

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

CIVIL APPEAL 81 OF 2009

HUMPHREY WAWERU KARIUKI.....APPELLANT

VERSUS

CMC MOTOR GROUP LIMITED.....1ST RESPONDENT

KINDEST AUCTIONEERS.....2NDRESPONDENT

R U L I N G

1. Humphrey Waweru Kariuki, who is the appellant to this appeal, seeks an order of stay of execution of the ruling delivered in Milimani CMCC No.4202 of 2008, on 27th January, 2009, pending the hearing and determination of his appeal. The appellant filed a notice of motion dated 24th July, 2008, in the lower court pursuant to which he obtained an *ex-parte* interim order on 15th July, 2008 restraining the respondents, CMC Motor Group Ltd and Kindest Auctioneers, (hereinafter referred to as the 1st and 2nd respondents), with dealing in any manner with motor vehicle Reg. No.KAY 023L (hereinafter referred to as the subject vehicle).
2. The notice of motion, dated 24th July, 2008, sought *inter alia* an order of mandatory injunction directing the respondents to return the subject vehicle or in the alternative, an order directing the respondents to put the subject vehicle in the custody of Garam Investment Auctioneers or any other neutral place as ordered by the court. The motion was heard *inter-partes* and dismissed by a Senior Principal Magistrate on 27th January, 2009. That ruling and order of 27th January, 2009 is the subject of this appeal. The appellant now contends that unless the ruling delivered on 27th January, 2009 is stayed, the 1st respondent shall dispose off the subject vehicle to the detriment of the appellant who has an arguable appeal with a high probability of success.
3. The appellant maintains that the 1st respondent fraudulently and unlawfully caused the subject vehicle to be registered in its favour together with one Nicholas Kipkoech Rono while the interim orders were still in force. The appellant is therefore apprehensive that unless the orders sought are granted, the respondent will dispose off the subject vehicle since there are no orders restraining them from doing so.
4. The application was opposed through a replying affidavit sworn by Anthony G. Mbuthia, the credit controller of the 1st respondent. He maintains that the appellant's motion is incompetent, bad in law and an abuse of the court process, as a similar application filed by the appellant was pending in the Chief Magistrate's Court. It is further maintained that the appellant has not satisfied the conditions for granting an order of stay of execution pending appeal. Finally, it is contended that the appellant's motion has been overtaken by events as the subject vehicle was sold on 20th February, 2009 to Hughes Agricultural (Tanzania) Ltd. It is argued that the application for stay of execution pending appeal having been brought 30 days after the order sought to be stayed, was brought after an unreasonable delay.
5. I have carefully considered this application, the affidavit in support and in reply, the annextures thereto as well as the submissions made by counsel. It is apparent from the copy of the ruling dated 24th July, 2008 which was annexed to the affidavit of the appellant, that the ruling and order sought to be stayed is

an order dismissing the application dated 24th July, 2008 with costs. Such an order is not capable of execution except in regard to the order for costs. From the appellant's supporting affidavit it is evident that what the appellant seeks is an order which will prevent the respondent from disposing of the subject vehicle. In other words, an order of injunction. That will not be the effect of an order for stay of execution of the order of dismissal made on 27th January, 2009. Secondly, the appellant's application was dismissed on 27th January, 2009.

6. The appellant did not however move to this court for orders of stay of execution until a month later. This delay which is unreasonable in the circumstances has not been explained. Finally, it is evident from the annexures which were availed by the respondent that the subject vehicle has been disposed off. The order for stay of execution pending appeal if granted will therefore not serve any useful purpose. For the above reasons, I find no merit in this application and do therefore dismiss it with costs.

Dated and delivered this 19th day of June, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Kariuki for the appellant/applicant

Advocate for the respondent absent