



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 125 OF 2018

(CORAM: OUKO, OKWENGU & GATEMBU, JJA)

PHELOMENA WARIGIA WAWERU.....APPLICANT

AND

DUNCAN WANYOIKE.....1ST RESPONDENT

DAVID GITAHU.....2ND RESPONDENT

JOEL MIRITHI.....3RD RESPONDENT

CHARLES MUHORO.....4TH RESPONDENT

***(Being an application for injunction and stay of proceedings in the Environment
and Land Case No. 353 of 2017 pending an intended appeal from the Ruling***

and orders of the Environment and Land Court at Nairobi (Obaga, J.)

delivered on 10th April, 2018

in

ELC No. 353 of 2017)

RULING OF THE COURT

[1] On 10th April, 2018 the learned Judge (**Obaga, J**) dismissed a chamber summons dated 27th September 2017 filed by **Phelomena Warigia Waweru** (the applicant), in which she sought the committal of the respondents into civil jail for disobedience of court order issued on 27th June 2017. The order allegedly restrained the respondents, their agents or employees from interfering, alienating, disposing, entering, or constructing on LR. No. 10390/5 (suit property) pending the inter parte hearing of the applicant's application.

[2] The applicant is aggrieved by the dismissal of her application. She has, therefore, moved this Court by way of a notice of motion dated 30th April, 2018 seeking orders under Rule 5(2)(b) of the Court of Appeal Rules, and section 3A of the Appellate Jurisdiction Act of a temporary injunction restraining the respondents from interfering with the suit property, and a further order staying proceedings in Environment and Land Court (ELC) Case No. 353 of 2017, pending the determination of her appeal.

[3] Due to the Covid-19 pandemic, this matter was listed to proceed by way of written submissions on 22nd March, 2021. The parties were duly served with hearing notices through email on 3rd March, 2021 and advised to file their written submissions. However, neither the applicant nor the respondents filed any written submissions. The Court is therefore forced to determine the application on the basis of the application, the supporting affidavit and the annexures therefore.

[4] The applicant's motion having been brought under Rule 5(2)(b) of the Court of Appeal Rules, the jurisdiction of this Court is invoked by the filing of an appeal which is initiated through a notice of appeal. We have perused the application, but have not found any such notice. This means that the applicant is not properly before us as the Court's jurisdiction has not been properly invoked.

[5] In addition, the ruling dated 10th April 2018, a copy of which was annexed to the applicant's motion shows that the learned Judge dismissed the applicant's motion for two reasons. First, that the applicant served the respondents with an extract of the court order which did not contain a penal clause warning of the consequences in case of disobedience. Secondly, that there was no credible evidence of disobedience as the houses alleged to have been constructed in contravention of the court order, were actually old houses which could not have been constructed and completed in a span of four (4) months. This means that the court having dismissed the applicant's application, no positive orders capable of execution were issued. It would therefore be futile for this Court to issue an order of stay of execution as there is nothing to stay.

[6] For these reasons, we find that the notice of motion dated 30th April, 2018 is misconceived and has no merit. It is accordingly struck out.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY, 2021.

W. OUKO (P)

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU (FCIArb.)

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR