot introduce new prayers. It was the Respondent's case that the affidavit and property valuation annexed to submissions are procedurally incompetent.
20. On the legal principles governing review of bail, the Respondent cited ***R vs. Nottingham Justices Ex parte Davies [1981] QB 38***, where the Court held that:

“The court considering afresh the question of bail is both entitled and bound to take account not only of a change in circumstances which has occurred since the last occasion, but also circumstances which, although they then existed, were not brought to the attention of

the court. To do so is not to impugn the previous decision of the court and is necessary in justice to the accused. The question is a little wider that ‘Has there been a change?’ It is ‘Are there any new considerations which were not before the court when the accused was last remanded in custody?’”

21.The Respondent contended that no such new considerations have been shown.

22.Reliace was also placed on ***Samwel Mburu Njenga vs. Republic [2018] eKLR***, where the court emphasized that review requires demonstration of new or changed circumstances.

23.Further reliance was placed on ***Concelia Aoko Ondiek vs. Republic [2021] eKLR***, where the Court stated that:

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“The applicant is essentially asking this court to revisit an issue which has been canvassed and ruled on substantively by a court of concurrent jurisdiction. This, this court does not have jurisdiction to do. Neither the constitution, nor any statute confers upon this court any such powers of revision over orders or findings of a court of similar jurisdiction.”

The Court further observed:

“The applicant, has based this application on the letter of the officer in charge of the prison stating the various ailments that the applicant allegedly suffers from. Without venturing into the probative value of this information in the

form of a letter, I am not convinced by the submissions of counsel for the applicant, that this is new information that should convince the court to revive the orders of 14.4.2021. I say this in view of the substantive finding of the court, based on past judicial precedent, that ill-health is not a ground for grant of bail pending appeal. Neither is it an exceptional and unusual circumstance to warrant the grant of bail.”

24.The Respondent submitted that in this case, no exceptional new factor has been demonstrated.

25.The Respondent faulted the Applicant for introducing new prayers through submissions, in a new prayer for release on bond with a surety. It was submitted that submissions cannot substitute pleadings and that a party is bound by its prayers.

26.The Respondent objected to the property offered as security and argued that the said property was recently transferred and thus amounts to the Applicant standing surety for himself through a proxy thereby undermining the integrity of the bail process.

Issues for Determination

27.From the foregoing pleadings and parties submissions, I find that the issues for determination are:

- a) Whether this Court has jurisdiction to review its earlier bail order.***
- b) Whether the Applicant has demonstrated new or changed circumstances warranting review.***

- c) ***Whether inability to procure a Bank Guarantee constitutes impossibility justifying variation.***
- d) ***Whether the proposed alternative security is procedurally and substantively proper.***

Analysis and Determination

Jurisdiction

28. The doctrine of *functus officio* is a principle of finality which posits that once a court has fully exercised its jurisdiction and rendered a final decision on the merits, it lacks the authority to reopen, revisit, or alter that decision. The rationale of the doctrine is to promote certainty, prevent endless litigation, and safeguard the integrity of judicial decisions.

29. In ***Raila Odinga & 2 Others vs. Independent Electoral and Boundaries Commission & 3 Others*** [2013] eKLR, the Supreme Court held that a court becomes *functus officio* once it has performed all its duties in a matter and cannot re-engage with it except as provided by law.

30. It is however settled that the doctrine does not bar a court from addressing ancillary, incidental, or collateral matters, such as correction of clerical errors, review applications, taxation of costs, enforcement mechanisms, or applications for stay of execution pending appeal, which do not amount to a re-determination of the merits. This means that the court retains residual jurisdiction to

entertain ancillary matters such as stay of execution pending appeal.

31. In the instant case, the court finds guidance in the decision in ***Kiswili vs. Republic*** (supra), for the finding that it is settled that bail terms may be reviewed upon an application. The Court is therefore not functus officio in matters relating to bail pending appeal.

