

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

Civil Appeal 214 of 2008

MAGDALENE WANJIKU NDUNGU.....APPELLANT

VERSUS

TERESIA WANGARI NJUGUNA.....1ST RESPONDENT

JANE NJOKI NJUGUNA.....2ND RESPONDENT

R U L I N G

By a chamber summons filed on 7th May, 2008 Magdalene Wanjiku Ndungu the appellant herein sought an order staying execution of the orders issued on 16th May, 2007 by the Resident Magistrate, Thika, ordering her to vacate the suit premises. On the 8th May, 2008, the applicants appeared before Hon. Visram J. who certified the application as urgent and ordered that the application be served for *inter parte* hearing on 14th May, 2008. When the matter came up for inter parte hearing, Teresia Wangari Njuguna and Jane Njoki Njuguna who were the respondents and who were said to have been served did not attend court, whereupon the court granted the appellant's application for stay of execution.

The respondents have come to this court seeking to have the order issued on 15th May, 2008 set aside and leave granted to the applicants to file a replying affidavit to the appellant's application dated 6th May, 2008. The respondents' counsel Karuga Wangai has sworn an affidavit in which he depones that the respondents were never served with the application for stay of execution and were therefore unaware that the application was coming up for hearing. Counsel explains that he could not have been served with the application as deponed in the affidavit of service as he was not on record at the time of the alleged service.

The application is opposed by the appellant Magdalene Wanjiku Ndungu through a replying affidavit sworn by her advocate John Muturi Njoroge. The advocate swears that he served the respondents' advocate with the application dated 6th May, 2008 on the 7th May, 2008 but the counsel indicated that he was not on record. Thereafter on the 13th May, 2008 the 2nd respondent was served in person at Thika Law Courts. Counsel for the appellant further maintains that as the respondent's counsel was on record in the original proceedings and had not withdrawn he was still the counsel for the respondents. It is maintained that the respondent executed the orders dated 16th April, 2008 prematurely. It is further contended that the application is incurably defective and an abuse of the court process.

I have considered the application. It would appear that there was a problem with service. Although the 2nd respondent is purported to have been served, the 1st respondent was never served. The court was therefore misled into hearing the matter *ex parte*. In the circumstance it is fair that the parties be given a chance to be heard and the matter determined on merit. Accordingly, I allow the application and set aside the order made on 14th May, 2008. I grant leave to the respondents to file and serve a replying affidavit within 5 days from the date hereof and direct that a date for the *inter parte* hearing of the application be thereafter fixed in the registry on priority.

Those shall be the orders of this court.

Dated and delivered this 24th day of November, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Mr. Maondo H/B for the appellant

Advocate for the respondents absent