



**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 431 OF 2010**

**JOHN NGURE KABUTHA**

**REUBEN KAMAU MUTHONYI.....APPELLANTS**

**VERSUS**

**JAMES OSCAR HUSSEIN.....RESPONDENT**

*(Being an appeal from the ruling of the Hon. P. Gichohi (Mrs), Senior Principal Magistrate*

*delivered on 14<sup>th</sup> October 2010 at Milimani Commercial Courts in CMCC No.4230 of 2000)*

**RULING**

**Stay of execution of decree in CMCC 423 of 2000**

**Subordinate Court case pending appeal**

**I. BACKGROUND**

1. The original subordinate court case arose out of a TORT allegedly committed by the respondent/original plaintiff on 10 August 1999 between an Omni bus (Matatu so commonly called in Kenya) and the appellant (original defendants) motor vehicle truck. The omnibus is alleged to have hit the truck from behind.
2. There was judgment entered ex-parte against the appellant sometime in 2005. The judgment against two other defendants was set aside. The judgment against the appellant/defendant was executed on 31 March 2010 when M/s Daystar Auctioneers Ltd proclaimed the said properties. On 1 April 2010, a registration vehicle No. KWC 190 was attached.
3. The appellant filed an application to set aside the exparte orders. On 14 October 2010, the subordinate court dismissed the application. The appellant field an appeal to this High Court of Kenya at Nairobi. On the 21 October 2010, an application of the 21 October 2009 (to read 2010) and filed on 21 October 2010 was also filed seeking orders of stay of execution pending the hearing of the appeal.

**II. APPLICATION 21 OCTOBER 2010**

4. This application was first heard and determined by Khaminwa J but she later set her orders aside on good grounds given by the respondent. It has now come before this court for interparte hearing.
5. The applicant/appellant/original defendant stated that there be a stay of execution on grounds that at the time the application had been filed, the execution was irregularly obtained.
6. The Respondent/Respondent/Original Plaintiff explained this on the grounds that the applicant had been frustrating the whole process of execution. It therefore was important to note that the trial magistrate permitted the execution to proceed exparte.
7. As to the auctioneer license being suspended, this was one in which the decision was taken on 12 January 2010. That the effect of the suspension was from 6 March 2010, but this was not known to the auctioneers until the 15 April 2010 when the proclamation and attachment was complete.
8. The Respondent therefore prayed that there was no arguable appeal; the attachment was therefore lawful and valid that was made on the 1 April 2010. The attached goods should not be returned. That in reality, the disciplinary case 69 of 2009 held its hearing on 16 March 2010 but delivered its ruling on 21 March 2010 but this was not known to the auctioneer until 15 April 2010, when he then obeyed the orders.
9. The attachment was therefore lawful and valid that was made on the 1<sup>st</sup> April 2010. The attachment can be resolved in the alternative if the decretal sum is deposited and the goods are released together with the storage charges and auctioneers costs.

### **III. OPINION**

10. It is this court's view that once execution has been undertaken that it should be done to its completion so as not to keep the litigants, whose judgment is in his or her favour from the fruits of that judgment.
11. In this appeal, which has not been heard, the issue is whether the exparte judgment entered was regular or not. That is a matter to be dealt with in the main appeal.
12. In this application before this court, new matter has arisen. That being the auctioneer had no license to act as auctioneer and had indeed been suspended.
13. As of 2009, the respondent was aware that he had a disciplinary matter before the board. The letter clearly states that the suspension was to begin on 15 March 2010. The respondent interpreted this to mean that as he received the registered letter on 14 April 2010, time began to run as at that date.
14. This is what the advocate stated from the bar. There is no proof that the mail of the said suspension letter was undertaken on the 8<sup>th</sup> April 2010. If that was so, then the Board orders are of no effect.
15. The letter dated January 2010 clearly states the suspension was of 15 March 2010.
16. This means that the said auctioneer must release all goods attached between 15 March 2010 and August 2010 as being so attached illegally. If he had issues on the exact date he would have returned to the Board for clarification, as to the exact date the suspension of 6 months runs.
17. I would hold herein that as per the suspension letter and in light of, no other proof of receipt of the suspension notice, this court herein holds that the attachment made or the appellant's goods on 1<sup>st</sup> April 2010 was null and void.
18. That all the goods duly attached be released to the appellant without any charge either for storage nor

to the auctioneer charges.

19. The application is granted with costs to the appellant to be paid by the respondent.

RULING DATED THIS 18<sup>TH</sup> DAY OF MAY 2011 AT NAIROBI

**M.A. ANG'AWA**  
**JUDGE**

*Advocates:*

- i. *B. M. Muindi instructed by the firm of M/s Mutunga & Muindi Advocates for the Respondent*
- ii. *J. M. Nyaigo instructed by the firm of M/S Mbigi Njuguna & Co. Advocates for the Appellant*