

REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL NO. 27 OF 2017

MARGARET MWANGI.....1STAPPELLANT

ALEX NDINGA.....2NDAPPELANT

VERSUS

SIDIK OMAR BACHU.....RESPONDENT

RULING

This appeal arises from the decision that was made by Hon. I. Gichobi SRM on 7th July, 2017 in Milimani Commercial Courts, CMCC No. 6598 of 2014 in which he found the 1st appellant guilty of contempt of court and sentenced her to 30 days imprisonment. The 1st appellant was dissatisfied with that decision and preferred the present appeal. Together with the memorandum of appeal, the 1st appellant brought an application by way of Notice of Motion dated 17th July, 2017 seeking a stay of execution of the said decision pending the hearing and determination of her appeal to this court. This is the application before me. The application was brought on the grounds set out on the face thereof and on the supporting affidavit of the 1st appellant sworn on 17th July, 2017. The application was opposed by the respondent through a replying affidavit sworn on 10th August, 2017.

The 1st appellant's case is that on 5th November, 2014 the respondent filed an application in the lower court seeking injunctive orders which took 2 years to be determined. The 1st appellant has averred that on 27th January, 2017 she was ordered by the lower court to release the household items belonging to the respondent that she had confiscated. The 1st appellant has contended that by the time the court was delivering the said ruling on 27th January, 2017 and making the order aforesaid, the circumstances on the ground had changed as thugs had invaded her apartment and stole various items including the respondent's goods that were in her house at the time. The 1st appellant has averred that as at the time the order was made for her to return the respondent's household items, the same were not in her possession and as such she was incapable of complying with the court order. The 1st appellant has averred that the respondent made an application on 21st March, 2017 before the lower court seeking her committal to civil jail and on 7th July, 2017 she was found to have disobeyed the lower court's order and was sentenced to serve thirty (30) days jail term. The 1st appellant has contended that if the said orders made on 7th July, 2017 are not stayed, she will be arrested and sent to jail as a consequence of which she stands to lose her employment with Barclays bank of Kenya. The 1st appellant has averred further that the custodial sentence that was imposed upon her will affect the education of her children. The 1st appellant has contended that she did not defy the lower court order. She urged the court to grant the orders sought as she stands to suffer loss that cannot be compensated by way of damages.

In his affidavit in opposition to the application, the respondent averred that that the 1st appellant was his landlord and that in October, 2014 while he was away, the 1st appellant with his caretaker, the 2nd appellant, broke into his house without a court order, took away his household items and changed the door locks. He has stated that the court directed the appellants to allow him access to his personal effects and tools of trade while the case was pending but the appellants refused to comply. He has averred that on 27th January, 2017 the lower court ordered that his household items be released to him and an inventory be taken and filed in court. He has averred that the appellants once again refused to comply prompting him to file an application for contempt in which the court found the 1st appellant in contempt of court and sentenced her to serve one month in jail. The respondent has averred that the allegation by the 1st appellant that the goods that she was ordered to return were stolen is not true. He has averred that the 1st appellant had assured the court that the items were in safe custody at her apartment. The respondent has contended that the 1st appellant should be committed to civil jail and compelled to release the household items that she had confiscated as aforesaid. The respondent has put the value of his items that the appellants had confiscated at Kshs. 4,207,100/-.

The application was argued orally before me on 26th September, 2017. I have considered the application together with the affidavit filed in support thereof. I have also considered the affidavit of the respondent that was filed in opposition to the application and the submissions by the respective advocates for the parties. Order 42 Rule 6(1) of the Civil Procedure Rules gives this court power to stay execution of a decree or order of the court appealed from pending the hearing of the appeal. Order 42 Rule 6(2) provides for conditions that must be met before an order for stay of execution is granted. The rule bars the court from making an order for stay of execution unless it is satisfied that the applicant would suffer substantial loss if the stay is not granted, and that the application for stay has been made without unreasonable delay. In addition, the applicant must furnish such security as the court may order for the due performance of the decree in the event of that the appeal fails. I am satisfied from the material before me that the 1st appellant stands to suffer substantial loss unless the stay sought is granted. The decree sought to be stayed is for her committal to jail. If the stay sought is not granted the 1st appellant risks being arrested and put to jail for thirty (30) days. She will lose her liberty and employment. The loss to her would no doubt be substantial. Apart from showing the likelihood of substantial loss being suffered, the 1st appellant also had a duty to demonstrate that the application was brought without unreasonable delay and that she was ready and willing to furnish such security as the court may order for the satisfaction of the order appealed against. I am satisfied that the application was brought without unreasonable delay. The 1st appellant did not however undertake to furnish security. That omission does not stop the court from making an order that she furnishes security as a condition for stay.

Due to the foregoing, I find merit in the Notice of Motion dated 17th July, 2017. The application is allowed in terms of prayer 4 thereof on condition that the appellant shall deposit in court a sum of Kshs.200,000/= as a security within 45 days from the date hereof in default of which the stay shall lapse automatically without any further reference to the court. The costs of the application shall be in the cause.

Delivered and Dated this 26th day of April 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

No appearance for the Appellants

No appearance for the Respondent

Catherine Court Assistant