



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI LAW COURTS)
CIVIL APPEAL 316 OF 2004

ANGELINA N. KAMAU.....1ST APPELLANT

MUGANDA WASULWA

T/A KEYSIAN AUCTIONEERS.....2ND APPELLANT

VESUS

PURITY G. MUTHAMIA.....1ST RESPONDENT

**HON. RICHARD MAOKA MAORE.....2ND
RESPONDENT**

R U L I N G

1. By a chamber summons dated 14th December, 2004, the applicants Angelina N. Kamau and Muganda Wasulwa, seek to have the order made on 29th July, 2004 set aside. The applicants further seek an order that the logbook for motor vehicle registration No. KAH 096Q deposited in court pursuant to the order made on 12th May, 2004 be released to the applicants. The applicants filed an appeal in this court on 11th May, 2004, against the ruling and order made on 4th May, 2004 in Milimani CMCC No.1095 of 2004 in which it was ordered that motor vehicle No. KAH 096Q be released to the respondent Purity G. Muthamia and that the log book for the motor vehicle be deposited in court and account be taken between the parties.
2. On the 12th May, 2004, the applicants filed an application under certificate of urgency and obtained an interim order for stay of the orders of 12th May, 2004 in CMCC No.1095 of 2004, until 26th May, 2004 when the application for stay of execution pending appeal was to come for hearing. The applicants were also required to deposit into court the logbook for motor vehicle KAH 096Q. The application was however not heard but was adjourned on several occasions, interim order being extended.
3. On 18th June 2004, Hon. Ransley J. issued an order for release of the motor vehicle on condition that the sum of Kshs.252,000/=, and the bailiff charges of Kshs.122,096.69 is paid into an interest earning account in the joint names of the parties' advocates within 14 days. In default the motor vehicle was to be

sold and the distress levied.

4. On 20th July, 2004, the matter came up before P. Kihara Kariuki Ag. J. (as he then was), who directed that the file be placed before Ransley J. “for mention on 26th July, 2004, for the purpose of giving directions on his lordship’s final determination for the application dated 11th May, 2004 in the light of the ruling dated 8th July, 2004 in the lower court.”

5. On 26th July, 2004 parties appeared before Ransley J. who stood over the matter to 29th July, 2004 for further mention. On 29th July, 2004, there was no appearance for the applicant but counsel for the respondent was present. Mr. Ransley then directed that the vehicle be released and the plaintiff to pay all costs for its release and the costs of the suit. It is this order that the appellants now seek to set aside.

6. According to the affidavit sworn by the 2nd appellant, the order of 18th June, 2004, was not complied with and consequently the motor vehicle was sold on 22nd July, 2004. The applicant therefore requires the order of 29th July, 2004 to be set aside and the logbook for the motor vehicle released to enable the applicant transfer the vehicle to the successful purchaser.

7. By grounds of opposition filed on 16th July, 2007 the respondents objected the application on the following grounds:

(i) That the application is grossly incompetent and bad in law in that it contravenes the very provisions of the law it purports to rely on.

(ii) That the applicant’s remedy or recourse lies on review under Order XLIV and not setting aside under Order IXB.

(iii) That the orders sought cannot now be granted as the appeal is still pending.

(iv) That the alleged purchaser of motor vehicle registration KAH 096Q has not been enjoined and the applicants have no locus to seek the orders sought in the application.

8. There was also a replying affidavit sworn by the 1st respondent. The 1st respondent deponed that the applicants had failed to comply with the order of 29th July, 2004 but have instead engaged in fraudulent activities. The 1st respondent further deponed *inter alia*, that the applicants are acting in bad faith, and that the applicants have no locus to ask for the release of the logbook. The 1st respondent contended that the applicants ought to have applied for review and not setting aside. At the hearing of the application, the respondent did not attend court and the hearing therefore proceeded *ex-parte*.

9. I have carefully considered the application before me and the submissions which were made by counsel for the applicant. The application before me was brought under Order IXB Rule 3(a), 4(1) and 8 of the Civil Procedure Rules. However, those are provisions concerning the hearing and consequences of non-attendance of a suit after the close of pleadings. The provisions do not therefore have any relevance to this application. To that extent the application before the court is defective.

10. In arguing the application, Mr. Munjla submitted that the order of 29th July, 2004 should be set aside as it was made in error, the motor vehicle having been already sold by the time the order was made. I understand Mr. Munjla to be invoking the provisions of Order XLIV Rule 1 and 2 of the Civil Procedure Rules which provide for review of an order or decree on account of some mistake or error apparent on the face of the record. First, the application before me has not invoked the relevant provisions for review, secondly, there is no error apparent on the face of the record. The applicant is relying on contentious facts which have not been established. Thirdly, the issue of the release of the motor vehicle is the subject of the appeal now pending before this court. To grant the orders sought by the applicants would in effect prematurely determine the appeal in the applicant’s favour. For the above reasons, I find no merit in the application and do therefore dismiss it.

Dated and delivered this 11th day of May, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Mungla for the applicants

Advocate for the respondents absent

Erick – Court clerk