

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

MISCELLANEOUS CRIMINAL APPLICATION NO. 54 OF 2008

*(Originating from Criminal Case No. 1200 of 2008 at Kisutu RM's Court
before Hon. H. Mwankenja, RM)*

1. BASIL PESAMBILI MRAMBA
2. DANIEL AGGREY NDHIRA YONA APPLICANTS

VERSUS

THE REPUBLIC RESPONDENT

R U L I N G

Mwaikugile, J.

The applicants BASIL PESAMBILI MRAMBA and DANIEL AGGREY NDHIRA YONA hereinafter referred to as the 1st and 2nd Applicants respectively have, through a team of five (5) learned Advocates filed a Chamber Summons made under Section 149 of the Criminal Procedure Act, Cap. 20 of the Revised Edition of 2002.

In the chamber summons the applicants have prayed to this court to first, order that the conditions on which the Applicants were admitted on bail by the subordinate court be

varied and reduced. Second, to make any other order that this Honourable Court may in the interests of justice, deem just and appropriate in the circumstance of the matter grant.

The chamber summons is supported by the affidavit deposed by one of the five advocates for the applicants, one Mr. Michael J.T. Ngallo learned counsel.

On the other hand the respondent has deposed and filed a counter affidavit which on the face of it gives the impression that he is opposed to the application but after hearing the parties it has come to light that the position is not strictly so.

In this application the applicants were represented by Mr. Michael Ngallo; Sam Mapande, Thadayo Joseph who made the address in chief, Elisa Msuya and Mafuru Mafuru learned counsels, while Mr. Fredrick Kapela Manyanda Senior State Attorney assisted by Mr. Obadiah Kameya Senior State Attorney, Mr. Thadeo Mwenyepazi and Mr. Prosper Mwangamila State Attorneys represented the Respondent.

In his submission in chief Mr. Thadayo Joseph learned counsel for the applicants prayed to this court to adopt the affidavit of Michael Ngallo filed in this court as part of his submission in support of the application. The learned counsel contends in his submission that the application has been filed under section 149 of the Criminal Procedure Act Cap. 20 R.E. 2002 in which the applicants seek the bail conditions imposed by the subordinate Resident Magistrates Court at Kisumu in Criminal Case No. 1200 of 2008 to be varied and reduced. The trial Magistrate imposed bail condition under section 148 (5) (e) of the Criminal Procedure Act, Cap. 20 which according to the learned counsel did not conform to the law by restricting bail condition to cash bail when the law also provides for an option. Briefly, it was his submission that the cash bail condition which required the applicants to deposit cash Tshs.2,900,000,000/= was excessive and could not be met by the applicants and that since section 148 (5) (e) of Cap. 20 provides for option of depositing cash or other property equivalent to half the amount or value of actual money or property involved, he prayed that the cash bail condition be varied and the

applicants be required to deposit in court titles of properties worth half of the lost money to be shared equally between them.

In paragraph 6 sub-paragraph (b) of the affidavit the learned counsel also prayed to this court that the condition of neither applicant should travel out of Dar es Salaam be looked into. According to the learned counsel, the 1st Applicant is a member of Parliament representing Rombo constituency. The condition imposed on him not to travel out of Dar es Salaam would not only affect the 1st applicant but members of his constituency are going to suffer as a result of that, for an offence, not committed by them because the applicant won't have the opportunity to visit them to get their views to be aired in the Parliament during Parliament session. The learned counsel submitted that the said condition be varied. He further submitted that both the 1st and 2nd applicants have strong ties with the community in their respective areas. The condition of restricted movement will greatly affect the said community

hence prayed that the condition of restricted movement imposed by the trial court to both applicants be varied.

On the other hand, Mr. Manyanda learned State Attorney for the Respondent in principle did concede that section 148 (5) (e) of the Criminal Procedure Act, Cap. 20 provides for option of depositing property equivalent half the amount of the money or value of actual money or property involved. He however, argued quite rightly so that what the trial magistrate did was quite in order in that the condition of cash bail imposed on the applicants was one of the conditions which he was authorized by law to impose and he elected to exercise his discretion by imposing that condition. On the issue of restricting travel of the applicants, the learned State Attorney submitted that, again the trial Magistrate did impose the said condition as empowered to do so under section 148 (6) (b) of the Criminal Procedure Act, Cap. 20 R.E. 2002. It was his submission that the trial magistrate properly applied the law. Moreover, the condition imposed in the strict sense of the word does not restrict the applicants from moving outside Dar es

Salaam because if they make an application to the Court, the said application will be considered by the Court.

Mr Ngallo learned counsel for the applicants replied in rejoinder that in the case of emergency where the applicants might perhaps be required to travel over the week end, it might be difficult to secure permission of the Court. He prayed that on the submission made, the application be granted.

After hearing the submission made by learned counsels of the parties in this application and considering the grounds advanced in the affidavit and counter affidavit, I must point out at this juncture that in granting bail the trial court must have put into account and struck a balance between the interests of the individual and that of Society of which the applicants are a component. It should be borne in mind that the applicants at this stage are merely suspects and not convicts, so, the requirements as to bail are merely to secure the attendance of the accused at the trial. The trial magistrate properly directed his mind as to the application of the law relating to bail. However, after hearing the parties on the issue of varying the

cash bail condition and there being no serious dispute on that issue and also having been satisfied with the reason advanced in support of the said application, I grant the same.

With regards to bail condition of restricted movement to the applicants, as rightly submitted by the learned State Attorney for the Respondent, the condition imposed strictly speaking does not impose a complete restriction of movement. The applicants are at liberty to put up an application to the subordinate court whenever need arises, seeking for permission to travel outside Dar es Salaam. But again, taking into account the fact that both applicants have strong ties with their respective communities, one might be tempted to reconsider the bail condition imposed. But then looking at the wording of section 148 (6) (b) which for ease of reference I reproduce it hereunder:

“148.- (1)

(2)

(3)

(4)

(5)

(6) Where a court decides to admit an accused person to bail, it **shall** impose the following conditions on bail, namely –

(a) . . .

(b) restriction of the movement of the accused to the area of the town, village or other area of his residence".

The condition imposed is mandatory. The use of the word it, meaning the court **shall** connotes mandatory requirement. The court has no option but to comply with the spirit of the law. As earlier pointed out, the applicants, are at liberty to make appropriate application in court for permission to travel outside Dar es Salaam as and when need arises. To that extent, the

court grants application to vary condition of cash bail only and the other condition of restricted movements for the applicants remain intact. I so rule.



N.M. MWAIKUGILE

JUDGE

28/11/2008

Order:

The condition of each accused to deposit (sharing principle) Cash T.shs 2.9 Billion is hereby varied and do impose the following condition:

- (1) Each accused to deposit in court (Resident Magistrates Court at Kisumu) Titles of properties worth half of the lost money (which is approximately Tshs.5.8 Billion) to be shared equally between the two Accused (Applicants)

- (2) The rest of the Bail conditions are to remain intact except for the amount in the 4th bail condition imposed by the trial Court which should read in part as "... who will sign bail bond in the sum of Tshs.2.9 Billion.
- (3) Since the 2nd Applicant's sureties have not been reflected on trial court record, the said sureties be approved by the District Registrar, High Court of Tanzania Dar es Salaam.
- (4) Sureties for the 1st Applicant who seem to have been approved by the subordinate court, they remain approved and undisturbed.


N.M. MWAIKUGILE

JUDGE

28/11/2008