



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL 141 of 2019**

**KEVIN MWANGI WAMBUI.....1<sup>ST</sup> APPELLANT/APPLICANT**

**SYLVIA MUKUI.....2<sup>ND</sup> APPELLANT/APPLICANT**

**VERSUS**

**JOEL MUTURI MURIUKI.....RESPONDENT**

***(Being an appeal from the ruling of Milimani Chief Magistrate's Court Civil Case No. 6230 of 2016 delivered by Honourable E Wanjala (SRM) on 25<sup>th</sup> February, 2019)***

**RULING**

The appellants herein filed an application by way of Notice of Motion under Order 42 Rules 4 and 6, Order 22 Rule 22, Order 51 Rules 1 & 3 of the Civil Procedure Rules, Section 1A, 3, 3A and 63 of the Civil Procedure Act, for the substantive order that there be a stay of execution of the judgment of the lower court and stay of the sale of motor vehicle registration No. KBX 411Z following the same judgment and decree issued on 25<sup>th</sup> February, and 21<sup>st</sup> March, 2018.

The application is supported by grounds set out on the face of the application and a supporting affidavit sworn by the 2<sup>nd</sup> appellant.

There is a replying affidavit sworn by the respondent opposing the application. This was followed by a notice of preliminary objection lodged on behalf of the respondent to the effect that the affidavit in support of the application offends the mandatory provisions of Order 1 Rule 13 (1 & 2) of the Civil Procedure Rules. There is a supplementary affidavit sworn by the 2<sup>nd</sup> appellant addressing the replying affidavit.

This ruling relates to preliminary objection first because, if the supporting affidavit is found to be faulty then the application may not stand on its own.

Order 1 Rule 13 (1&2) read as follows: -

***“(1) Where there are more plaintiffs than one, any one or more may be authorised by any other of them to appear, plead or act for such other in any proceedings and in like manner, where there more defendants than one, anyone or more of them may be authorised by any other of them to appear, plead for act for such other for any proceeding.***

***(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.”***

The supporting affidavit in this case stated that the deponent is the 2<sup>nd</sup> appellant, and had authority of the 1<sup>st</sup> appellant who is a her employee to swear the affidavit. She continued to say that she is the owner of the motor vehicle which is the subject matter of these proceedings. In effect she is the principal.

The title to Order 1 of the Civil Procedure Rules reads:

**“PARTIES TO A SUIT”**

Some key words stand out in Order 1 Rule 13 (1). That is to say, **“to appear, plead, to act for such other in any proceeding”**.

Going by the heading of this Order and contemplation of the words cited, I do not think, with respect, that such authority extends to an affidavit in an application such as the one in issue.

The marginal note to Order 1 Rule 13, reads as follows *“Appearance of one of several plaintiffs or defendants for others.”* When the marginal note is read at cross reference to the contents of the body of the entire rule, it is clear that reference is to pleadings that found the basis of the claim. The preliminary objection is therefore misconceived and therefore, dismissed with costs to the applicants.

The step taken by the respondent has delayed the determination this application. Parties shall now take a hearing date for the argument of the Notice of Motion dated 15<sup>th</sup> March, 2019. For the avoidance of any doubt the interim order shall remain in place until the application is heard and determined.

Dated, signed and delivered at Nairobi this 23<sup>rd</sup> day of October, 2019.

**A. MBOGHOLI MSAGHA**

**JUDGE**