

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL 1037 OF 2004

JAMES GATHIRU GITAU
APPELLANT

VERSUS

STEPHEN NJOGU KIRUMBA 1ST RESPONDENT

CAPITAL MOTOR EXHIBITION LTD 2ND
RESPONDENT

CHOPPER AGENCIES 3RD RESPONDENT

RULING

This is an application brought under Order 41 Rule 4 and Order 21 Rule 22 of the Civil Procedure Rules for stay pending appeal of the lower court's order granting possession of the motor vehicle Reg. No. KAQ 839F to the 1st Respondent.

In his supporting affidavit, the Applicant claims to be the bona fide purchaser of the said motor vehicle, and has annexed the agreement for sale and a copy of the log book showing he is the current registered owner of the same. He claims that the motor vehicle was impounded following an application to the Court by the 1st Respondent who is its previous owner. He states that the Court Order of 10th November, 2004 releasing the motor vehicle to the 1st Respondent was not served on him.

In his Replying affidavit, the 1st Respondent states that he bought the aforesaid motor vehicle from the 2nd Respondent in September 2003, fully paid its value, and in December 2004 sold the same to one Peter Njoroge Nganga. He has not annexed any proof of such sale.

However, Mr Nganga has sworn an affidavit stating that he purchased the said motor vehicle from the 1st Respondent and has annexed the sale Agreement. However, he has not annexed any proof that he actually paid the purchase price, nor that he has the log book, nor a search from the motor vehicle registry showing that he is the current owner of the motor vehicle.

I am satisfied on a balance of probability that the Applicant here has made out a prima facie case of ownership, and that he would indeed suffer substantial loss if an order for stay were not made. He has an arguable appeal, and is entitled to orders preserving the asset which is the subject of this appeal. Because the ownership of the motor vehicle is disputed, I believe it would not be appropriate to hand-over the same to him at this time. The Order that I believe will serve the best interests of Justice is to return the same to the custody of the Police pending final determination of this appeal. Accordingly, I order that motor vehicle Reg. No KAQ 839F be placed in the custody of the Flying Squad at Pangani Police Station pending the hearing and determination of the Appeal herein. The Officer Commanding Pangani Police Station shall supervise the execution of this Order.

Dated and delivered at Nairobi this 22nd day of February, 2005.

ALNASHIR VISRAM

JUDGE