



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**MISC CASE 1690 OF 2005**

**RICHARD MWAURA KIARIE.....APPLICANT**

**VERSUS**

**MICHAEL CHEGE..... RESPONDENT**

**R U L I N G**

The Notice of Motion dated and filed on 2/12/05, seeks

1. }
2. } .....Already spent
3. Leave to file Memorandum of Appeal out of time against the order of the Lower Court, dated 7/9/05.
4. That the grant of leave operate as stay of judgment, decree and all other subsequent orders in CMCC No. 10791/04 and the attached vehicle KAP 009W be released pending the hearing and determination of the appeal.
5. The Draft Memorandum of Appeal herein be deemed duly filed and served upon payment of the court filing fees.
6. Costs to be in the cause.

The application is based on S.79G; 3A of Cap. 21, Order 21 r. 22, Order 50 r. 1, and is on the grounds **interalia** that;

The applicant intends to appeal against the order dated 7/9/05 in CMCC 1079/04 the intended appeal raises triable issues on matters of law and facts; time of lodging the appeal lapsed on 6/10/05 but the delay is so far not inordinate as it was caused by an application in the said CMCC 10791/04 filed on 29/9/04 seeking Review of the said orders of 7/9/05 – which application was determined on 17/11/05 against the applicant; the Respondent has unlawfully and without giving any valid notice of proclamation and/or attachment, attached and took possession of applicants moveable property and applicant is apprehensive that the same may be sold any time without notice; applicant stands to suffer irreparable loss if his properties are sold, in particular vehicle KAP 009W (a PSV Matatu) which is the applicant's source of livelihood.

The application is supported by an Affidavit of Richard Mwaura Kiarie.

In Response, the Respondent avers, **inter alia** that; the applicant was duly served with summons to enter appearance, through his driver; applicant was again served with 10 day Notice of Entry of judgment which was received by the conductor of applicants vehicle and applicant acknowledged receipt of the Notice; applicant filed application seeking setting aside of the default judgment which setting aside was granted on terms that the entire decretal sum be deposited in joint interest earning account within 14 days from 7/9/05, failing which the setting aside order shall stand vacated; the applicant neglected/failed to deposit the money as ordered by the court within 14 days, until 23/9/05, when the vehicle KAP 009N was attached by the Auctioneers and Notification of Sale given – for 7 days; applicant never appealed against the order of court setting aside the judgment on the stated terms, hence the applicant is guilty of laches; even if leave to appeal out of time is granted it cannot operate as stay of the decree; the applicant is in breach of the court orders; the vehicle, KAP 009W, was validly attached and auctioneer should be allowed to proceed with the public auction.

Having closely perused through the pleadings herein and considering the submissions by learned counsel for both sides I have reached the following findings and conclusions.

On 22/11/06, upon close scrutiny of the pleadings and the submissions by learned counsels for both sides, this court dismissed the application with costs, and gave today's date for delivery of the reasons for the dismissal.

From the pleadings, the applicant is not telling the whole truth to this court. The contention that applicant was not properly or duly served with the summons is irrelevant to the extent that that had been taken into account by the lower court; when that court granted the order setting aside the interlocutory judgment. That gave the applicant the opportunity to defend the suit on merit. But that opportunity was squandered by the applicant, by not complying with the conditions, set by the lower court upon which the setting aside order had been granted.

If the applicant's contention is to be believed, there is much that he did not disclose or deliberately concealed from this court.

He contends that the appeal time lapsed because of the fault of his then counsel, who, rather than proceed on appeal to challenge the ruling of the Learned Magistrate, chose, without the applicant's authority or consultation, to file an application for Review.

My perusal of the pleadings does not support those averments. This is because the application for Review was supported by a Supporting Affidavit, deponed by the applicant. How could he have sworn such an affidavit if he did not know what was happening or had not agreed to proceed with the Review application?

I do not believe the applicant on this, and his idea of an appeal was an afterthought.

Of greater importance is the fact that the lower court had set aside the interlocutory judgment and the applicant failed/neglected to comply with the terms and conditions under which that order was granted. If he felt aggrieved by the order, he should have appealed. He did not. He proceeded on a Review, and when that failed – the application for Review was dismissed – he blamed, falsely, the counsel then on record. That is where valuable time was wasted.

But of even greater importance is the fact that upon failure to comply with the Lower court's orders, the same was automatically vacated upon expiry of the 14 days and execution proceeded. Motor Vehicle KAP 009N, which was one of the moveable assets attached, was sold, by public auction, on 30/9/05.

Accordingly, to issue an order to release such goods after they have been lawfully sold and the property (ownership) passed to another person is an order in vain. This court, and any court for that matter, cannot issue an order in vain.

It was for the above reasons that the application, by way of Notice of Motion, dated 2/12/05 was dismissed, with costs to the Respondent, and against the applicant.

DATED and delivered in Nairobi, this 5<sup>th</sup> Day of February, 2007.

**O.K. MUTUNGI**

**JUDGE**