32. I further find that the case of ***Concelia Aoko Ondiek*** (supra) is distinguishable from this case and must be read in context as it addresses attempts to revisit decisions of courts of concurrent jurisdiction without statutory authority. In this case, the application is made before the same Court that issued the bail order and I accordingly find that this court has jurisdiction.

33. I also note that while on one hand, the Respondent opposed the Application, it at the same time clearly conceded to it at paragraph 16 of its Replying Affidavit where its deponent averred, in part, as follows: -

“THAT without prejudice to the foregoing, and in the spirit of fairness, the Respondent does not oppose the Applicant’s admission to bail pending appeal, subject to such reasonable and adequate security or conditions as this Honourable Court may deem fit to safeguard the execution of the sentence...”

34. The above concession, by the Respondent, reinforces this court’s position that it has the jurisdiction to deal with the issue of review of bond terms.

Change of Circumstances

35. My reading of the principles expressed in ***R v Nottingham Justices Ex parte Davies*** (supra) reveals that review requires either change in circumstances or new considerations not previously before the Court.

36. In the present case, it was not disputed that the Applicant has remained in custody despite the fact that he was granted bail pending appeal 7 months ago on account of his deteriorating health condition. It is clear that the Appellant's continued incarceration for over seven months demonstrates his inability to comply with the bond terms, which, to my mind, amounts to a new material consideration.

37. The Court is alive to the fact that bail pending appeal is meant to be real and effective. This means that a condition that proves practically unattainable may defeat its purpose.

Impossibility and Bail Conditions

38. The principles in ***Davis Contractors Ltd vs. Fareham U.D.C.*** (supra) establish that frustration occurs whenever the law recognizes that, without the default of either party, a contractual obligation has become incapable of being performed.

39. In this case, I find that while bail conditions are not contracts, the broader principle that the law does not compel performance of an impossible obligation is persuasive.

40. It is my humble view that if compliance is objectively unattainable despite reasonable efforts, insistence upon such compliance may render the order granting bail illusory. It is trite that the primary purpose of bail is to ensure an accused person's (in this case the Appellant) court attendance rather than to punish him. In this regard, courts have taken the position that bail terms must not be so onerous as to defeat the constitutional objective of preserving liberty pending appeal. (See **R vs. Danson Mgunya & Another [2010] eKLR** and **Republic vs. Ahmed Mohamed Omar & 6 Others [2010] eKLR**).

Procedural Objections

41. On the Respondent's objection to the introduction of new prayers during submissions the Court agrees that the said introduction is not procedural. The court however notes that the substantive application seeks variation of bail terms generally. I therefore find that the Court retains the discretion to impose appropriate and enforceable alternative security conditions as it is not bound by the proposals made by the Applicant.

42. As regards the Respondent's objection to the property offered as security, this court finds that the Deputy

Registrar retains authority to verify ownership, valuation, and propriety of any proposed security. The property's valuation at Kshs. 55,000,000/= suggests that it is capable of satisfying any reasonable bond terms the Court may impose, but this is still subject to verification of title and valuation by the court.

43. Without saying more, this court is certain that the Deputy Registrar is well placed to carry out such verification and will therefore restrain itself from making a determination on the suitability of the security offered by the Applicant.

Disposition

44. For the reasons that I have stated in this ruling, I find that the instant application is merited and I therefore allow it in the following terms:

a) The condition requiring a Bank Guarantee of Kshs. 53.5 million in the ruling rendered on 31st July 2025 is varied and/or set aside and in its place an order is made that the Applicant is admitted to bail pending appeal on the following terms: -

i) The Applicant shall execute a cash bail of Kshs. 20 million; OR in the alternative,

ii) Provide two (2) sureties with property security worth Kshs. 30 Million each subject to strict verification by the Deputy Registrar.

iii) The Applicant shall be required to deposit his passport with this court. In the event he requires it for travel, an application to that effect will be made before this court.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY 2026.

**HON W. A. OKWANY
JUDGE**

**In the presence of
Mutuku for Appellant
Mwila for Respondent
Abdirzak - Court Assistant**