

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

MISC. CIVIL APPLICATION NO. 7 OF 2005

SUMMER DISTRIBUTORS LIMITED
APPLICANTS

VERSUS

DAHEL MOHAMMED DAUD (Sued as legal
Representative of the estate of Omar
Dahir Mohammed) RESPONDENT

RULING OF THE COURT

The applicant herein, SUMMER DISTRIBUTORS LTD was the defendant in Meru CMCC No. 609 of 2003 in which judgment was entered against the applicant in favour of the respondent for the sum of Kshs. 629,369/= on 3.8.2004. The applicant was granted stay of execution for 40 days and consent on costs was recorded on 22.10.2004. From submissions on record, the 40 days stay of execution expired on 8.12.2004 and in the meantime, the parties proceeded to negotiate fresh terms for settlement of the decretal sum. No amount was paid, and on 24.12.2004, the respondent proclaimed and attached the applicant's motor vehicle registration number KAL 044V.

On 6.1.2005, the applicant filed this application seeking two main orders, namely an order for enlargement of time for the filing of the appeal and secondly an order declaring that the attachment of the applicants motor vehicle on 24.12.2004 and the respondents requirement upon the applicant to pay the decretal sum within seven days from 24.12.2004 was in contravention of the provisions of Order 49 rule 3A, the application was brought under section 10 of the Judicature Act, the High Court Practice and Procedure Rules, Part 1 of the Vacation Rules 3(1) and (2), Sections 3A and 63 of the Civil procedure Act, Order 49 Rules 3A and 5 and Order 50 Rules 1` and 2 of the Civil Procedure Rules.

The application was based on ten grounds on the face thereof and was also supported by an affidavit made and sworn by one RAJESH PETHAD who describes himself as the manager of the applicant. The heart of the applicant's contention is that the proclamation and attachment of the applicant's property was done during the period excluded by the provisions of Order 49 Rule 3A and that the same should be found to have been irregular and unlawful and to order the same lifted. Regarding the prayer for leave to file appeal out of time, the applicant submitted that failure to file appeal within time was occasioned by the delay in providing certified copies of proceedings and judgment. The applicant annexed a copy of the letter applying for proceedings and judgment (annexture RPI) and also the certificate of delay as part of annexture RP2. The application was opposed. It was submitted on behalf of the respondent that the provisions of Order 49 Rule 3A do not apply to execution proceedings and Mr. Mithega urged the court to determine whether indeed the provisions of Order 49 Rule 3A apply to execution proceedings.

The prayer for leave to file appeal out of time was granted to the applicant on 11.1.2005 and applicant was given 14 days within which to file the appeal. The only issue for determination when the parties appeared before me on 18.1.2005 was therefore to determine whether or not the provisions of order 49 Rule 3A apply to execution proceedings. Order 49 Rule 3A provides as follows:-

“3A. Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty first day of December in any year and the sixth day of January in the year next following both days included, shall be

omitted in the computation of time (whether under these rules or any order of the court) for the amending, delivering or filing or any pleading or the doing of any other act. Provided that this rule shall not apply to any application in respect of a temporary injunction.”

Mr. Mithega for the respondent urged the court to find that the above provisions do not apply to execution proceedings. Mr. Mithega submitted that to stretch the provisions of this rule to cover execution proceedings would amount to suspending all court processes during the said period.

The reading of the rule leaves no doubt in anyone’s mind that the only proceedings not affected by the said provisions are applications in respect of a temporary injunction. Otherwise, the amending, delivering or filing of any pleading or the doing of any other act (whether under the rules or any order of the court) is put on hold between 21st December and 6th January in the next year following. In view of these provisions therefore, I find that the respondent’s purported proclamation and attachment of the applicant’s motor vehicle registration number KAL 044V on 24.12.2004 was illegal, irregular and unlawful and the same should therefore not be allowed to stand

In the result, the applicant’s application is thus allowed in terms of prayer 3 thereof. The execution levied on the applicant’s property namely motor vehicle KAL 044V Mitsubishi Canter, its accessories or any other property of the applicant attached pursuant to the proclamation dated 24.12.2004 in Meru CMCC No. 609 of 2003 is hereby ordered lifted and the property so attached be restituted forthwith to the applicant. M/S Clear Real Traders shall be served with this order for their immediate action.

As regards costs for this application, the same shall abide the outcome of the intended appeal. It is so ordered.

Dated and delivered at Meru this 1st day of February 2005.

RUTH N. SITATI

Ag JUDGE

1.02.2005