JUDICIARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL CASE 1 OF 2009

THE REPUBLIC

VERSUS

DR. ELSON BAKILI MULUZI
LYNESS VIOLET WHISKY

CORAM: THE HONOURABLE JUSTICE E. B. TWEA
M/S Nampota, Mwala, Nyamilandu of Counsel for the State
M/S Chokhotho, Jai Banda, of Counsel for the Accused
Edith Malani Miss, - Official Interpreter

R U L I N G

Twea, J

This is a summons for further bail pursuant to Section 12B of the Corrupt Practices Act, brought by the Anti Corruption Bureau. It is supported by affidavits of Mr Christopher Ernest Kaminjolo of the Bureau.

Section 12B of the Corrupt Practices Act, (CPA) states that:

> "12B. If any person against whom investigations or proceedings for an offence under part IV are pending is

> preparing or about to leave Malawi, whether temporarily or permanently, the Director or any officer authorized by him in that behalf may apply to any court for an order requiring such person to furnish bail in any sum, or, if he has already been admitted to bail, in such greater sum and on such additional condition as the case may require with or without sureties; and in any such application the court may make such order as it deems fit".

When this case was called on 25th June, last, the lawyers for the 1st accused person, Dr Bakili Muluzi,were not prepared and had not, by then, responded to the affidavits filed by the Anti Corruption Bureau, herein after referred to as the Bureau. They sought and were granted an adjournment. Following the adjournment, this court noted that the bail bond sought to be enlarged was not exhibited to the affidavit of the Bureau. The Court directed the Registrar to inform the Bureau to file a supplimentary affidavit deponing to the terms of the bail sought to be enlarged or reused and the defence to equally respond. When the case was called again. on 30th June, last, the supplementary affidavit had been filed. Further, the bail bond in issue was exhibited. However, there was no specific response by the defence.

I examined the record to ascertain what happened and what orders were issued in respect of bail.

The record indicates that on 24th February last, the Bureau appeared before the Chief Resident Magistrate Court in Blantyre and applied for warrants of arrest against the accused persons: Dr Bakili Muluzi and Lyness violet Whisky. The Court, when issuing the warrants of arrest stipulated, among other things, as follows:-

> "…A warrant of arrest is issued against Dr Muluzi. The same shall be effected/execution during day time as defined under the Criminal Procedure and Evidence Code. Further, once arrested Dr Muluzi shall be formerly charged and cautioned. Further and importantly, Dr Muluzi shall be held by the ACB for no longer than three hours from the time of arrest during which time he may be charged and cautioned. Upon being formerly charged and cautioned Dr Muluzi shall be released on bail by the ACB on condition that he surrenders his travel documents, namely, Passport to the ACB.

Dr Muluzi is to appear before this court together with the ACB on a date to be obtained by the ACB from this court but to be no later than two weeks from today's date for the ACB to inform Dr Muluzi of how it intends to proceed in this matter failing which this court will discharge him. ….The endorsement on the warrants must be strictly adhered to by the ACB and must be clearly spelt out on the WOA to be submitted before this court for issuance herein".

The warrant of arrest for Dr Muluzi was endorsed for bail as ordered by the court. It was duly issued, on the same day.

The parties appeared again before the Chief Resident Magistrate on 26th February, last for committal. The court endorsed that the accused persons had been released on the bail. However, it added a further condition: that they shall not, by themselves or third parties interfere with any of the State witnesses. A bail bond was issued on the same date, together with the endorsement under Section 97 of the Criminal Procedure and Evidence Code.

I noted that the "bail bond" did not comply with Section 119 of the Criminal Procedure and Evidence Code in respect of the bond. Section 119 reads:

> "119. Before any person is released on bail under Section 118, a bond for such sum as the police officer or court, as the case may be, thinks sufficient shall be executed by such a person and, where sureties are ordered, by one or more sufficient sureties conditioned that such a person shall attend at the time and place mentioned in the bond, and shall continue to so attend until otherwise directed by the police officer or court, and containing such other conditions as the police officer or court may think fit".

