



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE Civil Appeal 7 of 2007

JOSEPH .R. KINGORI.....1ST PLAINTIFF

FRANCIS GITAU t/aFEMFA TRADERS.....2ND PLAINTIFF

VERSUS

JASON GICHURE CHEGE.....DEFENDANT

RULING

By a Notice of Motion dated 8th October, 2008, pursuant to the provisions of sections 3 and 3A of the Civil Procedure Act (Cap 21) and order XLIV Rule 1 of the Civil Procedure Rules, the applicant seeks orders:

1. That while pending the hearing and determination of this application, there be a stay of execution of the order detaining motor vehicle reg. No. KAL 058T Mitsubishi Truck at Kitale Police station.
2. The honourable court be pleased to review and set aside the court's order dismissing the application for stay on the grounds that there was no appeal against the order for the motor vehicle Reg. No. KAL 058 T to be kept at Kitale Police Station.

The application is based on the grounds:

- (a) That there is an error apparent on the face of the record which warrants a review of the said orders.
- (b) That the applicants stand to suffer irreparable loss if the grant of the orders sought herein are not granted.
- (c) That the respondent shall not be prejudiced if the orders sought herein are granted.

The application is predicated upon the annexed affidavit of Joseph Ruoro Kingori sworn on the 8th day of October 2008.

On behalf for the applicant, it was argued that the honourable court dismissed the application for stay erroneously, in stating that the applicant did not appeal against the order detaining the motor vehicle reg. No. KAL 058 T Mitsubishi truck, at Kitale Police Station.

He did not appeal against the said order. That the Judge ought to have looked at the application for stay on its own merit and reach a finding independently of the lower court's ruling.

The motor vehicle kept at Kitale Police Station is security for the loan the applicant advanced to one John Chege Gichure, the respondent's father. The motor vehicle has since been registered in his name as embodied in exhibit "JRK 3" – a copy of the log book.

Further detention of the said motor vehicle at Kitale Police Station exposes the said motor vehicle to the risk of vandalism.

For those reasons the applicant urged me to allow the application.

The respondent filed a replying affidavit sworn on 27th October 2008 in opposition thereto.

It was argued on behalf of the respondent that the application lacks merit and is otherwise an abuse of the process of the court.

That there is no error on the face of the record which warrants the review of the orders issued by the Judge.

That the applicant having admitted that he registered this motor vehicle in his own name, that is enough evidence why the court's orders complained of should not be set aside.

His ultimate position is that being the owner of the motor vehicle in issue as evidenced by an agreement exhibit 'JGC1', the transfer of the same by the applicant is unlawful. The enjoyment of the stay orders by the applicant is to his detriment and/or prejudice.

I have carefully considered the background of the dispute leading to the application for stay.

So far as is discernable from the court record, a decision was made by the lower court granting a conditional stay. Being dissatisfied with the decision the applicant filed an application before the High Court for an order of stay. That application was dismissed by the Judge on the 16th day of September 2008. It is that dismissal order that the applicant has come to review and/or set aside.

On the one hand, the applicant contends that a review is open to him under order XLIV of the Civil Procedure Rules as read together with section 80 of the Civil Procedure Act. The logic behind the argument is that an appeal therefrom was filed on 23rd April 2007 being Kitale HCC Appeal No 7 of 2007. That an application under order XLI Rule 4(1) for stay pending appeal filed on 15th June 2007 amounts to an appeal from that order of dismissal of the lower court.

On the other hand, the respondent contends that this court is being asked to sit on appeal on the order of a Judge of concurrent jurisdiction. That, I was urged, goes against the grain.

It is clear to me from the record of proceedings that the appellants had sought an order of stay of execution of the order of 20th April 2007 from the trial court. That court granted the stay sought in its ruling of 14th June, 2007. In line with the said ruling the motor vehicle registration No. KAL 058T was to be kept under the custody of the O.C.S Kitale Police Station, pending the hearing and determination of H.C. Civil Appeal No.7/2007 filed on 23rd April 2007. It is instructive to note that there was no appeal from that order of stay of 20th April 2007.

It is further clear to me that what the appellant now seeks is an order to stay the Chief Magistrate's stay order made on 14th June 2007.

Order XL1 Rule 1 of the Civil Procedure Code provides:

“ No appeal or second appeal shall operate
as a stay of execution or proceedings under
a decree or order appealed from except in
so far as the court appealed from may order
but, the court appealed from may for
sufficient cause order stay of execution
of such decree or order, and whether the
application for such stay shall have been
granted or refused by the court appealed
from, the court to which such appeal is
preferred shall be at liberty, on application
being made, to consider such application and
to make such order thereon as may to it seem
just, and any person aggrieved by an order of
stay made by the court from whose decision
the appeal is preferred may apply to the
appellate court to have such order set aside”.

It is also clear to me that under order XL1 Rule 1 any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

The pre-conditions for setting aside an order of stay by the court from whose decision the appeal is preferred - in this case the Chief Magistrate's court – are as follows:-

One, an appeal must be in place.

Two, it must be demonstrated by evidence that substantial loss may be occasioned to the applicant unless the order is made.

Three, the application must be made without unreasonable delay.

Four, the applicant must give such security as the court may order.

Firstly, as said earlier, there is no appeal from the order of stay of 20th April 2007.

Secondly, there is no evidence before me that substantial loss may be occasioned to the applicant unless the order of stay is made. The motor vehicle is kept at Kitale Police Station under the custody of the O.C.S pending the hearing and determination of the appeal. That secures the motor vehicle from risk of vandalism.

Thirdly, the application was made timeously.

Fourthly, the applicant has not offered any security for the due performance of such decree or order as may ultimately be binding on the applicant.

As the applicant has failed to satisfy condition number one – no appeal in place – number two – substantial loss – number four – provide security, this application is for rejection.

Accordingly, the application fails and is dismissed with costs.

By way of directions the appellant/applicant is advised to fast track the main appeal, Civil Appeal No. 7/2007 to avoid wastage of the motor vehicle. To that end the Civil Registry is directed to give this case priority in terms of dates.

Dated and delivered at Kitale this...15THday of.....DECEMBER.....2009.

N.R.O. OMBIJA

JUDGE



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