



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

**AT NAIROBI**

**CIVIL CASE NO. 339 OF 2010**

**NZUKI**

**MWINZI.....PLAINTIFF**

**VERSUS**

**ST. MUGUACHA T/A GALAXY**

**AUCTIONEERS.....DEFENDANT**

**Coram: Mwera J**

**The Plaintiff in person**

**Makumi for defendant**

**Njoroge, court clerk**

**RULING**

The application to be determined was filed in court on 10/2/11. It was brought by the respondent firm of auctioneers under the now repealed Order XLVIV rule 1 (1) of the Civil Procedure Rules and section 9a of the Civil Procedure Act. It had one main prayer:

i) that ex parte orders of 10.11.10 be reviewed, varied and/or set aside, because, as drafted, they appeared to be final in nature yet the respondent's (Nzuki Mwinzi) application of 8.11.10 which gave rise to the said orders, was yet to be heard inter parties. With the questioned orders, the present applicant firm of auctioneers had not had the opportunity to be heard on the application of 8.11.10 by Mr. Mwinzi. The applicant in his affidavit considered the "final" orders given by the court as an error on the face of the record. That the court may not have intended to bar the applicant from being heard on the merits of the application dated 8.11.10.

The application was served and the respondent to it (Nzuki) filed two grounds of opposition to the effect that this application has no merit because his own application of 8.10.11 was yet to be heard inter partes.

Directed to submit the applicant did so while the respondent (Nzuki) did so later, after the court had proceeded to pen the following determination.

The ex parte orders complained of resulted from the appellant's (Nzuki) application dated 8/11/10 whose prayers were for the court:

**i) to certify that application urgent;**

**ii) to grant stay of execution of a decree that followed an interlocutory judgement in lower court until appeal was finally heard.**

**iii) to order the auctioneers, M/s Expeditious General Merchants to return the attached motor vehicle registration no. KAS 903 W.**

When the application was heard at the first instance on 10/11/10 prayers 1, 2 were granted. The appellant was directed to serve the application for mention before the appeals judge on 18/11/10, with the 2 interim orders being in force until then. The 3<sup>rd</sup> prayer to release the attached motor vehicle was not granted.

On 18/11/10 the matter came up before the appeals judge (Maraga J) and also on 30.11.10. On both occasions the learned judge directed that the matter do come before the undersigned. It came on 8/2/11.

Come the 8/2/11 for mention and Mr. Makumi for the present applicant intimated to the court that orders of 10.11.10 appear to shut out his client. They sounded final in nature and thus prejudicial to him. The court seemed to agree with Mr. Makumi then. It directed filing and serving an appropriate application to be mentioned on 17.2.11. The cause went before Khaminwa J and again before the undersigned with the application dated 8/2/11 – under review.

From perusal of the current Order 42 rule 6 (6) Civil Procedure Rules 2010 which replaced the old Order 41 rule 6 (2) Civil Procedure Rules and in the light of the fact that the court granted the stay of execution until the appeal was finally determined, it is clear that that order seems to lock out the applicant whom the court directed to be served with the application dated 8.11.10 for mention on 18/11/10. The true intention of the court was to grant an interim stay of execution, serve the application dated 8/11/10 so that the parties appear before the appeals judge to direct further course of proceedings. The orders were directed to hold until the mention on 18/11/10. In essence, if the appeals judge did not extend those orders to another date when the application dated 10.11.10 was heard, it can be taken that they lapsed. But that cannot be so gleaned from the extracted orders which stated that the orders had been granted.

**“.....pending the hearing and determination of the appeal herein.”**

Accordingly, the ground for review has been argued successfully and the court thus reviews its orders of 10/11/10 to read that they remain in force until the application dated 8/11/10 is heard inter partes. Parties should now list that application for hearing in the next 28 days.

Prayers granted as sought.

Delivered on 12.4.11.

**J. W. MWERA**

**JUDGE**

