



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO. 81 OF 2014**

**JACKSON TOMPOI OLE SAIKA ..... APPELLANT**

**VERSUS**

**JOSEPHINE KIRAMATICHU TEEKA .....1<sup>ST</sup> RESPONDENT**

**VERONICA WANGOI TEEKA ..... 2<sup>ND</sup> RESPONDENT**

**MARY NDONAISHI ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Appellant, by a Notice of Motion brought under Order 42 Rule 6(6), Order 51 Rule 1 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil procedure Act and dated 23<sup>rd</sup> June, 2014 seeks the following orders:
  - a. **Spent**
  - b. **Spent**
  - c. **Pending the hearing and determination of this appeal this Honorable Court be pleased to issue stay of execution of the orders dated 11<sup>th</sup> June, 2014 in Narok Chief Magistrate's Court Civil Case Number 97 of 2013 Josephine Kiramaticho Teeka & 2 Others vs Jackson Tompoi Ole Saika and the applicant be released on bond on such terms as this Honorable court may deem reasonable to grant.**
  - d. **Costs of this application be provided for.**
2. The application is based on the grounds on its face as well as the affidavit of the Appellant sworn on 23<sup>rd</sup> June, 2014 and filed alongside the application.
3. On 16<sup>th</sup> July, 2014 the Respondents filed a Replying Affidavit sworn by the 1<sup>st</sup> Respondent on 15<sup>th</sup> July, 2014. The Respondents further filed a Preliminary Objection on 25<sup>th</sup> August, 2014 raising the following grounds:
  - a. **That the court lacks the jurisdiction to try the matter in the first place. Pursuant to the provisions of section 75 (1), (g), section 79B and Order 42 Rule 1(1), 13(2) (4) (a) (b) (c) (e) (f) and (ii), of the Civil Procedure Rules, 2012 Cap 21 Laws of Kenya.**
  - b. **That the Honorable Court has no jurisdiction to grant the orders sought in the said Appellant's suit, whether under the provisions cited or at all.**

4. The Preliminary Objection was argued before me on 13<sup>th</sup> October, 2014 by the learned counsel for the Appellant Mr. Wamaara and Mr. Kamwaru for the Respondents.
5. The basis of the Respondents' objection was that the Appellant had not complied with the rules of the subordinate court. In particular, the Appellant failed to obtain leave from the subordinate court.
6. Mr. Kamwara further submitted that the order being appealed against was not before the court and that the appeal did not contain the necessary documents as enumerated in Order 42 Rule 13 of the Civil Procedure Rules. He concluded by submitting that the Notice of Motion was an abuse of the court process since it did not meet the standard of appeal and neither was it a Review or Judicial Review.
7. On the other hand, the learned counsel, Mr. Wamaara submitted that the Preliminary Objection had no merit. He contended that a Memorandum of Appeal was filed within the stipulated time. Further the appeal was not ripe for hearing and that the supporting documents would follow after directions had been taken. According to counsel, the matter was urgent as the appellant was cited for contempt and was seeking a stay of execution.
8. Finally counsel submitted that an aggrieved party has an automatic right of appeal on any matter arising out of **Order 40 (i) (ii) (iii) of the Civil Procedure Rules**. The appellant therefore did not require leave of the subordinate court. He urged the court to find that the Preliminary Objection was an abuse of the court process. He prayed the same be dismissed with costs.

### **ISSUES FOR DETERMINATION**

- i) leave to appeal from lower court not obtained;
  - ii) whether Appellant ought to have complied with **Order 42 Rule 13**
9. The Respondents' objection was that this court lacks jurisdiction to hear and determine the application. He argued that under **Section 42 (13) (2)**, an application for stay of execution can only be determined if the Appellant has complied with the procedure for filing an appeal from the subordinate court.

### **ANALYSIS:**

10. The Appellant had failed in this regard. He had not obtained the leave of the lower court before filing his appeal. Being a ruling, the right of appeal against it was not automatic. Therefore, the Appellant ought to have first obtained leave in terms of **Section 75 (1) (g) of the Civil Procedure Act**. The said section provides:

**“(1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted—**

**(a) .....**

**(b) .....**

**(c) .....**

**(d) .....**

**(e) .....**

**(f) .....**

**(g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;**

(h) .....

11. I agree with the Counsel's submissions that the right of appeal is not automatic and must be granted by the Statute or law. This appeal is against the decision of the lower court made on 11<sup>th</sup> June 2014 in SPMCC NO. 97 OF 2013. By that ruling, the lower court found the Appellant had disobeyed its injunctive orders prohibiting him from encroaching the Respondents' parcel of land registration number CIS-MARA/NKOBEN14.
12. **Order 40 (3) (1)** provides that if the court granting an injunction finds that a person has disobeyed or breached any of the terms of the injunction, it may impose a fine on the contemtor or may order the property of the guilty person be attached or that the person be detained in prison for a term not exceeding six months.
13. By dint of **Section 75 (1) (g)**, an order made pursuant to this provision which imposes a fine or detention is appealable as a matter of right. In addition **Order 43 Rule 1 (u)** of the **Civil Procedure Rules** expressly provides that a right of appeal lies against orders made under **Order 40 Rules 1, 2, 3, 7 and 11**. Therefore, the Appellant did not require permission of the subordinate or appellate court to file his appeal.
14. Even if it was not provided for, the fact that the Appellant did not obtain the leave of the lower court does not oust the jurisdiction of the High Court. The said section is clear that the permission to appeal, where the right is not automatic, may be granted by either the subordinate court or the Appellate court. Taking into account the nature of the proceedings and the penalty which the Appellant faces, it is just that he be allowed to ventilate his issues. This ground has no merit.
15. The second limb of the Preliminary Objection was that there was no proper Appeal before the court. In particular, counsel for the Respondents argued that the order which is being appealed was not filed together with the Memorandum of Appeal as required by **Order 42 Rule 2**. In addition other documents required by **Order 42 Rule 13** had not been annexed. Therefore according to Counsel there was no appeal upon which the court could act.
16. This court's jurisdiction as the appellate court is invoked once an appeal is filed. **Order 42** provides that an appeal is proffered once a Memorandum of Appeal has been filed. (See **Anders Bruel T/A Queencross Aviation V. Kenya Civil Aviation Authority & Another, [2013] eKLR**).
17. Although the order from which the appeal was not filed together with the Memorandum of Appeal as required by Order 42 Rule (1) (2), this has no effect on the jurisdiction of the court. It is a procedural requirement that has no bearing on the application for stay of execution.
18. At this juncture the merits of the appeal need not be considered nor whether the appeal has been admitted for hearing and it also follows that this court need not consider whether all the documents to be attached to the Record of Appeal have been produced.
19. For the above reasons, I find that the Preliminary Objection dated 13<sup>th</sup> October, 2014 has no merit and it is hereby overruled.
20. The Appellant shall have costs.
21. The Interim order is hereby extended.

Orders accordingly.

Dated, Signed and Delivered at Nakuru this 8th day of May, 2015.

**A. MSHILA**

**JUDGE**