



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**CIVIL APPEAL NO. 93 OF 2009**

**PATRICK KINGORI WARUGONGO.....APPELLANT**

**VERSUS**

**JAMES NDERITU.....1<sup>ST</sup> RESPONDENT**  
**POINTEX (K) LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

PATRICK KINGORI WARUGONGO, the appellant/Applicant, took out the Motion dated 23<sup>rd</sup> March 2010 pursuant to the provisions of *Order XLI rule 4* of the Civil Procedure Rules in which he sought for the following orders:

- (a) That the honourable court be pleased to hear this application in the 1<sup>st</sup> instance due to its urgency.***
- (b) That the honourable court be pleased to issue stay of execution against motor vehicle KAH 223Q, maize milling plant and KAH 099W, pending the hearing and determination of the appeal herein.***
- (c) THAT the honourable court do issue orders restoring the objector/appellant to the status quo ante the execution by ordering the immediate release of removed movables belonging to the objector/appellant.***

The Motion is supported by the affidavit of the Applicant. When served, James Nderitu and Pointex (K) Ltd., the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, opposed the Motion by filing the replying affidavit of James Nderitu.

What provoked the filing of the current Motion is the attachment of some of the properties of the Applicant herein in execution of a decree. The 1<sup>st</sup> Respondent i.e. James Nderitu, had, vide Nanyuki S.P.M.C.C. No. 8 of 2005, caused the property of the Applicant herein to be attached in execution of a decree against Pointex (K) Ltd., the 2<sup>nd</sup> Respondent herein. It is alleged that the Appellant/Applicant's advocate caused to be issued a notice of objection to attachment. The 1<sup>st</sup> Respondent is said to have issued, in response, a notice of intention to proceed with the execution of the decree. The Applicant was prompted to file a formal application dated 9<sup>th</sup> October 2008 to establish the basis of the objection. The 1<sup>st</sup> Respondent filed a replying affidavit to resist the application. The application was heard and dismissed

on 8<sup>th</sup> July 2009. Being aggrieved, the Appellant filed this appeal. The Appellant is now before this court complaining that the 1<sup>st</sup> Respondent has moved and removed some of the attached goods while this appeal is pending. He has now beseeched this court to grant him the orders of stay to avoid the appeal being rendered nugatory. He claimed he will show on appeal that the attached goods do not belong to the 2<sup>nd</sup> Respondent.

The 1<sup>st</sup> Respondent on his part urged this court to dismiss the application. He claimed that the temporary order issued on 25<sup>th</sup> March 2010 were served on Mr. Simon Ngomonge of Dollar Auctions at 3.30 p.m. on 29<sup>th</sup> March 2010. By that time, it is said that motor vehicle registration No. KAH 099W had been sold in an auction conducted in the morning of 29<sup>th</sup> March 2010. The 1<sup>st</sup> Respondent accused the Appellant of laches. He argued that the objection was dismissed on 8<sup>th</sup> July 2009 yet he waited for many days before obtaining stay orders.

I have considered the rival submissions. What is not in dispute is that the Appellant's appeal will be rendered nugatory if the order of stay is not granted. The 1<sup>st</sup> Respondent is of the view that whatever the Appellant now seeks to protect has taken place. It is said motor vehicle registration No. KAH 099W was sold on 29<sup>th</sup> March 2010. When the application came up for interpartes hearing, Mr. Karweru admitted that it would appear motor vehicle registration No. KAH 099W was sold on the same day the order was issued and served. His complaint is that it was sold in total contravention of the auctioneers' rules. From the submissions and the material placed before me, there is no doubt that motor vehicle registration No. KAH 223Q and the maize milling plant have not been sold. If the order for stay is not given it is obvious that this appeal will be rendered useless. I think that is the only order available at this stage. I hereby grant prayer (b) i.e. in respect of KAH 223Q and the maize milling plant pending appeal. Costs of the Motion shall abide the outcome of the appeal.

***Dated and delivered at Nyeri this 1<sup>st</sup> day of April 2011.***

**J. K. SERGON  
JUDGE**

In open court in the presence of Mr. Karweru for Applicant N/A Mwangi Kariuki for Respondent.

J.K. SERGON  
JUDGE