REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Appeal 66 of 2006

PRISCILLA JELAGAT …… APPELLANT

VERSUS

SAM KIPROP ……..……..... RESPONDENT

JUDGEMENT

This is an appeal arising from the Ruling delivered by the Honourable Principal Magistrate in Eldoret CMCC No. 301 of 2006, delivered on 25-5-2006.

The Appeal raises four (4) grounds, namely:-

1. The Magistrate erred in law and in fact in not

considering that there were two applications, by the Respondent dated 20.3.2006 and 2.5.2006 respectively listed for hearing on 25th May, 2006.

2. The Magistrate erred in law and in fact in not considering the oral submissions by the Plaintiff's/Appellant's Counsel.

3. The Magistrate erred in law and in fact in not giving the plaintiff/Appellant ample time to file a Replying Affidavit in respect to the latter application dated 2.5.2006 contrary to the rules of natural justice.

4. The Learned Magistrate erred by applying wrong principles in reaching his ruling.

The Appellant claims that the Orders of injunction granted against her had not been served. However, it is clear that she did not file a Replying Affidavit to place this allegation on record. She therefore cannot raise the said question of fact in the appeal. I hold that the Honourable Magistrate exercised his discretion properly when he found that the Appellant had been served and had even instructed an advocate who took the date for the hearing of this application for committal.

I also hold that while there were two applications before the trial magistrate, he was right in hearing the application for committal for disobedience of Court orders first before the substantive application for injunction.

I find that the Appellant's Counsel was heard but she could only raise matters of law since there was

no Replying Affidavit.

The Appeal herein has no merits whatsoever.

Be that as it may this Court exercising its supervisory jurisdiction over Subordinate Courts finds that the may not have been "**due process**" in the hearing of the application.

The Plaintiff filed the Plaint dated 20th March, 2006 in which he pleaded as follows:-

1. The Plaintiff is the absolute and sole registered owner of that parcel of land known as Ngeria/Megun Block 2 (Cheplaskei)/59 measuring approximately 0.8094 Ha.

2. The Defendant without any colour of right is interfering with the Plaintiff's ownership.

He sought a permanent injunction restraining the Defendant by herself or her agents from interfering or dealing in any way with the suit property. It would appear from the record that the plaintiff then proceeded to obtain ex parte orders of injunction pending inter partes hearing. It is this Order that the Defendant has allegedly disobeyed and leading to her committal to civil jail.

In her Defence, the Defendant claims that she has been in occupation of the suit property since 1994. That her customary "husband" bought the land measuring four (4) acres. There is no Reply to the Defence.

In the light of the pleadings, I find it odd that the plaintiff has obtained the main and only relief he sought in the Plaint by way of an ex parte Order. Once the injunction was granted nothing was left of the suit. The Defendant had no opportunity to be heard and she is also being put into civil jail before the application is heard inter partes.

If the Defendant has been in occupation on the land from 1994, then it would amount to a miscarriage of justice if the injunctive orders were granted and enforced after it was obtained ex paprte. Is it possible that the ex parte orders is being used to evict her from the suit premises? There is no prayer for eviction.

It does not appear that the Defendant only entered the suit premises just before the suit was filed. The Plaintiff has deliberately economised on the facts he disclosed. He does not say when the Defendant first entered onto his land.

It is my view that there has been no due process in the manner the order was obtained considering the pleadings. Inquiry ought to have been made by the Subordinate Court to ascertain whether the ex parte order was being used for restraining purposes or eviction purposes.

In the absence of a reply to the Defence, it would appear the Plaintiff would only be assisted by an eviction order which has not been sought in the Plaint. Although the Defendant has not articulated her claim persuasively yet she is entitled to due process of the law. She can only be evicted from the property in accordance with the law and after being given a fair opportunity to be heard. In the present circumstances, there has been violation of the cardinal principles of natural justice and the Court process has been misapplied leading to a gross miscarriage of justice.

As a result I do hereby invoke the supervisory jurisdiction of this Court under Section 65 (2) of the Constitution and set aside the orders granted on 25th May, 2006. The applications dated 20th March, 2006 be set down for hearing and heard on its merits. The warrant of arrest is hereby quashed.

Each party to bear his/her costs in the appeal. Orders accordingly.

DATED AND DELIVERED AT ELDORET ON THIS 10TH DAY OF SEPTEMBER, 2008.

M. K. IBRAHIM

JUDGE

In the presence of:

Mr. Limo for the Respondent

Mr. Nabasenge for the Appellant