

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

MILIMANI LAW COURTS

Civil Appeal 558 of 2005

JAMES KAMAU NJOROGHE.....APPELLANT

VERSUS

KIHARA MANJAU KAGIRI..... RESPONDENT

J U D G M E N T

On 25/8/05, the Appellant/applicant came to this court, by way of a Chamber Summons under Order 41 Rule 4 of the Civil Procedure Rules, seeking: stay of execution of appellant/objectors goods in CMCC 4721/2003 pending the appeal herein, and that the attachment of the applicant's goods be raised and any attached items restored to the appellant/objector at the cost of the respondent.

His grounds are that the appellant is not a party to the suit in the Lower Court: that the proclaimed goods are the property of the appellant/objector herein.

In opposition, the Respondent avers that the proclaimed and attached goods belong to the appellant/objector because both the names Kamau Kereru and James Kamau Njoroge refer to the applicant; that the goods have already been sold; that applicant has not met the conditions of Order 41 Rule 4 (on security and evidence that he would suffer substantial loss if stay is not granted).

I have perused the pleadings and considered the submissions by Learned Counsel for both sides [Mr. Mbugua and Mr. Gachimo] and have reached the following findings and conclusions:

The only identification document attached and produced before me in the pleadings reads JAMES KAMAU NJOROGHE, and there are no other names in that ID. Where the names Kamau Kereru come from, is not shown in the documents before me. Accordingly, in the absence of such evidence, I see no basis in holding that the two sets of names belong to, and refer to, the same person described and shown as the appellant herein. Consequently, that ground of opposition to the application is not established as per the documents before me. This finding is reinforced by the Logbook for the vehicle, where the names are the same as those in the applicant/objectors ID [photocopy].

Turning to the tenets of Order 41 Rule 4 of the Civil Procedure Rules, I find that the application was made without undue delay. The Respondent stated that the applicant has offered no security as required by the Order and Rule under which the application is brought.

I have difficulty with this condition in the current circumstances and facts. The whole attachment seems to be based on the unproven allegations that the appellant/objector is the same as the judgment debtor. If that submission holds no water, as I have already held, it looks unjust to proceed and demand security from a victim who is not even a party to the suit, who is also shown to be an old man of about 70 years and whose livelihood revolves around the vehicle sought to be sold.

Under those circumstances, it is, in my view, just to hold onto the execution pending the appeal to clear some of the issues raised by both parties during the hearing of the case on merit.

I find it difficult to believe the averment, by the respondent, that a Chief's statement that the judgment

debtor is one and the same person as the appellant/objector contrary to the National Identity Card produced to be reliable as evidence.

Once there are objector proceedings, as in this case, no party should do anything to the disputed goods until those proceedings are finally concluded, including the appeal against the lower court's ruling. That is what justice demands and that is the right thing to do. Consequently, to aver that the goods have been attached and sold when these proceedings were still unconcluded, is no defence.

All in all therefore, I grant the Chamber Summons herein in terms of prayer No. 2. No execution pending the final determination of the appeal herein. The Respondent to meet the costs of this application.

It is so ordered.

DATED and delivered in Nairobi this 19th Day of October 2006.

O.K. MUTUNGI

JUDGE