



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
CIVIL APPEAL 486 OF 2009

WASHINGTON N. CHEGE WAGOI..... APPELLANT

-VS-

JOSEPH WAINAINA NJEGARESPONDENT

RULING

1. On the 3rd September, 2009 Washington N. Chege Wagogi, hereinafter referred to as the appellant, lodged a memorandum of appeal, against the order delivered on 2nd September, 2009 by the Resident Magistrate in Milimani CMCC No. 9891 of 2005. On the same day, the appellant filed a notice of motion under Order 41 Rule 4, Order 50 Rule 1 of the Civil Procedure Rules, section 63 (e), 3A of the Civil Procedure Act and section 10 of the Judicature Act.
2. The application was certified urgent under the High Court Vacation Rules. An interim order of stay of execution was issued and the application ordered to be served and heard *inter partes*. Having been served, Joseph Wainaina Njenga who is the decree holder in the lower court and the respondent to the appeal, has raised a preliminary objection to the appeal and the motion, on the grounds that the appeal is incompetent having been filed without leave of the court, contrary to order 42 Rule 1 of the Civil Procedure Rules.
3. It was submitted that the order appealed against was issued under order 21 Rule 18 of the Civil Procedure Rules in respect of which there is no automatic right of appeal. The court was therefore urged to strike out the motion and the appeal.
4. On the 17th September, 2009 Mr. Kabue who was holding brief for the appellant's counsel indicated that he was given instructions that leave had been obtained, though he had not received a copy of the order granting leave. Consequently, the court adjourned the matter to enable the appellant's counsel produce the order granting leave. No order was however produced; instead an unsuccessful attempt was made to adjourn the matter.
5. I have examined the memorandum of appeal, the notice of motion and the affidavit filed in support of the motion, and in reply to the motion. It is evident that the appellant is not appealing against the decree of the lower court which was issued on 2nd August, 2007, but is appealing against the order of the court made on 2nd September, 2009 allowing the respondent to proceed with the execution of that decree against the appellant.

6. The order of 2nd September, 2009 was made as a consequence of execution proceedings following a notice to show cause served on the appellant. I concur with the respondent that the appellant did not have an automatic right of appeal against such an order. The appellant had therefore to obtain leave of the court. No leave having been obtained both the appeal and the notice of motion are incompetent.

7. Accordingly the appeal and the motion are hereby struck off. I award costs to the respondent.

Dated and delivered this 12th day of October, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Matwere holding brief for Omosa for the appellant

Nyakiangana for the respondent

Eric, court clerk