

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 176 of 2007

MOHAMED H. KHIMJIAPPELLANT

VERSUS

REPUBLICRESPONDENT

R U L I N G

Mohamed H. Khimji, the appellant herein, took out a notice of Motion pursuant to the provisions of sections 356(1) and 352 of the Criminal Procedure Code in which he applied for the order issued by Mrs. C.N. Ndubi, learned district magistrate on 9th October 2007 to be stayed pending the hearing and determination of this appeal. The motion is supported by the affidavit sworn by Japheth Asige dated 23rd October 2007. Mr. Monda learned Senior State Counsel was allowed to make oral submissions to oppose the motion despite the fact that he did not file any replying affidavit.

The history behind the filing of this motion appear to be brief. The appellant was tried on a charge of two counts before the Municipal Court. In court I, the appellant was accused of failing to comply with the requisition of a notice served under sections 30(1) and 238 contrary to Section 30(2) of the Physical Planning Act. In count II he faced a charge of failing to give a notice of inspection in writing to the Municipal Council to start construction work and routine inspection contrary to By law 16(1) of the Building Code, Local Government (Adoptive by laws) 1968. After undergoing a trial the appellant was convicted on both counts and sentenced to pay a fine of Kshs.5,000/- on each count. Being aggrieved the appellant filed this appeal. Pending appeal he has now taken the aforesaid notice of motion to seek for a stay of the order issued on 22/10/2007 allowing the prosecution of the judgment delivered on 9th October 2007. The record shows that on 22/10/2007, the court prosecutor applied for the boundary wall, which had been put up illegally to be demolished. The application was opposed by Mr. Asige, learned advocate for the appellant. The court after considering the arguments nevertheless allowed the application. The appellant applied for stay of execution but the application was rejected hence the filing of the current motion.

It is the submission of Mr. Asige that the appellant will suffer irreparably if his perimeter wall is demolished before his appeal is heard. It is the submission of Mr. Monda that the appellant should have appealed against the order refusing stay of execution instead of filing a fresh application before this court. To begin with I am convinced that the appellant will suffer substantial loss if a stay order is not granted. The question is whether or not the appellant was entitled to file this application when he had already applied before the trial court and had his application dismissed. The answer to this issue appear to be straightforward. By the time of making the application for stay the appellant had not filed an appeal. He merely applied for an order for stay of 14 days. It is not even stated that he was applying for stay pending Appeal. For this reason I think the appellant is perfectly right to seek for the orders he is now applying. I find merit in the application.

The court is given a wide discretion to grant the order prayed for under section 356(1) of the Criminal Procedure Code. The law requires that such an order be granted on such terms as to security for payment of money on the performance or non-performance of any act. I stay execution of the orders given on 22/10/2007 pending the hearing and determination of this appeal on condition that the appellant deposits with the registrar of this court a sum of Kshs.20,000/- within a period of 15 days from the date hereof.

Dated and delivered at Mombasa this 1st day of July 2008.

J. K. SERGON

J U D G E

In open court in the presence of Mr. Mwakireti for the Applicant

N/A for Respondent.