It is important to note that the sum fixed in the bond is what the accused person forfeits or is called upon to render or the State may recover by warrant of attachment in case of a breach, in accordance with Section 125 of Criminal Procedure and Evidence Code. In this respect therefore the "bail bond" was defective and therefore irregular.

The current application is for enlargement of the bond. As I said earlier, there was no sum stipulated at all. In effect the accused person was conditionally released. In this respect therefore, it is for this court to consider what amount of bail would be sufficient in the circumstances: having regard to Sections 118(2) and Section 121(1), of the Criminal

Procedure and Evidence Code, that bail should not be excessive. In order to do so, this court cannot proceed under Section 12B of CPA. In my view the proper procedure would be to proceed under Section 362 of the Criminal Procedure and Evidence Code; exercise the courts powers to review. I am sure that had the defect in the "bail bond" been brought to the attention of my Brother Judge seized of the trial, he would have, likewise, reviewed the order.

I have taken into account the views espoused by both parties in their affidavits and, to the extent relevant, what was submitted in their arguments. To begin with a person who is prepared to give bail may be released on bail.

In the present case, it has been demonstrated that the 1st accused person and his co – accused had given bail when the warrants of arrest were issued against them and they were released on "bail". In fact in respect of the 1st accused, it is on record that the charges now before this court have been there, in the essence, since the year 2004. It is also on record that the 1st accused person is on bail on other charges before this Court, yet to be prosecuted. It is further on record that he had travelled abroad and came back and surrendered to the custody of the proper authorities on his bail. This has not been denied by the State. The record further has it that the State was aware and did not object to the 1st accused person travelling abroad for medication.

The State however, submitted that it was concerned with "rumours" that the 1st accused person intended to abscond once he leaves the country. The State submitted that the "rumours" were being investigated. Issues were raised about air tickets bookings and so forth. In my view the issues were mere speculation and opinion and, of course, counter speculation and opinion by the defence. There was nothing substantial that came up.

While it may be legitimate for rumours to move an investigation, I do not think that it is open to the court to make decisions or orders based on rumours. The court should only act when the investigations establish the substance of the rumour. A person should not be at risk of being deprived of his liberty on account of rumours. I would therefore place no weight on the rumours.

The State has applied that the 1st accused bail bond should be in the sum of K1, 7billion. In essence, the State is applying for the total sum of the

monetary value of the charges alleged against him. As I said earlier, court should not lose sight of the essence of bail, that it should be fixed with due regard to the circumstances and should not be excessive: Sections 118(2) and 121(1). It was argued by the State that the sum should not be an issue, because it is non – cash bond. The defence differed with the State on this point. I equally differ. The sum fixed must be such that an accused person and/or his sureties will be able to pay into court, in cash or kind or to raise. It is a requirement that the court should examines the sureties as to whether they are, in this respect, sufficient or not. Should they be found wanting, the accused person will be remanded in custody. In this respect therefore, Section 12B of CPA, if applied, would work out exactly in the same way as Section 122 of the Criminal Procedure and Evidence Code. It is my view that K1.7 billion is exceedingly excessive in any circumstances in this Country. It would, in effect, amount to denial of bail. The essence of a bail bond is to ensure that the accused person will be available to take his trial. The court should not be influenced by what the State will recover at the end of the trial when fixing the cognisance. Ordinarily an accused person who honours his bail is entitled to a refund of any monies or property deposited into court or to be discharged from the obligation to pay the cognisance. I therefore decline to equate bail bond to restitution or recovery of the proceeds of crime.

Be this as it may, the discretion lies with this court. I have examined the circumstances of this case, as aforesaid. I find no objective basis for alleging that the 1st accused person will abscond. I therefore order that he executes a bail bond in the sum of 50 million kwacha not cash with two sufficient sureties in the sum of 10 million Kwacha each, not being cash. I reinstate the conditions ordered by the Chief Resident Magistrate Court, and further, order that he may not leave the jurisdiction of Malawi without the order of this Court and that he must surrender his passport back to the Director of ACB within 10 days of his return to this jurisdiction.

The 1st accused person shall be admitted to custody should he fail to execute the bond within 7 days of this order.

Pronounced in Chambers this 8th day of July 2009 at Blantyre.

E. B. Twea
JUDGE