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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

MISC APPLICATION NO. 149 OF 2009

(ARISING FROM COURT OF APPEAL CR APPEAL NO 186/2009)

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(ARISING FROM HIGH COURT CRIMINAL APPEAL NO. 07/2009)

(ARISING FROM BUGANDA ROAD CRIMINAL CASE NO. 1374 OF 2006)

ANTHONY SEMPIJJA :::::::::::::::APPLICANT/APPELLANT

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VERSUS

UGANDA::::::::::::::::::::::::::RESPONDENT

Coram: Hon Justice A. S. Nshimye, JA

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RULING

This is an application brought under section 40 of the Civil Procedure Act and rules 43 and 44 of the judicature (Court of Appeal Rules) Directions, seeking for an order granting the applicant
25 bail pending the determination of his appeal N0. 186/2009 in this court.

Mr. Serwadda Angozosi appeared for the applicant while Miss Faridah Nakayi, State Attorney appeared for the respondent.

30 The background of this application is that on 22.6.2009, the applicant was convicted by the Chief Magistrate’s court Buganda Road of the offence of embezzlement c/s 257 now 268 (d) of the Penal Code Act and sentenced to 5 years imprisonment. He was also convicted on five other counts of making false documents without authority and sentenced to 1 year’s imprisonment

each to run concurrently. He appealed to the High Court against both conviction and sentence. His appeal was dismissed by Hon Justice P.K Mugamba, hence his appeal to this court on 7th July 2009. The facts relating to the circumstances under which the offences were committed are unknown. The record of proceedings of the High Court also containing the record of the trial court below have not been typed and forwarded to this court. He has so far served 7 months of his sentence and according to counsel, it is not known when his appeal is likely to be heard.

It is with that background, he has applied to this court to be released on bail pending the hearing of his appeal.

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The application is supported by his original affidavit and an additional one filed on 27.1.2010.

The main grounds of the application are that:-

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1. His appeal has high chances of success as indicated in the memorandum of appeal attached to his additional affidavit and that the hope was premised on the trial court having wrongly relied on an audit report of an unqualified person.

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2. The appeal is likely to take long to be heard and he might serve the whole or a substantial part of the sentence which might render the appeal nugatory.

3. He has a fixed place of abode at Wabiyinja zone Mutundwe Parish Makindye Sabagabo Wakiso district.

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4. He is of good character and the offence he was charged with did not involve personal violence.

5. He is aged 55 and vulnerable to contracting infectious diseases in prison.

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6. He had been on bail in the Magistrate's court for 2 years and he honored the bail conditions until he was convicted and committed and that he is not likely to abscond.

Counsel Sserwadda referred me to the Supreme Court Application of **Arvind Patel Vs Uganda Sc. Cr. Application NO. 1/2003** which laid down guidelines to be followed by court while considering an application of this nature. A. Patel had been convicted by a chief Magistrate's court of conspiracy to murder c/s 201 of the Penal Code Act and sentenced to 5 years imprisonment. His appeals to the High Court and Court of Appeal were dismissed. He appealed to the Supreme Court. While his appeal was still pending, he applied to be released on bail. Justice Oder JSC (as he then was) set down the following guidelines to be borne in mind.

(a) The character of the applicant.

(b) Whether he or she is a first offender or not.

(c) Whether the crime of which the applicant was convicted involved personal violence.

(d) Whether the appeal is not frivolous and has a reasonable possibility of success.

(e) The substantial delay in the determination of the appeal.

(f) Whether the applicant has complied with bail conditions granted after the applicant's conviction and during the pendency of the appeal (if any).

Counsel quoted his Lordship Justice Oder who stated:-

“In my view it is not necessary that all the conditions should be present in every case. A combination of two or more criteria may be sufficient. Each case must be considered on its own facts and circumstances.”

He went on to submit that the above principles have thereafter been applied in hundreds of applications handled by this court; For example he cited Misc application **NO. 19/2008 Ntambi Kayongo, and John and Kyaryesubula John V R.**

He presented three potential and substantial sureties namely:

1. Seruwo Robert 36 a baker and resident of Mirembe zone, Mutundwe Parish of Makindye, Wakiso District a holder of voter's card N0. 08634197. He was a surety for the applicant s in the lower court.

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2. Nampewo Benedict (55) wife of the applicant and in business of Bakery at Wabiyinja zone, holder of a village ID N0 744. She was also a surety in the lower court.

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3. The 3rd surety Mr. Segujja Matia (77) LC chairperson of the village of the applicant. He is a landlord in the area. He also produced an LC letter introducing him.

Finally counsel prayed that his client's application be granted on such conditions as the court deems fit.

15 **In reply** learned counsel Faridah Nakayiza for the respondent, opposed the application.

She submitted that the applicant honored his first bail conditions because he had not known what would be the outcome of his trial. Now that he was convicted and sent to prison, it is very risky to release him because he still has more than 4 years to serve.

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Secondly she did not believe that the applicant's appeal was likely to succeed because, the same grounds which failed in the High Court, were the same grounds raised in this court.

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Counsel stated further that she had read the judgment of the learned trial judge and agreed with it. On the likely hood of delay, learned counsel prayed that the appeal be fixed without further delay. She prayed that the application be disallowed.

After having heard both counsel and read the affidavits in support, I find that the applicant has proved on the balance of probabilities.

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- (a) That he is an appellant in this court.

(b) That he was of good character and the offence with which he was convicted did not involve personal violence.

5 (c) That he was on bail for 2 years in the chief magistrate's court and honored all the conditions.

(d) That he has served 7 months of his prison sentence and yet his appeal is not fixed or likely to be heard soon.

10 (e) That his belief in the success of his appeal was not rebutted by an affidavit in reply by the respondent.

I hold that this is an application that qualifies for exercise of my discretion in favour of the applicant by granting him bail pending the hearing and determination of his appeal.

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He will be released on the following terms:-

1. He will deposit in court cash bail of shs 3,000,000/= (Three million shillings).

20 **2. He will have three sureties binding themselves with the sum of shs 50,000,000m not cash.**

3. The three sureties presented by counsel are approved.

25 **4. The applicant is to report to the Registrar of this court on every last working day of every month starting from 26/2/2010 for extension of his bail until his appeal is disposed of or until this order is varied.**

Dated this 3rd day of February 2010.

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A. S. NSHIMYE
JUSTICE OF APPEAL

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