



MARY WANJIRU WARUIWA.....APPELLANT

VERSUS

ELIAS MWANGI MAINA.....RESPONDENT

RULING

1. Mary Wanjiru Waruiwa, hereinafter referred to as the applicant is dissatisfied with a ruling which was delivered by Miss Mokaya, Principal Magistrate on 22nd June, 2009 in CMCC No.6077 of 2008. She has lodged an appeal in this Court seeking to have the ruling and the order of the trial Magistrate set aside and the suit in the lower Court struck out with costs.

2. The applicant has now moved this Court under Order XLI Rule 4, 5 and 6 of the Civil Procedure Rules, Section 3A and Section 63e of the Civil Procedure Act seeking the following orders:

(i) There be issue an order of injunction directed at the respondent Elias Mwangi Maina, restraining him from interfering, alienating, disposing of, removing appellant or evicting the appellant or interfering with the appellant from all those premises known as Plot No. 54 Mathare North light industries pending the hearing and determination of this application and of the appeal.

(ii) There be a stay of execution of the ruling and order of Court in CMCC No.6077 of 2008, dated the 22nd day of June, 2009 pending the hearing and determination of this appeal.

(iii) Costs of this application be provided for.

3. The application is anchored on the following grounds:

(a) The appellant is dissatisfied with the ruling of the Court dated the 22nd day of June, 2009, and has already lodged an appeal.

(b) The appeal has high chances of success and appellant is ready and willing to provide security for its due satisfaction in the most unlikely event that the appeal should fail.

(c) The continued sustenance of the order of Court dated the 22nd day of October, 2008, is tantamount to giving orders against the appellant who was not sued, served or heard in the said application, but on whom the order so illegally obtained is sought to be enforced with the consequence that she faces eviction by way of interlocutory orders without first being heard.

(d) In the event that the appellant is evicted from the suit premises without being heard, she will suffer substantial loss and damage by being removed from her place of abode since 1968. The resident does not stand to suffer any such or similar loss or damage.

(e) To meet the ends of justice, it would be made to grant the prayers sought. And on the annexed affidavit of Mary Wanjiru Waruiwa, the appellant herein and other arguments to be adduced at the hearing hereof.

4. In her affidavit, the applicant avers that she has a good appeal and that unless the orders sought are granted, she may be evicted. She therefore prays for an order to preserve the status quo pending the hearing of her appeal. It is evident that the applicant seeks an order of interlocutory injunction under Order XLI Rule 4(6) of the Civil Procedure Rules pending the hearing of her appeal. In order for the applicant to succeed, she has to convince this Court that she has an arguable appeal which prima facie has chances of success.

5. The ruling of the Court subject of the applicant's appeal has not been availed to this Court. It is therefore difficult for this Court to appreciate the applicant's appeal. Moreover, from a copy of the order which was annexed to the application as annexure MWW3, it is evident that the order sought to be appealed against is an order dismissing an application dated 21st April, 2009. A copy of that application has not been annexed to the current application.

6. Be that as it may, an order of dismissal is not an order capable of being stayed, as it is not an order capable of being executed other than execution for costs. The applicant has not presented to this Court any material upon which the Court can conclude that there is prima facie evidence that the respondent is infringing upon the applicant's rights. Further the applicant has not established any proprietary rights over premises No.54 Mathare North, Light Industries.

7. For the above reasons, I find no merit in this application and do therefore dismiss it.

Those shall be the orders of this Court.

Dated and delivered this 30th day of October, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

No appearance for the appellant

No appearance for the respondent

Eric, court clerk