

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Misc Civ Appli 2 of 2008

NYERI MOTOR SERVICES LTD APPLICANT

versus

CHARLES GACHUHI NYAMU RESPONDENT

RULING

What is for consideration in this ruling is a Notice of Motion dated 8th January, 2008. That application is brought under Order XLI Rule 4(1)(2) of the Civil Procedure Rules. The Applicant seeks stay of execution of the judgment of the Senior Resident Magistrate's Court at Muranga in Misc No. 24 of 2004 pending appeal. The Applicant in his affidavit in support deponed that a ruling was due from the Principal Magistrate's court in Misc No. 24 of 2004 on 16th March 2007. That ruling was in respect of an application dated 20th December 2006. The application was for an order to set aside a judgment entered herein. It was argued that although the court gave the date of ruling as 16th March 2007, the same was not delivered until 18th October 2007 which was in the absence of the parties herein and their advocates. That no notice was issued in respect of that ruling. The Applicant stated that he intends to appeal. In stating so the Applicant did not clearly indicate if his appeal would be against the ruling or against the judgment. What however prompted this application was that auctioneers proclaimed the Applicant's goods on 7th January 2008. The Applicant is of the view that his intended appeal has high chances of success.

The application was opposed. In his submissions counsel for the Respondent stated that Order XLI contemplated that there would be an appeal on record. There being no appeal filed by this applicant the Respondent argued that the application is incompetent.

Order XLI Rule 4(6) of the Civil Procedure Rules provides as follows:-

“Notwithstanding anything contained in subrule (1) of this rule the high court shall have power in the exercise of its appellate jurisdiction to grant a temporarily injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with”.

As can be seen from those provisions for a party to benefit from the provisions of that order they ought to have complied with the procedure for instituting an appeal from the subordinate court. The Applicant did not prove to the court that there has been such compliance. For that reason I do uphold the objection raised by the Respondent and on that reason alone the application will fail. Additionally the Applicant has failed to indicate whether the intended appeal is against the ruling read on 18th October 2007 or against the judgment which the Applicant has sought to set aside. The judgment from the information obtained from the affidavit in support, seem to have been entered in the year 2006. It would therefore seem that time has run out for filing an appeal against that judgment. Similarly if the appeal is against the

ruling of 18th October 2007, that too would be out of time if the same has not so far been filed. In the end the court finds that the application is incompetent as stated herein before and for that reason the Notice of Motion dated 8th January 2008 is hereby dismissed with costs to the Respondent.

DATED AND DELIVERED THIS 27TH DAY OF FEBRUARY, 2008.

MARY KASANGO

JUDGE