



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

Civil Appeal 554 of 2000

JOE MWANIKI MWANGI.....1ST APPELLANT

JOSEPH KAMAU MWANGI.....2ND APPELLANT

HANIEL GICHINA MWANGI.....3RD APPELLANT

VERSUS

HENRY MUKORA MWANGI.....1ST DEFENDANT

CHARLES GICHINA MWANGI.....2ND DEFENDANT

RULING

Before me is an application by way of Notice of Motion dated 10th March 2008 and expressed to be brought under Order XXI Rules 22 and 25 of the Civil Procedure Rules and Section 3A, 34 and 35 of the Civil Procedure Act in which the Applicant seeks orders that the attachment of this motor vehicle registration No. KAE 182P be lifted and that M/s Kingpin General Merchants be ordered to release the Applicant's motor vehicle registration No KAE 182P forthwith and unconditionally. The Applicant also seeks costs of this application.

The application is based on the facts as stated on the body of the Notice of Motion and supported by an affidavit sworn by the Applicant on 10th March 2008. The facts which gave rise to this litigation briefly may be stated.

The Appellants sued the Respondents on a land dispute. The dispute was referred to the Land Disputes Tribunal and decided in favour of the Respondents. The Respondents being aggrieved with the decision of the Tribunal appealed to the High Court being **Civil Appeal No 554 of 2000**. The appeal was heard by Aganyanya J. (as he then was) and was dismissed with costs on 17th July 2002 which costs were taxed at Sh. 51,000/= against both Applicants.

On 13th February 2008 the 2nd Defendant paid his portion of the taxed costs being Sh. 26,000/=. On 4th March 2008 the Respondent instructed M/s Kingpin Auctioneers to attach the Applicant's motor vehicle registration No KAE 182P. The attachment warrant indicated that the decretal amount outstanding was Sh 55,975/=.

Mr. Mungai appearing for the Applicant submitted that the judgment having been delivered on 17th July 2002 the Respondent was required to comply with the provisions of Order XXII Rule 22 which provides that any execution based on a judgment over one year old, notice to show cause ought to issue first before. Reference to Order XXII Rule 22 in the notice of motion is an error. The correct provision is Order XXI Rule 18 of the Rules. Further Mr Mungai submitted that the attachment was irregular in that the auctioneer having received part of the decretal sum amounting to Sh 26,000/= towards the settlement of the claim and the same was not disclosed in the attachment warrant as the amount demanded was Sh 55,975/=

Mr. Wandabwa appearing for the Respondents in opposition to the application relied on the grounds of opposition filed herein and further submitted that the costs having been agreed by consent the provisions of Order XXI Rule 18 did not apply. He also submitted that one year had not elapsed since the consent order for costs was recorded on 17th July 2007 and this application was brought on 10th March 2008. With due respect to Counsel, time starts running from the date the judgment was delivered and costs were awarded and therefore execution of decree required compliance of Order XXI Rule 18 of the Civil Procedure Rules. The Applicant also attached the validity of the attachment warrant which demanded a sum of Sh. 55,975/= which did not reflect a sum of Sh 26,000/= which had been received by the auctioneer on behalf of the decree-holder. The auctioneer had a duty to disclose the amount he had received towards the settlement of costs and failure to do so rendered the attachment warrant invalid and of no legal effect.

For the reasons above stated the Applicant's application is allowed in terms of prayers 2, 4 and 5 of the Notice of Motion dated 10th March 2008.

Dated and delivered at Nairobi this 26th day of June 2008.

J. L. A. OSIEMO

JUDGE