



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
ELC MISC APPLICATION NO. 59 OF 2013

MARY WANJIRA NJIRUAPPLICANT

VERSUS

JULIA MUTHANJE NJIRURESPONDENT

RULING

The Notice of Motion dated 30th April 2013 seeks the substantive prayer that this Court stays or restrains the respondent from executing Resident Magistrate's order dated 27th February 2013 that is removing the caution on L.R GATURI/NEMBURE/9862 till hearing and disposal of an intended appeal or otherwise directed by this Honourable Court.

The same is supported by the plaintiff/applicant's affidavit.

The application is opposed and the defendant/respondent has filed grounds of objection in which she alleges, inter alia, that the application is frivolous and an abuse of the Court process.

Counsels for both parties have filed their submissions which I have considered.

The application is brought under Order **42 Rule 6 (b) of the Civil Procedure Rules and Sections 1A and 3A of the Civil Procedure Act**. **Order 42 Rule 6 (1) of the Civil Procedure Rules** provides for stays in case of appeal and **sub-rule 6** gives this Court the power, in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided that **"the procedure for instituting any appeal from the subordinate Court or tribunal has been complied with"**.

Section 1A and 3A of the Civil Procedure Act provide for the overriding objective of the Act which is the just, expeditious, proportionate and affordable resolution of civil disputes and also provide for the Court's inherent powers.

It is clear to me, therefore, that before a party can avail himself of the remedy under **Order 42 Rule 6 (b) of the Civil Procedure Rules**, the applicant has to have commenced **"the procedure for instituting an appeal from a subordinate Court or tribunal"**.

From the record herein, there is no evidence to suggest that any appeal has been filed against the order or the Resident Magistrate dated 27th February 2013. An intention to appeal is manifested by a Notice of Appeal – see **SAFARICOM LTD VS OCEAN VIEW RANCHING HOTEL LTD & TWO OTHERS CIVIL APPLICATION NO. 327 OF 2009 (2010) e K.L.R.** Without a notice of appeal, the applicant cannot get the order sought. I notice from the record that there was High Court Civil Appeal No. 11 of 2013 filed at Embu before this matter was transferred here. However, that appeal was struck out by

Lady Justice Ong'udi on 18th April 2013 and there is no evidence that another appeal was subsequently filed in this Court. Whereas the High Court has inherent powers, such powers are exercised in accordance with the law. The law is that while there may be no actual appeal already filed, there must nevertheless be an intention to appeal which is manifested by a notice of appeal. There is no such notice here.

Ultimately therefore, the Notice of Motion dated 30th April 2013 is dismissed with costs.

B.N. OLAO

JUDGE

29TH AUGUST, 2013

29/8/2013

Coram

B.N. Oloa – Judge

CC – Muriithi

Mr. Mugo for Applicant – present

Mr. Mwangi for Respondent – present

COURT: Ruling delivered this 29th day of August 2013 in open Court.

B.N. OLAO

JUDGE

29TH AUGUST, 2013