

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Misc Civil Appli 182 of 2005

SAMMY GITAU APPLICANT

VERSUS

HARUN KINYUA MBURU RESPONDENT

RULING

The applicant has filed an Appeal No. HCCA 8 of 2005. He seeks stay of execution in SRMCC 4232 of 1998 pending the hearing of the APPEAL.

The grounds upon which the stay is sought are stated in the Notice of Motion that there is risk of execution before hearing of his appeal. He complains that he was thrown out of seat of justice and that he would find it difficult to recover if appeal is successful.

Appeal stands high chances of success as the vehicle which caused the accident did not belong to him. It would be contrary to rules of natural justice were orders to be refused. The application is supported by affidavit of the applicant.

I have perused the material laid before the court. The proclamation shows decretal amount to be sh. 369,442.90/=

The goods attached are, used two sets of sofa set, one mountain bike, one TV Sony, one refrigerator Sanyo. The sale of these items all described as “used” would not fetch anything near half the decretal amount. These are goods of daily personal use.

It is also shown that the vehicle 498G the insured is Victor Waweru not Sammy Gitau, the applicant. In that lower court case the Defendant was called Sammy Gitau and he was represented by advocate. However he was not called to give evidence in his defence.

Now the applicant argues that he was never consulted by the advocate at all and he never knew of the case until the auctioneers arrived. There is an affidavit that a firm of advocates Mohammed Muigai were instructed by United Insurance to defend the case but the advocate never saw the applicant (defendant in the case). It appears to me that there might be confusion here and the applicant may be condemned to pay a decree he is not involved with.

Without commenting on the merits of the appeal I am of the view that the execution should be stayed. Firstly, because the assets attached are of household daily use and of minimal value. It would be inhuman to take them anyway.

Secondly, it just could be true that the Applicant’s vehicle was not involved. He was never in court to speak for himself. However a stay in the present circumstances can only be granted on condition.

I order the applicant to deposit Sh. 300,000/= in a joint account of both advocates earning interest for the time it will take the appeal to be heard. The deposit shall be made with the next thirty days from today. Costs shall be in appeal.

Dated 27th July 2005.

J KHAMINWA

JUDGE