

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**MISC. CRIMINAL APPLICATION NO. 140 OF 2019**

**ARCHARD ALPHONCE KALUGENDO.....APPLICANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

*(Origin; Economic Crime Case No. 54 of 2017, Kisutu Resident  
Magistrate's Court)*

**RULING**

*Date of last order: 20/09/2019*

*Date of Ruling: 10/10/2019*

**S.M. KULITA, J.**

The applicant in this matter one ARCHARD ALPHONCE KALUGENDO together with one other person are facing the economic crime case, registered as Economic Case no. 54 of 2017 at the Resident Magistrate's Court of Dar es Salaam at Kisutu,. The offence that the applicant and that other person have been charged with is notailable at the subordinate

court, hence this application. According to the charge sheet which has been annexed to this application the offence is;

*"Occasioning loss to a specified authority, contrary to paragraph 10(1) of the 1<sup>st</sup> schedule to, and sections 57(1) and 60(2) of the Economic and Organized Crime Control Act [Cap 200 RE. 2002]"*

The applicant is represented by the Mr. Francis Makotta, Learned. The application was made by way of chamber summons supported by an affidavit sworn by the said Advocate. It has been made under sections 29(4) (d) and 36(1) of the Economic and Organized Crime Control Act [Cap 200 R.E. 2002].

In his reply to this application the Respondent's Counsel, Mr. Candid Nasua, State Attorney apart from lodging the counter affidavit sworn by himself he also lodged a Certificate from the Director of Public Prosecutions (DPP) objecting the applicant to be released on bail on the ground that the safety and interests of the Republic will be prejudiced.

In his submission in respect of the objection the Learned State Attorney submitted that once the certificate of the DPP has been filed position of the law requires the application for bail not to proceed, instead the prosecution submits to the court on

the validity of the certificate. Mr. Nasua went on to submit that it is undisputable that the applicant is charged with Economic Case no. 54 of 2017 which is pending at Kisumu Resident Magistrate's Court and the value of the said property is Tshs. 2,486,397,982/=. As that sum exceeds 10,000,000/= and that the applicant is not yet committed to High Court for trial, it is upon this court to entertain the application for bail under section 29(4)(d) of the Economic and Organized Crime Control Act [CAP 200 R.E. 2002]

The Learned State Attorney also went on to submit that section 36 of the Act governs the grant of bail and the conditions involved, to which among those conditions is that mentioned under section 36(2) which states if the DPP has lodged a certificate the applicant cannot be released on bail, that the hands of the court are tied.

The Learned Counsel further submitted that once the certificate has been filed the court's duty is just to go through it in order to satisfy itself if it has met the validity test. He cited the case of **DPP vs ALLY NOOR DIRIE (1998) TLR 202** which mentioned the three ingredients for the certificate's validity tests. Mr. Nasua, mentioned those tests being: that the DPP must certify in writing; secondly that the safety or interests of the Republic are likely to be prejudiced by granting

bail in the case; and that the certificate must relate to a criminal case either pending trial or pending appeal.

The Learned State Attorney concluded by praying that the application not to be allowed because there is a certificate which has met the validity test. He quoted the case of **DPP vs. LEELING LING, Criminal Appeal no. 508 of 2015 (unreported) at page 15, line no.7**, which states;

*"The position of the law as stated in the Dirie's Case is that once the DPP's certificate has met the validity test the court shall not grant bail"*

The Learned State Attorney also submitted that it is not the requirement of the law for the DPP to give reasons for objecting bail where he considers the safety or interest of the Republic are likely to be prejudiced. He said that that is a position of the law stated in a case of **EMMANUEL SYMPHOLIAN MASSAWE Vs. R (CAT), Criminal Appeal no. 252 of 2016 (unreported)**

In his reply the applicant's Counsel, Mr. Makotta submitted that when the matter was scheduled for hearing the application for bail they received a certificate from the DPP which challenges the grant of bail to the applicant.

The learned Counsel, Mr. Makotta went on to submit that the said certificate has been filed in the abuse of court process, he cited the case of **EMMANUEL SYMPHOLIAN MASSAWE (Supra)** at page 16 in that regard. He also cited the case of **DPP vs. ALLY NOOR DIRIE & ANOTHER (Supra)** at page 252, to which he submitted that the court defined two identical words with different meaning which are the phrases "*pending trial*" and "*awaiting trial*" at page 257 of the aforementioned case. In that regard the wording of the certificate under the quoted provision is "*pending trial*" while the case against the applicant at the Resident Magistrate's Court is "*awaiting trial*".

