



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KITALE

CIVIL APPEAL NO. 5 OF 2010

MARY WACHANA..... APPELLANT/ APPLICANT

VERSUS

1. JOSEPH W. OWIDI

2. RAILI OWIDI..... RESPONDENTS

REASONS FOR RULING

By a ruling delivered, dated and signed on the 1st day of March 2010, I dismissed the application herein and reserved my reasons for doing so, which I now give, but first the background.

By a Notice of Motion dated 25th February, 2010, pursuant to the provisions of section 1A,3,3A and section 63 (e) of the Civil Procedure Act, Order XLI rule 4 and L Rules of the Civil Procedure Rules, the applicant seeks orders:-

1. That the application be certified as urgent and service hereof be dispensed with in the first instance.
2. There be a stay of execution of the ruling delivered by the Deputy Registrar in Kitale HCCC No. 131 of 2000 together with the orders consequential therefrom pending the hearing and determination of the application inter partes.
3. There be a stay of execution of the ruling delivered by the Deputy Registrar in Kitale HCCC No. 131 of 2000 together with the orders consequential therefrom pending the hearing and determination of this appeal.

The application is based on the grounds that: -

- a) The Honorable Deputy Registrar delivered his ruling on 24th February, 2009 in Kitale HCCC No. 131 of 2000 in favour of the respondents and against the appellant/ applicant.
- b) The appellant/ applicant is dissatisfied and aggrieved by the said ruling in its entirety.
- c) The appellant's counsel made an oral application before the Deputy Registrar for stay of execution of the ruling and order under reference but the said application was declined by the Deputy Registrar.
- d) The appeal herein is arguable and has overwhelming chances of success.

- e) This appeal will be rendered nugatory unless the stay order sought is granted.
- f) The appellant stands to suffer irreparable loss and damage unless stay order sought is granted.
- g) The appellant is ready to abide by the conditions/ terms that the Honorable Court may impose.
- h) This application is brought without any undue or inordinate delay.
- i) The Honorable Court has unfettered discretion to grant the reliefs sought.

On behalf of the applicants, it was argued that by reason of the ruling delivered by the Deputy Registrar in favour of the respondent and against him his eviction from the suit land is imminent.

Arising from the said ruling the said advocates filed Memorandum of Appeal herein.

That his appeal is arguable and has overwhelming chances of success by reason of the fact that:-

- a) The ruling effectively denied the appellant an opportunity to show cause in any event.
- b) The ruling did not appreciate the fact that there was an appeal pending in the Court of Appeal.
- c) The learned Deputy Registrar did not take into account submissions by the learned counsel.
- d) The learned Deputy Registrar completely misdirected himself in relation to the subject matter upon which the ruling was to be delivered.
- e) The learned Deputy Registrar misdirected himself in finding that the appellants/ applicants counsel was opposed to the Notice to show cause whereas the counsel already raised preliminary objection as to the competence of the notice to show cause
- f) The learned Deputy Registrar misdirected himself on finding that the order of stay granted by the Hon. Justice Ochieng was temporary in the absence of any evidence to support that finding.
- g) The learned Deputy Registrar misdirected himself in finding that there cannot be an appeal where a party has indicated to withdraw the same.

That the applicant made an oral application for stay of execution of the ruling and order emanating therefrom upon the delivery of the same but the same was dismissed.

That unless an order of stay is granted, the appeal will be rendered nugatory. In that event the applicant will suffer irreparable loss as he will be subjected to an eviction from the parcel the subject matter of the suit.

The respondent raised a preliminary objection vide a notice dated 26th February, 2010 on the grounds that:-

1. The applicant lacks the requisite **locus - standi** to file the application and the appeal. Hence the entire proceedings are a nullity, incompetent and procedurally bad in law.
2. The application and the subsequent appeal is an abuse of the due process of the law.

By way of arguments the applicant submitted that the order appealed from was directed as **Wafula Sitalia**, the defendant in Kitale HCCC NO. 131/2000). However, the said Wafula Sitalio is not the one who filed the appeal and the application. Equally, Mary Wachana who has come to court was not a party to the **NTSC** before the Deputy Registrar. Hence Mary Wachana is a busy body and the court ought not to entertain her. That the only time Mary Wachana featured in Kitale HCCC No. 131 of 2000 was as an

objector but the proceedings were dismissed by Karanja - J. She appealed to the Court of Appeal at Eldoret vide Civil Appeal Number 201 of 2009.

That there is a notice of withdrawal of Eldoret Court of Appeal Civil Appeal number 201 of 2009. That was in respect of appeal against the order dismissing the objection proceedings filed by Mary Wachana (The current applicant). However, Mary Wachana is not a party to Kitale HCCC No. 131/2000.

That if any adverse orders were made against Wafula Sitaloi, then it is only the said Wafula Sitaloi who has the *locos - standi* to challenge the Deputy Registrar's orders by an appeal as opposed to Mary Wachana.

That if Mary Wachana was aggrieved by the orders of the Deputy Registrar -which has given rise to the present appeal Number 5 of 2010 - then she could only come to court to challenge the same by an application under orders **XLVIII Rule 3** of the Civil Procedure Rules.

I have fully considered the issues raised by the parties in the application. Having done so I have taken notice of the fact that there are two suits to wit:-

1. KITALE H.C.C.C No. 131/2000 JOSEPH WANDERA OWIDI, RAILI OWIDI VS. WAFULA SITIALO - NOTICE TO SHOW CAUSE.

2. KITALE H.C.C.C No. 131/2000 JOSEPH WANDERA OWIDI & WAFULA OWIDI WAFULA SITIALO - (OBJECTIONS PROCEEDINGS)

The applicant herein Mary Wachana, was an objector in Kitale H.C.C.C. No. 131/2000. However, her objection was dismissed by Karanja, J. the applicant then appealed against the dismissal of the objection in Eldoret (C.A) Civil Appeal No. 201/2009. This was an appeal against the order dismissing the objection proceedings. Subsequently, she withdrew the Eldoret (C.A) Civil Appeal No. 201/2009. That is the only nexus between the applicant and the subject matter herein.

In effect, upon dismissal of the objection proceedings and withdrawal of the appeal arising there from, the battle remained with the original parties in H.C.C No. 131 of 2000 i.e **JOSEPH WANDERA OWIDI , RAILI OWIDI VS WAFULA SITIALO.**

The Notice to Show Cause was heard by the Deputy Registrar who allowed the application. An order of eviction was then directed at **WAFULA SITIALO** to move out of the subject land or face eviction.

In the premises if eviction orders or any order was made against **WAFULA SITIALO** then it is only **WAFULA SITIALO** who has the requisite *locus - standi* to challenge orders. Her (**Mary Wachana**) application is thus misplaced. Those are the reasons why I dismissed the Notice of Motion dated 25th February, 2010.

Dated and delivered at Kitale this 2ND Day of June 2011.

N.R.O OMBIJA
JUDGE.

Dated, delivered and countersigned by the Lady Justice Martha Koome

at Kitale this.....day.....of 2011.

MARTHA KOOME
JUDGE