



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS

Civil Appeal 831 of 2005

STEPHEN MBURU NJOROGEAPPELLANT

VERSUS

HUMPHREY KABURU MICHAEL

BETH MWIHAKI KABURU.....RESPONDENTS

RULING

On 25/10/05, the appellant/applicant vide Notice of Motion of the same date moved to this court seeking the following orders:

1. **Already spent**
2. **Stay of Subordinate Court in C.M.C.C. No. 10267 of 2005 restraining the applicant from taking away, disposing or selling applicant's vehicle No. KAJ 471R pending inter-partes hearing of this application.**
3. **Upon grant of prayer No. 2 above the court to order immediate release of the vehicle held by the 1st Respondent to the applicant pending the hearing and determination of this application.**
4. **Order for the release of the said vehicle pending hearing and determination of the appeal herein.**

The application is supported by an Affidavit by the applicant – Mburu Njoroge, and on the grounds that the Subordinate Court made the order challenged herein when there was no sufficient grounds for so doing: that the applicant has appealed against the order; that the applicant will be prejudiced and inconvenienced by the said order; that the Respondents are likely to waste, misuse or dispose of the applicant's vehicle; and that applicant is apprehensive that the possession of the vehicle by 3rd party will expose the applicant to liability should it be involved in an accident or stolen.

Reading through the pleadings and considering the submissions by learned counsels for both sides, I have reached the following findings and conclusions.

The applicant has intentionally failed to disclose, to this court, how and when the vehicle alleged to be in the possession of the 1st Respondent came to be in the possession of the Respondent. The applicant's averment that the Respondent had no right to the vehicle, KAJ 471R is not wholly truthful, from the

records before me. The truth seems to be that the applicant's father owed money from a sale of land, transaction, in the process of which the applicant stood as guarantor to his father and gave the vehicle in issue as security-guarantee, for his father. When applicant's father failed to honour the agreement that is how the vehicle came to be held, as the security, as per the guarantee agreement. Whether that guarantee agreement was freely entered into or not, is a matter of evidence at a full trial. What is not disputed is that the guarantee was entered into prior to the vehicle being brought into the picture, and that is how the police came to know that the applicant had stood as guarantor for his debt, and offered the vehicle as security.

The foregoing facts are material for disclosure, but are not so disclosed by the applicant, in the absence of which disclosure the discretionary and equitable reliefs prayed for herein, are not available to the applicant under the circumstances of this case.

Secondly, the law on guaranteeship is so clear as to warrant no discourse, as attempted by the applicant. Upon default by the principal debtor-guarantee and the security thereto automatically become available to the creditor- the Respondent.

From the pleadings, the vehicle, KAJ 471R is the only security held or available to the 1st Respondent. To stay the Subordinate's order and release the said vehicle to the applicant, which orders are the essence of prayer Nos.2, 3 and 4 of the Notice of Motion herein, would be highly prejudicial to the Respondent as that would be tantamount to recalling the security from the Respondent while the debt is still outstanding. The guarantor – the applicant herein would be discharged before the debt/credit to his father, has been settled.

All in all therefore, and for the above reasons, the application, by way of a Notice of Motion fails and is dismissed with costs to the Respondent and against the applicant. The two suits at the Subordinate Court to proceed on merit, to finality. It is so ruled and ordered.

DATED and delivered in Nairobi this 16th Day of October 2006.

O.K. MUTUNGI

JUDGE