Mr. Makota stated that the case is pending trial when an accused person is before the court of a competent jurisdiction and also the said accused has been informed of his right to plea. To him it is different from the matter at hand as the Resident Magistrate's Court of Kisumu is not competent to determine the application, also the applicant has no right to plea. Hence, the said case thereat is not pending trial but awaiting trial.

The Advocate submitted that the certificate of the DPP being a certificate pending trial cannot be applied for the case at hand because the trial is not yet pending at the High Court. He said that section 36(2) of the Economic and Organized Crime

Control Act which invoked the DPP to file a certificate has been declared unconstitutional by the Court of Appeal in a case of **AG vs. JEREMIAH MTOBESYA, Criminal Appeal no. 65 of 2016** in which section 148(4) of the Criminal Procedure Act was discussed and it declared that all other sections which are par material to that section 148(4) including section 36(2) of Economic and Organized Crime Control Act [Cap 200 RE 2002] were declared unconstitutional.

In concluding his submissions Mr. Makotta stated that this court is not bound by the DPP's certificate to object bail. It is his prayer that the matter should proceed with the hearing of the application for bail and grant the prayers.

In the rejoinder Mr. Nasua, State Attorney submitted that the DPP's certificate has not abused the court's process because it fulfills all legal requirements. He said that it could be defective if the applicant's counsel proves that the DPP acted on bad faith or abuse the court process or does not reflect the pending original case.

From the above submissions this court has the following observations; As for the words "pending trial" and "awaiting trial" the State Attorney submitted that, the words provided under section 36(2) of the Economic and Organized Crime

Control Act [Cap 200 RE 2002] are “pending trial” which actually means the DPP has powers to file a certificate when the case is pending trial. My ordinary interpretation on these two terms is that the case is said to be “pending trial” when it is in progress prior to trial which is to be conducted at the court with jurisdiction for that purpose which can either be the superior court or the same court, depending on the nature of the case. For example the economic case like this one, the legal requirement is that the bail consideration should be conducted at the High Court while the original case is pending at the RM’s/District Court. But even at that stage the said case is regarded “pending trial” at the trial court (High Court) as the Preliminary Inquiry is just a step towards thereto. That, after the Committal being conducted at the lower court the matter is committed to High Court for trial and the status will remain the same (pending trial) until the said trial is actually conducted at the High Court. Therefore, the word ***pending trial*** stipulated under Section 36(2) of the Economic and Organized Crime Control Act does not exclude the cases which are still pending at the lower courts for Preliminary Inquiry.

Having resolved the issue of interpretation of the word “pending trial” read in section 36(2) of the Act I now tune my mind into the two issues which arose during the submissions of

the Learned State Attorney and the Learned Advocate for the Applicant, which are the following;

The first issue is whether the application for bail can be entertained by this court after filing of the DPP's certificate.

The Second issue is whether the application for bail can be entertained by this court if the grounds stated in the certificate do not justify the likely hood of occurrence of any prejudice to the public interest.

The above two issues can be collectively resolved as follows; the current position of law is that once the DPP has filed a certificate to object bail under section 36(2) of the Act, the court can no longer inquire into the application for bail to determine whether the applicant can be released on bail, but it should only determine the validity of the DPP's certificate. In the case of **DPP vs. LEELING LING, Criminal Appeal No. 508 of 2015, CAT at DSM (unreported)** in which the aforementioned position of the law was given by citing the case of **DPP v. ALLY NURU DIRIE & ANOTHER, (1988) TLR 2002** it was held that the validity test of the DPP's certificate is for the same to fulfil the following conditions;



1. The DPP must certify in writing and effect that the safety or interests of the Republic are likely to be prejudiced by granting bail in the case.
2. The certificate must relate to a criminal case either pending trial or pending appeal.

The Learned State Attorney, Mr. Candid Nasua stated in his submissions that once the certificate of the DPP has been filed the position of the law requires the application for bail not to proceed, instead the prosecution submits to court the validity of the certificate that he has filed. To which from the above cited case, there is no doubt that the DPP's certificate filed before this court has passed the validity test as Mr. Makotta's challenge that there is no pending case against the applicant at High Court being found incredible.

In his submissions the Applicant's Counsel, Mr. Makotta challenged the certificate that it has been filed to abuse the court process. He also challenged the constitutionality of section 36(2) of the Economic and Organized Crime Control Act [Cap 200 RE 2002], however he has failed to establish as to how the said certificate abuses the court process. As for the issue of constitutionality of the above mentioned provision the court is of the view that this is not a proper forum for that purpose.

From the aforementioned reasons I find the DPP's certificate to object bail against the applicants fulfils all legal requirements for that purpose. That being the case I hereby dismiss the bail application.



**S.M. KULITA**

**JUDGE**

**10/10/2019**