



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CIVIL APPEAL 184 OF 2011

DAVID WEKESA APPELLANT

VERSUS

FESTUS NGOVILORESPONDENT

R U L I N G

The application dated 6.3.12 seeks orders that pending the hearing and final determination of this appeal, orders of stay of execution do issue in respect of Butali SRM's Court Civil Case No. 135 of 2009 and order the release of the appellant's goods and animals attached by KURONYA AUCTIONEERS.

The application is supported by the affidavit of DAVID WEKESA, the appellant/Applicant.

The thrust of the said affidavit is that the applicant will suffer substantial loss since the auctioneers have attached and moved the applicant's properties and animals to their yard. The application for stay in the lower court was not successful. The applicant has averred that his appeal would be rendered nugatory if the prayers sought are not allowed.

The application is opposed to as per the replying affidavit sworn by the Respondent, FESTUS NGOVILO on 16.3.12.

According to the respondent, the applicant is not entitled to the orders sought as the applicant is the one who failed to pay the costs ordered by the lower court. That the appeal has no chances of success and no irreparable harm would be suffered as he is capable of paying the costs if the appeal succeeds. The Respondent has also contended that the application has also been overtaken by events.

I have perused the auctioneers notification of sale (annexture ""KS0 2"). The attached goods are household goods and cows. These are properties of sentimental value. The applicant will suffer substantial loss if the same are sold. The appeal will also be rendered nugatory.

The application was made without unreasonable delay. The notification of sale is dated 28.3.12. The applicant moved to court on 6.3.12.

This court has not had the benefit of perusing the lower court's record and cannot therefore comment on the applicant's chances of success.

Although the Respondent claims that the application has been overtaken by events, no documents were annexed to show that the property in question had already been sold. I have also noted that the auctioneer has not been enjoined as a party to these proceedings. Be as it may, the auctioneer is an officer of this court and should obey the court's orders.

The application is allowed on condition that the applicant deposits 50% of the decretal sum in court or in a joint interest earning account of both counsels within 30 days from the date hereon in default execution to proceed.

Delivered, dated and signed at Kakamega in open court this 5th day of July, 2012

B. THURANIRA JADEN
J U D G E