



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISC. APPLICATION NO. 34 OF 2015

IN THE MATTER OF: AN APPLICATION BY PETER KINYUA MUCHENDU T/A
KINYUA AUCTIONEERS FOR LEAVE TO

APPLY FOR ORDERS OF MANDAMUS CERTIORARI

AND

IN THE MATTER OF: CIVIL PROCEDURE ACT CAP 21 AND JUDICATURE ACT
LAWS OF KENYA

AND

IN THE MATTER OF: SRMCC MISC. APPLICATION NO.166 OF 2015 KINYUA &
CO.

AUCTIONEERS =VS= MOSES MBUGUA METHA

AND

IN THE MATTER OF: THE REPUBLIC OF KENYA

VERSUS

THE RESIDENT MAGISTRATE HON. G.O. KIMANGA.....
RESPONDENT

PETER KINYUA MUCHENDU T/A KINYUA & COMPANY AUCTIONEERS
.....APPLICANT

AND

MOSES MBUGUA MEHTAINTERESTED PARTY

R U L I N G

1. By orders made by this Court on 19th August 2015 this Court granted the ex parte applicant leave to

commence judicial review proceedings for orders of certiorari and also ordered that leave should operate as a stay of the Ruling of the lower Court delivered on 14th August 2015.

2. Aggrieved with that Ruling the Interested Party has by an application dated 24th August 2015 come to this Court seeking one principal order that the order of stay of proceedings of the Magistrate's Court in Mombasa Misc. Application No.166 of 2015 be set aside. The applicant's case for setting aside the stay order is premised upon the submissions of Mr. Waithira that contrary to the averments in the Chamber Summons of 15th August 2015 that the Applicant therein was not served, with the application dated 8th August 2015, they were actually, served and that this is clear from the lower Court's Ruling of 14th August 2015 and that the application for judicial review was in contempt of the orders of the court to return the seized goods and is an abuse of the court process.

3. On his part Mr. Wachira opposing the application, stated that the application was for Judicial Review, and relied upon the replying affidavit of the Applicant, Peter Kinyua Muchendu, the Applicant in the Judicial Review application, and denies being served with an application for contempt of Court and that he is not a party to High Court Civil Case No.5 of 2015 at Nairobi, and is a stranger to any orders in that case. Counsel therefore urged the court to set aside the stay orders.

4. The principles upon which this court may set aside its orders include the necessity to consider whether all the facts and circumstances both prior and subsequent of the respective merits of both parties, it would be just and reasonable to set aside or vary the judgment or order if necessary and upon what terms.

5. The order of stay having been made *ex parte*, is by its very nature, provisional and can be set aside by the judge who granted them, but this is a jurisdiction that is exercised very sparingly and in very clear-cut cases.

6. In the present case it's clear that the application was made to forestall execution of the order of the lower Court in exercise of its discretion. The *ex parte* Applicant is not a party in the Nairobi case, and is unaware of it. To hold it against him would be to encourage abuse of process. I therefore allow the application and set aside the order of stay made in the Ruling of 18th August 2015.

7. Save as aforesaid, the other orders made on 19th August 2015 shall remain in force.

Dated, Signed and Delivered in Mombasa this 8th day of September, 2015.

M. J. ANYARA EMUKULE

JUDGE

In the Presence of:

Wathira for Applicant

Miss Lutta for Respondent

Wachira for Interested Party

Mr. Kaunda Court Assistant