



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 10 of 2010**

**MARY WANGARI KINUTHIA.....APPELLANT**

**VERSUS**

**JOSEPH MARORO ONDERI.....1<sup>ST</sup> RESPONDENT**

**MARY GESARE ONDERI.....2<sup>ND</sup> RESPONDENT**

**JOHN POLYCARP OBEGI.....3<sup>RD</sup> RESPONDENT**

**CATHERINE BITEGO ONDERI.....4<sup>TH</sup> RESPONDENT**

**R U L I N G**

1. By a notice of motion dated 15<sup>th</sup> January, 2010 Mary Wangari Kinuthia, (hereinafter referred to as the applicant), has come to this court seeking several orders. Essentially the applicant is seeking an order for stay of execution of the ruling and order of Resident Magistrate M.K. Kiema delivered on 18<sup>th</sup> December, 2009 pending the hearing and determination of the applicant's appeal which she has filed in this court.
2. The applicant also seeks an order of injunction restraining the respondents by themselves, their servants, agents or employees from advertising, offering for sale, selling by public auction or public treaty, transferring, disposing, alienating, charging, encumbering or otherwise dealing in any manner whatsoever with the property known as LRNo.209/8987 (hereinafter referred to as the suit property.) The applicant further seeks an order of mandatory injunction compelling the respondents whether by themselves, their servants, agents or employees to vacate the suit premises. Finally the applicant seeks an order for costs.
3. The application was precipitated by orders which were issued in the Chief Magistrate's Court at Milimani Civil Case No.8552 of 2009 in which the trial magistrate declared that the applicant's continued occupation of the suit property is unlawful, and constitute an illegal trespass and ordered the eviction of the applicant from the suit premises. The applicant contends that the orders were granted without any hearing and that the trial court did not have jurisdiction to deal with the suit or grant the orders sought.
4. The applicant maintains that the orders were further obtained by non-disclosure of material fact especially that there was a suit pending in the high court. The applicant contends that she has been the lawful occupant of the suit premises following a letter of allotment given to her on 12<sup>th</sup> July, 1977 and that she has been in occupation and has been paying the annual rates since the time of allocation.
5. In response to the application, Joseph Maroro Onderi, Mary Gisare Onderi, John Polycarp Obegi, and Catherine Bitego Onderi, who are the respondents to this application have filed a notice of preliminary objection, objecting to the application on the following grounds:
  - (i) That the procedure for instituting an appeal from a subordinate court has not been complied with in that leave to file this appeal was not sought or granted before filing the appeal which is contrary to Section 75 of the Civil Procedure Act and Order XLII of the Civil Procedure Rules.
  - (ii) That the remedy for a party against whom an *ex-parte* order has been obtained by reason of that party's non-attendance at the time and place the *ex-parte* order was made, is to seek to set aside the *ex-parte* order as per Order IXB Rules 3 and 8 of the Civil Procedure Rules, and not appeal against the order.
  - (iii) That all courts, except where expressly limited by statute, have jurisdiction to order a trespasser to vacate a proprietor's land.

6. Mr. Nyang'au who appeared for the respondents argued that the applicant could not obtain an order for an injunction pending appeal under Order XLI Rule 4(6) of the Civil Procedure Rules as there was no proper appeal before the court. Mr. Nyangau submitted that the applicant did not have an automatic right of appeal under Section 65 of the Civil Procedure Act as read with Order XLII of the Civil Procedure Rules and therefore she needed leave to appeal. Mr. Nyangau argued that the applicant ought to have obtained leave to appeal from the trial court within 14 days from the date of the ruling subject of the appeal. Since no such leave was obtained, there was no valid appeal before the court. He therefore urged the court to strike out the application.
7. In response to the preliminary objection, Mr. Wetangula contended that the issues being raised did not qualify to be raised as a preliminary objection. He submitted that a preliminary objection raises a pure point of law argued on assumption that all facts raised are correct. In this case, Mr. Wetangula pointed out, there were issues of fact yet to be established. Mr. Wetangula noted that the applicant's chief complaint was that she was unable to trace the lower court file and that she could not apply to have the lower court file reconstructed because the pleadings are not in her possession as she was never served. Mr. Wetangula further submitted that the court has inherent jurisdiction under Section 3A to ensure justice to a party.
8. Referring to Section 1A of the Civil Procedure Act as amended, Mr. Wetangula submitted that the overriding objective of the Act and Rules was to facilitate the just, proportionate and affordable justice. On the issue of jurisdiction, Mr. Wetangula argued that the suit property is regulated under the Registration of Titles Act under which all disputes are to be handled by the high court as per Section 2 of that Act. The court was therefore urged to dismiss the preliminary objection and proceed with the hearing of the application.
9. Having given due consideration to the preliminary issues which have been raised, I find that the issue as to whether the application dated 15<sup>th</sup> January, 2010 is properly before the court, is an issue of law which has been properly brought as a preliminary issue. However, the issue is dependent on the establishment of facts which do not appear to be before this court. For instance, it is not clear, under which order, the ruling subject of the applicant's appeal was made. Although the respondent has submitted that the order under which the ruling was made provides no automatic right of appeal to the applicant, thus necessitating the applicant applying for leave to appeal, no copy of the application or copy of the ruling has been availed to this court to confirm the respondent's contention.
10. With regard to the issue as to whether the applicant ought to have come by way of an application to set aside the ex-parte order instead of an appeal, again, that is an issue which can only be determined after the parties have place all facts before this court. Similarly on the issue of jurisdiction, on the information currently before the court, the circumstances in respect of which the orders appealed against were given are not clear. It is not therefore possible at this stage to determine under which jurisdiction the court was acting. What I am saying in short, is that the issues raised by the respondent cannot be disposed off as preliminary issues. Accordingly, I overrule the preliminary objection and order the hearing of the application dated 15<sup>th</sup> January, 2010 to proceed.

**Dated and delivered this 9<sup>th</sup> day of March, 2010**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Wetangula for the appellant/applicant

Kitheka H/B for Nyang'au for the respondent

Eric - Court clerk