



**REPUBLIC OF KENYA  
IN THE HIGH COURT  
AT KAKAMEGA  
Miscellaneous Civil Application 77 of 2009**

**CHEGENYE DANIEL CHITWAH  
T/A D.C. CHITWAH & CO. ADVOCATES ..... APPLICANT  
V E R S U S  
JOHN MUKEYA KITIABI ..... RESPONDENT**

**R U L I N G**

In his application dated 2<sup>nd</sup> July, 2009 the applicant is seeking orders restraining the respondent or his agents from taking possession of motor vehicle No. **KRK 882**, Mercedes Benz 200.

The applicant contends that he was instructed by the respondent to file an appeal on his behalf after the respondent had been committed to civil jail by the lower court. The applicant filed High Court Civil Appeal No.39 of 2009 on behalf of the respondent and contends that since the respondent was in custody, he authorized his son, one Sospeter Shole Kitiabi to give him Motor vehicle No. **KRK 882** as security for his fees. The respondent was released from civil jail but has refused to pay the fees prompting the applicant to file his bill of costs that is pending taxation.

Mr. Anziya, counsel for the respondent opposed the application. Counsel relied on the affidavit of the respondent sworn on 6<sup>th</sup> July, 2009 and that of Sospeter shole Kitiabi sworn on 6<sup>th</sup> July, 2009. Although the applicant urged the court to expunge the later affidavit. I do not find any good reason for doing so as the applicant in his supporting affidavit has averred that he went to the respondent's residence at Lurambi in the company of one Shole, who I presume to be the deponent of that affidavit. The deponent is aware about the dispute and is competent to swear the affidavit.

The application herein is brought under **sections 3, 3A, 63 (b) and (e)** and Order L **rule 1** of the Civil Procedure Act. The respondent herein admits that he instructed the

applicant to represent him. His only contention is that the vehicle in question does not belong to him. He has annexed a copy of a Sale agreement showing that the vehicle belongs to Sospeter Shole Kitiabi who according to the applicant is the respondent's son. Sospeter Shole Kitiabi has sworn an affidavit contending that the applicant intended to buy the vehicle and took it from him for test drive.

From the submissions herein, it is clear that the respondent instructed the applicant to represent him when he had been committed to civil jail. It is also clear that the respondent did not pay the applicant any legal fees. I am also satisfied that the motor vehicle number **KRK 882** was given to the applicant as security. Sospeter Shole does not state in his affidavit when the applicant took the vehicle for test drive and when the negotiations to purchase the vehicle started.

It is unfortunate that the respondent could not settle the applicant's fees amicably after he was released from prison. It does not matter whether the case was argued or parties recorded a consent.

**Sections 3, 3A and 63** of the Civil Procedure Act empowers this court to grant the orders being sought. The applicant's bill of costs is pending taxation. I do order that the motor vehicle registration No. KRK 882 shall remain in the possession of the applicant pending the taxation of the applicant's bill of costs and payment of the taxed costs. The respondent is at liberty to apply and substitute the motor vehicle herein with another security of equal value.

In the end the application dated 2<sup>nd</sup> July, 2009 is granted as prayed. The respondent shall meet the costs of the application.

*Delivered, Dated and Signed at Kakamega this 12<sup>th</sup> day of November, 2009*

**SAID J. CHITEMBWE**

**J U D G E**