

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Commercial Civil Suit 1 of 2005

NAUSHAD TRADING COMPANY PLAINTIFF

VERSUS

JOHNSON M. KITHETE T/A FARMERS GENERAL STORESDEFENDANT

RULING

Johnson M. Kithete t/a Farmers General Stores, the Applicant in this matter, took out a motion pursuant to Order XXI rules 6,7 and 22 of the Civil Procedure Rules in which he sought for inter-alia:

- (i) *An order for stay of execution of the attachment of the motor vehicles in his possession.*
- (ii) *An order declaring the execution process as null and void*
- (iii) *An order reinstating the attached motor vehicles to him.*

The motion is supported by Johnson Muthangi kithete. The motion is resisted by Naushad Trading Co. Ltd, the Respondent herein, who filed grounds of opposition.

The Applicant has claimed in this motion that the Respondent has repossessed from him motor vehicles registration numbers KAH 912B, Trailer No. ZB 9406, KAB 32H, ZB 8874, KAD 366W, KAK 067K and KAC 356B through Mwara investments Ltd to recover a debt he owed the Respondent without a court order. It is the argument of the Applicant that the Respondent had no authority to repossess the motor vehicles. The Applicant does not state how the aforesaid motor vehicles came to his possession. The Respondent has not also assisted this court to either unravel this mystery. It is the submission of Respondent that since there was no decree, then there is nothing to stay.

I have keenly considered the rivaling submissions. I have also taken into account the material placed before this court for determination. It is orally admitted before court that the motor vehicles were repossessed from the Applicant on instructions of the Respondent. It is also admitted that there is no order or decree sanctioning the repossession. The Provisions of Order XXI of the Civil Procedure rules relate execution of decrees and orders. Order XXI do not apply to actions or omissions in situations where there is no decree or order.

Consequently, I agree with the submissions of Mr. Mogaka advocate for the Respondent that Motion is premature and misconceived. There is nothing to be stayed. This court cannot resolve the dispute set out in the motion under Order XXI. In the end the motion is hereby ordered struck out with costs to the Respondent.

Dated and delivered this 19th day of October 2006

J. K. SERGON

JUDGE

In open court in the presence of Mr. Omwenga for the Plaintiff. No appearance for the Defendant.