



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**HCCA NO. 4 OF 2014**

**[From the original Bungoma CMCC No. 343 of 2010]**

**ERICK KIMINGICHI WAPANG'ANA ..... APPELLANT**

**VERSUS**

**ISAAC ZACHARIA MULATI ..... RESPONDENT**

**AND**

**JOHN KENNEDY WANYAMA**

**C/O CHINA ROAD & BRIDGE ENGINEERING CO..... OBJECTOR**

**AND**

**KENNEDY SHIKUKU t/a**

**ESHIKHONI AUCTIONEERS .....APPLICANT**

**RULING**

1. In this notice of motion, it is the auctioneer's application brought under section 1A, 1B, 3A and 63 (a) of the Civil Procedure Act. The applicant sought for four prayers two of which were determined at an interlocutory stage. The prayers pending for determination are; first the applicant is asking the honourable court to set aside its orders of 4<sup>th</sup> March 2014 together with all the consequential orders and secondly he prayed for the costs of the application. The application is supported by the grounds on the face of it and the two affidavits deposited by Kennedy Shikuku.

2. The application is opposed by the appellant/respondent. The respondent deposes in paragraph 3 of his replying affidavit that this matter cannot be re-opened for the auctioneer who was not a party to the proceedings. He further deposes that counsel for the decree holder entered into consents in other proceedings aimed at pre-empting the orders of stay he already got. He says the auctioneer cannot be granted stay as there is no substantive suit filed by the auctioneer. He prayed that this application be dismissed with costs to him.

3. I have considered the contents of the present application vis-a- vi the issues raised in opposition thereto. Briefly, the genesis of this problem was occasioned by the respondent when he failed to comply within the set timelines with the interim orders issued on this file on 17<sup>th</sup> January 2014 by the E & L court sitting in Eldoret. It was complicated further by the fact of the proceedings going on concurrently

both in this file ( the appeal file) and the original case file before the chief magistrate's court whose decision the respondent has appealed. There was no stay applied for and obtained staying further proceedings in the subordinate court. This is exhibited by the annexed copy of the consent order in the respondent's further affidavit marked as 'EKW – 2.'

4. The underlying provisions of the sections in which this application is premised are the overriding objective principles which are meant to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. Section 3A & 63, the applicant seeks to invoke the inherent power of the court. Further, setting aside orders are usually given at the discretion of the court therefore any party seeking the said orders must demonstrate to court why he merits the court's positive exercise of the discretion. In the case of **Shanzu Investment Ltd. Vs. The Commissioner of Lands [1993] eKLR** the Court of Appeal laid the test for setting aside judgments as; either defence on merit or prejudice and explanation for delay as grounds for the party seeking the orders to prove.

5. The applicant deposes in paragraph 3 and 4 of his affidavit in support that it is impossible for him to comply with the orders of this court issued on 4<sup>th</sup> March 2014 as the motor vehicle in issue was already vested to a Mr. Allan Waithumbu Njuguna vide a consent order entered into and filed in the subordinate court on the 4<sup>th</sup> February 2014. Therefore had the applicant participated during the hearing of the application dated 29<sup>th</sup> January 2014 which resulted in the issuance of the orders sought to be set aside, this court may have reached it a different decision to that of the 4<sup>th</sup> March 2014. The applicant submits further that the respondent is also aware of this order although he says the order was made to perpetuate fraud against him (the respondent).

6. On the basis of the consent order filed in the subordinate court, the applicant seems to me to have a good reason to deserve the grant of the orders sought. However, the prayer for the orders of setting aside as pleaded is incomplete which then ties this court's hand in her exercise of discretion. In prayer (c) for determination is paraphrased thus;

***“That this honourable court be pleased to set aside its orders of 4<sup>th</sup> March 2014 together with all other sub-sequential orders.”***

The respondent stated that stay cannot be granted pending in a vacuum as the auctioneer has no substantive suit or interest in the present proceedings. I will point out, that stay orders was already granted pending the hearing and determination of this application. The difficulty this court faces is while the applicant is asking for setting aside; he does not specify what cause of action should follow in the event that that prayer is granted. Further, on perusal of the grounds on which the application is premised and the supporting and supplementary affidavit, the applicant does not suggest any way forward once the orders of 4<sup>th</sup> March 2014 are set aside. He should have pleaded for instance, set aside the orders of 4<sup>th</sup> March 2014 and substitute thereto an order dismissing the application of 6<sup>th</sup> Feb 2014; or for the court to direct the application to be heard afresh?

7. In my opinion, the applicant ought to have approached the court by way of an application for review which would have helped to conclude the matter on attachment. Be that as it may, in the interest of substantive justice provided for under article 159 of the Constitution, this court shall not close her eyes to the existence of the consent order filed in the subordinate court. The applicant will suffer prejudice if the orders sought to be set aside were to remain in force. I will therefore proceed to set aside partially the order issued on the 4<sup>th</sup> March 2014 to the extent that the order requiring the auctioneer to release the motor vehicle be and is hereby set aside. The application dated 29<sup>th</sup> January 2014 to be heard afresh on prayer limb (b) of the said motion. This application is therefore allowed with costs to the respondent.

**Dated and Delivered** in Bungoma this 5<sup>th</sup> day of November 2014

**A. OMOLLO**

**JUDGE.**