



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NUMBER 294 OF 2011

ZACHARIA MWANGI MAINAAPPELLANT

VERSUS

JANE WANJIKU GITHIRI.....RESPONDENT

RULING

In the notice of motion dated 26.6.11 the appellant had this main prayer under **Rules 5 (2), 42 of the Court of Appeal Rules!**:

i) that there be a stay of execution of a decree pursuant to a ruling delivered on 16.6.11 in the lower court pending appeal.

That in that ruling the learned magistrate directed that a certain suit motor vehicle be kept at an agreed place or at Pangani Police Station pending hearing of this appeal. And that before the hearing of the same, the respondent was in the process of implementing the ruling of 16.6.11. The applicant stood to be prejudiced.

The applicant deponed in the supporting affidavit that the lower court ruling was erroneous in law and irregular for the reason that the motor vehicle in question could waste as the appeal sat pending. That he was the rightful owner of that motor vehicle which he bought at an auction. The order regarding its custody as directed on 16.6.11, would result in wastage of the motor vehicle therefore be a loss to the appellant/applicant.

In the replying affidavit, the respondent stated that there was no merit in the prayer sought because the motor vehicle in issue had already been taken and kept at Pangani Police Station as directed by the lower court. This was a neutral place now that the 2 litigants were feuding over the ownership of that motor vehicle. The respondent was a *bona fide* purchaser of that motor vehicle for value and the logbook (ann. JWG 01) bore her name as the registered owner.

Directed to submit, the appellant maintained that he bought the subject motor vehicle for sh. 280,000/= on 14.5.2001 at a public auction by M/s S. K. Ndegwa Auctioneers, who issued him with:

“..... relevant documents of ownership.....”

That the respondent on the other hand claimed buying the same motor vehicle from Equity Bank but that was after the appellant had purchased it as aforementioned, with no objection. The applicant then seemed to delve into what sounded like arguing the merits and demerits of how the ownership of this motor vehicle should go to him.

On the other hand the respondent repeated that the orders sought had been overtaken by events as the motor vehicle was already in the custody of Pangani Police Station as ordered on 16.6.11.

Having all the foregoing in mind and that the motor vehicle is already given into the custody of Pangani Police Station as per the order of 16.6.11, then there is nothing to stay. The appellant may go on to process his appeal for trial or better still move to have the suit in the lower court disposed of at the earliest.

Telling this court that his appeal was arguable appeared irrelevant to the conditions set down in Order 42 Civil Procedure Rules on stay.

The application is dismissed with costs.

But in passing, the court was intrigued by the appellant's bare claim that he bought the subject motor vehicle at an auction and due documents were issued to him. None was produced against the respondent's production of a copy of a log-book! And where was ann. "ZM 1" – a copy of the ruling of 16.6.11 stated in paragraph 2 of the supporting affidavit? Well.

In sum the application is dismissed with costs.

Delivered on 10.11.11.

J. W. MWERA
JUDGE