



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

MISC. CIVIL APPL. NO. 18 OF 2017

SIBOTA JOHN.....APPLICANT

=VRS=

**JOSEPH OGEA (Suing as the personal Representative of the
Estate of John Momanyi Onger).....RESPONDENT**

RULING

Before me is the Notice of Motion dated 14th November 2017 and filed herein on even date in which the appellant/applicant seeks return of motor vehicle KBH 502J Toyota Matatu on such terms as the court may deem reasonable. The applicant also seeks leave to file an appeal against the Ruling of Hon. A. Towett - Resident Magistrate delivered on 13th November 2017. The applicant contends that leave was not sought from the lower court hence this application. The application is supported by the affidavit of Sibota John, the applicant, sworn on 14th November 2017.

The application is opposed. In the statement of grounds of opposition filed on 29th May 2018, the respondent avers that the nature of Appeal contemplated herein lies as of right under Order 43 of the Civil Procedure Rules; that the application is misconceived, incompetent and an abuse of the court process; that it lacks merit and should be dismissed with costs.

The application was canvassed by way of written submissions.

Counsel for the applicant has in his submissions filed herein on 26th June 2018 given a brief background of the case; that the case in the lower court proceeded *ex parte* and judgement was entered against the defendant and a decree extracted. Thereafter the respondent instructed Moco Auctioneers to execute the decree and on 20th September 2017 his client's motor vehicle, the subject of this application was attached. The applicant then filed an application in the lower court seeking to set aside the *ex parte* judgement but the application dated 14th September 2017 was dismissed in a ruling delivered on 13th November 2017.

Being dissatisfied, the applicant intends to appeal against the said ruling and now seeks the leave of this court to do so as the right to appeal is not automatic. Counsel urges this court to consider the glaring nature of miscarriage of justice in the matter and grant the applicant leave to appeal as well as an order for release of the motor vehicle.

In support of his submissions, Counsel relies on the following two cases:-

1. Labh Singh Harman Singh Ltd V. AG & 2 Others Misc. Civil Application No. 83 of 2015 [2016] eKLR.

2. Edward Kamau & Another V. Hannah Mujui Gichuki & Another [2015] eKLR.

The application was opposed, this time the respondent submitting that the appeal does not lie as no leave was sought from the lower court as provided in Order 43 Rule 1 (1) of the Civil Procedure Rules. Counsel for the respondent further submitted that as there is no appeal the prayer for stay of execution does not also lie.

My predecessor Nagillah J, as he then was, granted a temporary stay of execution pending the hearing of this application *inter partes*. That interim order was granted on 15th July 2017. Thereafter Justice Nagillah retired and it was not until 31st May 2018 that the application was heard.

I have considered the application, the grounds thereof, the supporting affidavit, the grounds in opposition as well as the rival submissions of the Advocates for the parties. I have come to the unhappy conclusion that the application has no merit. To begin with, the applicant has not annexed either the order or the ruling from which he intends to appeal. Although at paragraph 3 he makes reference to a copy of the order

marked SJ1 there is no such annexure. It is not therefore possible for this court to tell whether the order sought to be appealed from is one that falls under Order 43 1 (1) or 43 (2) of the Civil Procedure Rules. If it does not fall under Order 43 (1) (1) where an appeal lie as of right, then the leave sought from this court ought to have been obtained from the lower court as Order 43 (2) states: -

“An appeal shall lie with the leave of the court from any other order made under these rules.”

The word court refers to the court from which the order was made but not the appellate court. The leave to appeal ought therefore to have been sought in the court below. If the order is one that falls under Order 43 1 (1) then this application is mischievous and superfluous and is not properly before this court. The applicant cannot seek a stay of execution pending appeal when he has not appealed. The application is therefore dismissed in its entirety and the costs thereof are awarded to the respondent. The orders by Nagillah J are hereby vacated.

It is so ordered.

Signed, dated and delivered in open Court this 1st day of November 2018.

E. N. MAINA

JUDGE