



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**MISC. CIVIL CASE NO. 36 OF 2019**

**THOMAS IBRAHIM MARIGA.....APPLICANT**

**=VRS=**

**JANE NYASUGUTA NYANG'AU & DOMINIC NYANG'AU**

**{Suing as Legal Representatives of the Estate of**

**JOSEPH NYANG'AU OMUNDI (DECEASED)}.....RESPONDENTS**

**RULING**

This ruling pertains to the applicant's Notice of Motion dated 15<sup>th</sup> June 2019. The same seeks orders as follows: -

**“1. (Spent)**

**2. (Spent)**

**3. (Spent)**

**4. That the Honourable court be pleased to grant leave to the applicant to appeal against the ruling of Hon. S. K. Arome – SRM delivered on 12.6.2019 vide Keroka SRMCC No. 93 of 2016.**

**5. That there be a stay of execution of the ruling delivered on 12.6.2019 vide Keroka SRMCC No. 93 of 2016 and all consequential orders arising therefrom pending hearing of the intended appeal herein.**

**6. That his Honourable court do issue further orders that may be expedient in the interest of justice.**

**7. That the costs of this application be in the cause.”**

In other words, the applicant seeks an order for release of his motor vehicle Registration No. KBB 093D, which is in the custody of the auctioneer, pending hearing and determination of the appeal he proposes to file. The grounds for the application as can be discerned from its face and the supporting affidavit are that he has paid the entire decretal sum and the auctioneer is yet to tax his bill and the continued attachment of the motor vehicle is prejudicial.

The application is vehemently opposed vide a replying affidavit sworn by Jane Nyasuguta the respondent. Learned Counsel for the parties canvassed the application before me on 20<sup>th</sup> June 2019. I have considered the material placed before me carefully. My finding however is that the application is incompetent. The orders made by the lower court were pursuant to **Order 22 Rule 22, Order 42 Rule 6, Order 51 Rule 1 and 3** the main one being **Order 22 Rule 22. Order 43 (2) of the Civil Procedure Rules** provides that before one can come to this court they must first have leave to appeal. **Order 43 (3) of the Civil Procedure Rules** is clear on how such leave is obtained. It states:-

**“(3) An application for leave to appeal under Section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.**

**(4) Save where otherwise expressly provided in this rule, “order” includes both an order granting the relief applied for and an order refusing such relief.”**

It has not been demonstrated that leave was sought in the lower court and was refused. The applicant must first comply with the requirements of **Order 43** before coming to this court. The application for leave is rejected and accordingly the other prayers do not avail. The application is struck out with costs to the respondent. It is so ordered.

**Signed, dated and delivered in open court this day of 18<sup>th</sup> July 2019.**

**E. N. MAINA**

**JUDGE**