

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
Civil Appeal 73 of 2004

CATHERINE KEMUNTO ORISI APPELLANT

VERSUS

MARY JEPKEMBOI TALLAM RESPONDENT

RULING

This application has been taken out under Order XLI rule 4, and L rule 1 of the Civil Procedure Rules as well as sections 3 and 3A of the Civil Procedure Act, and in which Mary Jepkemboi Tallam, who is the applicant herein seeks an order for the striking off of the appeal by Catherine Kemunto Orisi (hereinafter referred to as “the respondent”). She alternatively seeks an order to set aside an order of stay of execution, which was granted in Eldoret CMCC No.409 of 2004 on 13/10/2004.

Briefly, the applicant agreed to sell a portion of her property comprised in L. R. No.12395, to the respondent in February 2004. Following the applicant’s decision to rescind that agreement on 24/3/2004, the respondent moved the court, and obtained an order of injunction which she used to evict the applicant from the suit premises, thereby occupying houses which the applicant claims were not part of the portion that was for sale. Consequently this applicant obtained orders to set aside the agreement and orders as injunction. She also obtained a mandatory order requiring the respondent to move out of the said premises, after which the respondent filed her appeal and obtained an order on 13/10/2004 to stay the order requiring her to vacate the said premises.

The applicant who feels aggrieved by the order of stay, as she has been kept away from her household goods and personal effects, now also bases her application on the grounds that the respondent did not obtain leave of the court to file her appeal, and that the respondent has not taken any steps to prosecute her appeal, which was filed in July 2004. The record of appeal was filed on 3/8/2004.

Admittedly, the original application whose decision led to the filing of the contentious appeal and hence this application, was a one of the subordinate court following an application made under Order XXXIX rules 1, 2, 3 and 9 of the Civil Procedure Rules and section 3A of the Civil Procedure Act.

In my understanding the court has no jurisdiction to grant mandatory injunctions under the provisions of Order XXXIX rule 1, 2 and 3. Indeed, the court can only grant temporary injunctions under that Order, which would mean that since mandatory injunctions are not catered for elsewhere in the rules, a party who seeks mandatory orders would have to invoke the inherent jurisdiction of the court under section 3A of the Civil Procedure Act, which this respondent did, and the only logical assumption would be that the orders of mandatory injunction granted by the subordinate court were granted under section 3A aforesaid.

The issue that arises then is whether a party who is aggrieved by such an order needs to seek leave to the court to appeal. One would have to fall back on Order XLII of the Civil Procedure Rules, wherein it is stipulated that when an appeal lies as of right no leave to file an appeal would be required, and where a category of Orders and rules against which leave to appeal would lie as of right as of right as clearly specified. Appeals from orders that have been issued under Section 3A aforementioned do not fall within that category, which therefore means that a party who wishes to appeals against orders issued under section 3A, leave of the court would be required prior to filing the appeal.

The respondent did not seek or even obtain to file her appeal. Lack of such leave renders her appeal incompetent and in the circumstances it should not be allowed to remain on the record. I do therefore

grant an order to strike it off. This would obviously mean that any orders of stay which the respondent obtained pending appeal would be of no consequence and the same are automatically discharged forthwith.

The applicant whose application it thus meritorious shall have the costs of this application.

Dated and delivered at Eldoret this 1st day of February 2006.

JEANNE GACHECHE

Judge

Delivered in the presence of:

Mr. Ngeno for the respondent/applicant

No appearance for the appellant/respondent