



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA IN BUSIA**

**LAND & ENVIRONMENTAL DIVISION**

**ELC NO. 216 OF 2014**

ROSELINE AWINO ODUOR .....APPLICANT

**VERSUS**

STEPHEN OMONDI ODUOR ..... RESPONDENT

**RULING**

1. The application under consideration is a Notice of Motion dated 21/11/2016 filed here on the same date. It is brought under order 40 Rule 3 of Civil Procedure Rules and Section 31 of Civil Procedure Act. The Applicant - **ROSELINE AWINO ODUOR** - filed it against the Respondent - **STEPHEN OMONDI ODUOR** - seeking, in the main, to stay punishment arising from a finding of contempt of Court by her, which this Court made vide its ruling delivered on 10/11/2016.

2. The application has three prayers - prayers (a), (b) and (c) - but only prayers (b) and (c) are for consideration now. The said prayers are as follows:

Prayer (b): That this honourable Court be pleased to stay meting out punishment against contempnor pending hearing and determination of the intended appeal.

Prayer (c): Costs of this application be in the cause.

3. The grounds advanced in support state, *interalia*, that the intended appeal has high chances of success; that the Respondent will suffer no prejudice if the application is allowed; and that the Applicant will stand prejudiced if the punishment is meted out and the appeal is allowed. The supporting affidavit accompanying the application amplifies the grounds advanced.

4. The Respondent responded vide a replying affidavit filed on 19/1/2017. According to the Respondent the allegation that the intended appeal has high chances of success is mere speculation as the memorandum of appeal has not been availed. It was further deponed that the allegation that the appeal has high chances of success amounts to an attempt to argue such appeal before this court.

5. The Applicant filed a further affidavit in which she asserts that the actions found to constitute contempt on her part had been attributed earlier on to one MARGARET ANYANGO OCHWAGO.

6. The application was canvassed by way of written submissions. The Applicant's submissions were filed on 24/4/2017. Basically, the Applicant repeats what she stated in her supporting and further affidavits namely: That the actions of contempt attributed to her were the same actions attributed to a different person earlier. And on the basis of these same actions proceedings had been instituted against the other

person. The Applicant submitted that this would form the basis of her appeal.

7. The submissions of the Respondent were filed on 26/4/2017. The Applicant was said to be undeserving of the orders she is seeking because the Court found as a fact that she was in contempt. It was reiterated that no memorandum of appeal has been availed to Court. The Applicant is said to be playing around with the Court. She deserves to be punished, it was submitted. She is trying to confuse the Court and circumvent justice.

8. I have considered the application, the response made, and the rival submissions. I notice that the Applicant gave a notice of appeal dated 15/11/2016. The ruling of this Court relating to contempt was delivered on 10/11/2016. The notice came about five (5) days later. The Applicant is faulted for not, availing the memorandum of appeal. This application itself was filed on 21/11/2016, which is less than two (2) weeks since the ruling was delivered. I think the Applicant acted reasonably fast. The memorandum of appeal needs to be well thought through and it is understandable if it had not been prepared by the time of filing the application.

9. It is also clear to the Court that what is at stake here is the Applicant's personal freedom. She risks going to jail or paying a fine. The Court needs to approach the issue with understanding. It would amount to prejudice if the Applicant is for instance jailed only for her appeal to succeed after the sentence is served.

10. But the paramount consideration here is that somebody's personal freedom is at stake. I would not perhaps mind much if what was at stake was sale or auction of some property. I think in a situation like this, courts ought to be flexible. The submissions of the Applicant have alluded to the nature of appeal. Common sense and considerations of fair play in the circumstances incline me to allow the application. It is clear to me that the appeal, if successful, will be rendered nugatory if punishment will have been meted out against the Applicant.

11. Lack of memorandum of appeal is a factor that weighs against the Applicant but when it is considered that the nature of the appeal is made clear in the submissions, and that what is at stake is someone's personal freedom, that factor assumes a secondary place.

12. It is for all these reasons that I allow the application herein. Costs to be in the cause.

**Dated, signed and delivered at Busia this 19<sup>th</sup> day of July, 2017.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Applicant: .....

Respondents: .....