



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 47 of 2010**

**NYACABA ROCKS ENTERPRISES LTD.....APPELLANT**

**VERSUS**

**MAXWAY SERVICES STATION LTD.....1<sup>ST</sup> RESPONDENT**

**STONECITY QUARRIES LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a notice of motion dated 19<sup>th</sup> February, 2010, Nyacaba Rocks Enterprises Ltd, who is the appellant herein, has moved this court under Sections 1A, 3, 44(1), (2), and 78(1) and (2) of the Civil Procedure Act, and Order XXXIX Rule 1A, Order XLI Rule 4(1) and (6) of the Civil Procedure Rules. The appellant seeks orders as follows:

- (i) Spent.
- (ii) Spent.
- (iii) That a temporary injunction do issue, restraining the 1<sup>st</sup> respondent by itself, its servants, its agent auctioneer Ruth Ndung'u t/a Kingpin Auctioneers, or anyone acting under her or under her authority, or otherwise howsoever, from selling, leasing, using, tampering with, dismembering or interfering with the motor vehicle subject of the Appeal herein, KAV 044N Toyota Dyna, until the determination of the Appeal.
- (iv) That Order No. (iii) herein made be forthwith transmitted to, and served upon the Registrar of Motor Vehicles in regard to the records kept by him over the motor vehicle subject of these proceedings, KAV 044N Toyota Dyna, until further orders of this court.
- (v) Alternatively, pending the hearing and determination of this motion, the motor vehicle subject of these proceedings, KAV 044N Toyota Dyna, be forthwith removed to Leakey's Garage, off Enterprise Road, Industrial Area, Nairobi for safe custody at the appellant's and the 1<sup>st</sup> respondent's joint and equal expense, and not to be removed therefrom until the determination of this motion or until further court orders.
- (vi) That there be a stay of execution of the attachment of the appellant's items specified in the proclamation dated 21<sup>st</sup> November, 2009 pending the determination of the appellant/applicant's appeal.
- (vii) That the costs of this motion be provided for.

2. The application is based on an affidavit sworn by Teresiah Wangui Nganga the Managing Director of the appellant, and the grounds which are stated on the face of the motion. The background to the application is that the appellant was an objector in execution proceedings in the Chief Magistrate's Court at Thika. The objector was aggrieved by the attachment of the subject vehicle contending that the vehicle and all its accessories belonged to the objector and that the attachment and seizure of the motor vehicle was unlawful as the objector was not a party to the suit. The objection was heard by a Senior Resident Magistrate in Thika who delivered a ruling rejecting the appellant's objection to the attachment of the subject vehicle and allowing the decree holder to proceed with execution. The appellant has lodged an appeal in this court against the ruling of the Senior Resident Magistrate. The appellant's motion was filed simultaneously with his memorandum of appeal. The respondents to the appeal and the application are Maxway Services Station Ltd, who was the decree holder in the lower court and Stonecity Quarries Ltd who was the judgment debtor.

3. It is contended on behalf of the appellant that it has an arguable appeal which would be rendered nugatory unless the orders sought are given. The appellant contends that some of the goods attached are its tools of trade, which have been unlawfully attached. It

is further maintained that the 1<sup>st</sup> respondent has already been paid a sum of Kshs.200,000/= by the 2<sup>nd</sup> respondent in part satisfaction of the decree. In response to the allegation that the subject vehicle has already been disposed off, the appellant maintains that the alleged sale is a sham merely intended to defeat the appellant's interest.

4. In response to the application, Gabriel Muritu Kibe, the Managing Director of the 1<sup>st</sup> respondent has sworn a replying affidavit in which it is deponed *inter alia*, that the subject vehicle was sold, and that the appellant's application has therefore been overtaken by events. It is further contended that the application has been brought after inordinate delay and therefore the appellant has only itself to blame. Further, it is deponed that the appellant has not satisfied the conditions required in granting an order of temporary injunction. It is maintained that the 1<sup>st</sup> respondent is able to pay back the motor vehicle should the appeal be successful. It is further maintained that since it is the 1<sup>st</sup> respondent's contention that the attached goods do not belong to the appellant, the issue of tools of trade do not arise.

5. The 1<sup>st</sup> respondent's director depones that the appellant and the 2<sup>nd</sup> respondent are companies which carry on the business of stone quarrying in his land, and that the appellant is merely trying to assist the 2<sup>nd</sup> respondent which is a sister company to avoid settling the decree in CMCC No.554 of 2009. It is maintained that the attachment of the motor vehicle was proper because the decree was still outstanding to the tune of Kshs.285,844/=. In his submissions counsel for the respondents contended that the auctioneer owed no duty to the appellant as the goods did not belong to the appellant.

6. I have carefully considered the application before me. The respondent has deponed that the motor vehicle KAV 044N, which was the subject of the application has been disposed off. An advertisement for the sale of the vehicle as well as a letter from the Auctioneer confirming the sale and a receipt for Kshs.200,000/= issued to the successful bidder have been exhibited. Although the appellant alleges that the sale is a sham, the appellant has not offered any evidence to demonstrate that allegation. Moreover, it is apparent that the motor vehicle is now in the hands of a 3<sup>rd</sup> Party and the court cannot make orders involving the interests of a person who is not party to this suit.

7. Moreover, it is evident that the ruling of the trial magistrate was delivered on 29<sup>th</sup> January, 2010. The appellant only moved to this court over 3 weeks later. The apparent delay in filing the appellant's application has not been explained. That delay has dealt a death blow to the appellant's application as the execution process has been finalized. There is therefore nothing to stay. I find that the appellant's application has been overtaken by events, and the appellant has only himself to blame. Accordingly, I find no merit in this application and do therefore dismiss it with costs.

**Dated and delivered this 14<sup>th</sup> day of May, 2010**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Menye & Kinyanjui for the appellant

Advocate for the respondent absent

Eric - Court clerk