



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: A.K NDUNG'U, J

MISC. CIVIL APPLICATION NO. 65 OF 2020

JOHN KEBASO MASIKA.....APPLICANT

VERSUS

EVANS MORANDE OMINGO.....RESPONDENT

RULING

1. This ruling disposes the application dated 6.11.2020 lodged by John Kebaso (hereinafter the applicant) in which he seeks orders;
 1. Spent
 2. That pending hearing and determination of the applicant's application dated 23.9.2020 vide Kisii CMCC No. 675 of 2018, this honourable court be pleased to order that the applicant's motor vehicle Reg. KCM 118G be and is hereby released to the applicant on a running attachment.
 3. The costs of this application be in the cause.
2. The application is based on 10 grounds as seen on the face thereof and supported by the affidavit of the applicant sworn on the 6.11.2020.
3. The gist of the grounds and the supporting affidavit is that a notification of sale was issued to Bama Auctioneers in execution of an alleged ex parte decree/judgement in Kisii CMCC No. 675 of 2018. The applicant has not been served with warrants of attachment prompting him to file application for stay of execution, setting aside of the alleged warrants and the ex parte judgement that has been entered.
4. The court granted a stay of the sale pending hearing and determination of the applicant's application dated 23.9.2020. At the time of the filing of the current application, the said application was pending and was due for a mention to confirm submissions on 30.11.2020.
5. It is urged that the applicant has been exposed to risk of loss as the attached motor vehicle forms his only source of livelihood. It is prayed that the applicant motor vehicle be released on a running attachment pending hearing and determination of the application dated 23.9.2020.
6. The application is opposed. In a nutshell, the respondent avers that the application is defective, a non-starter, offends the law, it is an abuse of the legal process and a waste of precious judicial time since there is a similar application before the lower court pending for determination.
7. It is urged that the attachment aforesaid is legal and the applicant has not met the threshold for the grant of interlocutory and/or injunctive reliefs and/or orders.
8. The application was canvassed by way of written submissions.
9. I have applied my mind to the application, the affidavit evidence and submissions on record.
10. It is common ground that as at the time of filing this application there was pending before the Chief Magistrate's Court an application dated 23.9.2020 in which similar orders had been sought.
11. Vide that application, the applicant obtained a stay of execution of the decree stopping the sale of the attached motor vehicle but the court in its wisdom did not accede to the pray for the release of the motor vehicle. The parties were directed to file submissions on the application.

12. These facts demonstrate one thing; that the applicant seeks to obtain orders which they were unable to get from the lower court in this court. There is a serious procedural lapse in this attempt.
13. A party aggrieved by the orders issued at the magistrate's court is not bereft of avenues through which to challenge the lower court's finding. However, the only procedure known in Law would be by way of a revision or appeal.
14. It is a blatant abuse of the court process for a party to file a similar application in the High Court to challenge orders given in the Chief Magistrate's Court by any other means other than through a revision or an appeal.
15. There is (by the time of filing of this application), a live matter before the Magistrate's Court with specific orders issued for a stay of execution which orders fell short of ordering the release of the subject motor vehicle.
16. It was not open for the applicant to challenge those orders through an application similar to the one before the lower court. If aggrieved by the failure of the court to order the release of the motor vehicle, the open legal procedure was to appeal against the order.
17. With the effect that the application is improperly before this court. It is an abuse of the court process and is one for dismissal. I dismiss the application dated 6.11.2020 with costs to the respondent.

Dated and Delivered at Kisii this 27th day of January, 2021.

A.K NDUNG'U

JUDGE