

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.43 OF 2017

ZENA HASSAN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Appellant, Zena Hassan was aggrieved by the conviction and sentence by the **Kibera Chief Magistrate's Court in CR. Case No.3062 of 2014**. In that case, the Appellant had been charged with the offence of **forcible detainer** contrary to **Section 91** of the **Penal Code**. The particulars of the offence were that on March 2014 at Embulbul area within Kajiado North County, jointly with another, entered the house of Naima Wayua Mwanzia that is situated on Plot No.Ngong/Ngong/62378 and had refused to vacate therefrom despite constant demands without any reasonable grounds. The Appellant was placed on two years' probation on condition that she vacates from the suit parcel land by 5th May 2017. The Appellant was aggrieved especially by the decision of the trial court that required her to vacate the suit premises. She was of the view that the said court did not have jurisdiction to issue an order of vacation in a criminal case. She has filed an appeal to this court.

Pending the hearing of the appeal, the Appellant filed an application pursuant to **Section 357(1)** of the **Criminal Procedure Code** seeking to have the part of the decision that required her to give vacant possession of the suit premises be suspended pending the hearing and determination of the appeal. In support of the application, the Appellant stated that there were pending succession proceedings before the Kajiado High Court which had not been resolved. The dispute involved members of the family of the late Idd Malambo Hassan. The parcel of land that was the subject matter of the criminal case was one of the properties that is in dispute in the succession case. The Appellant reiterated that the trial court did not have jurisdiction to issue an eviction order particularly taking into consideration that the High Court in the succession cause had issued orders that the suit property not be distributed pending the hearing and determination of the dispute. The Applicant's position was urged on her behalf by her advocate Mr. Musyoki.

Ms. Nyauncho for the State conceded to the application on the grounds that the trial magistrate on the face of it, erred when she issued an eviction order in a criminal case. In particular, she submitted that eviction was not one of the punishments that may be imposed upon conviction of a person who has been found guilty of an offence under **Section 91** of the **Penal Code**.

This court agrees with both counsels in this application that indeed a *prima facie* case was made by the Appellant when she asserts that she was sentenced to a punishment that is not contemplated by the law. In the premises therefore, this court will allow the Appellant's application which seeks to stay or suspend the execution of the order of the trial magistrate issued on 6th April 2017 pending the hearing and determination of the appeal. It is so ordered.

DATED AT NAIROBI THIS 14TH DAY OF JUNE 2017

L. KIMARU

JUDGE