



**Kariuki v Azan Motors Limited (Civil Appeal E097 of 2023)
[2023] KEHC 27119 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27119 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E097 OF 2023
REA OUGO, J
DECEMBER 19, 2023**

BETWEEN

JOHN NDUATI KARIUKI APPLICANT

AND

AZAN MOTORS LIMITED RESPONDENT

RULING

1. The application for determination dated 11/10/2023 brought under sections 1A, 1B, 3A & 63 (e) of the *Civil Procedure Act* and orders 42 rule 6 of the *Civil Procedure Rules* seeks for orders for stay of execution of the ruling delivered on 29/8/2023 in Kimilili Magistrate's Court CMCC No. E91 of 2022 pending the hearing and determination of the application and the appeal.
2. The application was based on the grounds that the applicant filed a suit before the subordinate court seeking an order to restore possession after the respondent took the applicant's vehicle KCZ 806V on the pretext of repossession yet the respondent had no interest in the vehicle. At the time of filing suit, the respondent had taken the suit vehicle. Through a court order dated 8/6/2020, the applicant took possession of the vehicle. However, the trial court on 29/8/2023 ordered that the applicant should surrender the vehicle to the nearest police station without vacating the orders issued on 8/6/2022. The applicant alleges that the orders of 29/8/2023 have not only created an absurdity in terms of enforcement but it will cause the applicant to lose possession which will translate to massive losses as the applicant uses the vehicle as matatu. The applicant contends that the application has been made without undue delay and is willing to abide by any condition as to the security that the court will find reasonable to impose. The applicant alleges that the granting of the orders sought will not prejudice the respondent but will ensure that the subject of the appeal is preserved so that the appeal is not rendered nugatory. The application was supported by the affidavit of John Nduati Kariuki rehashing the ground on the face of the application.



3. In opposing the application, the respondent filed a Replying Affidavit dated 18/10/2023. It was averred that the application had been brought in bad faith as the trial court correctly found that the applicant failed to demonstrate how he was lawfully in possession of the vehicle having failed to avail the sale agreement. He also explained that the alleged third party that sold the vehicle to the applicant, Patrick Masinde Nyongesa who was charged with conspiracy to defraud contrary to section 393 of the Penal Code. However, the applicant at the filing of suit failed to inform the court of the pending criminal proceedings relating to the vehicle. The honourable trial court after looking at the evidence presented before it directed the vehicle be held at the police station to preserve the suit vehicle. In any event, the respondent argues that the vehicle can only be released to the original owner. It also blamed the applicant for failing to carry out a search to ascertain ownership of the vehicle. The respondent contends that the only remedy available to the applicant is a refund from the third party that sold him the vehicle.
4. The applicant in response filed a further affidavit and averred that the respondent has no claim with respect to the suit vehicle as it is registered in the name of Builderscope Enterprises Limited and the respondent is neither its director nor shareholder of the said company. Prior to the vehicle being transferred to Builderscope Enterprises Limited, the same was owned by Motorology Limited. The applicant argued that if the court assumed that the respondent sold the car to Patrick Masinde Nyongesa on 7/11/2020 then the transfer of the vehicle to Builderscope Enterprises Limited was then fraudulent. He denied colluding with Patrick Masinde Nyongesa to obtain vesting orders. He avers that his suit is anchored on him having possession of the vehicle. He advanced that he stands to lose Kshs 2,915,000/- which he has already paid as the purchase price.
5. The respondent filed a supplementary affidavit and averred that the introduction of Builderscope Enterprises Limited at this stage is meant to confuse the court. He contends that the applicant's failure to sue the party who sold the vehicle to him is suspicious in that at the time of paying the purchase price, he ought to have requested the logbook from the said Patrick Masinde Nyongesa.
6. At hearing Mr. Anwar relied on the applicant's supplementary and further affidavit. They also relied on their written submissions. Mr Anwar made oral submissions in support of the court granting an order of stay. Mr. Osoro similarly made oral submissions and relied on his written submissions dated 3/11/2023.
7. Having carefully considered the submissions by the parties and the affidavits on record, the issue is whether the applicant has demonstrated a case for the granting of stay orders. Order 42 rule 6 of the *Civil Procedure Rules* stipulates:
 1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.
 2. No order for stay of execution shall be made under sub rule 1 unless: -
 - a) The Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and



- b) Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant”.

8. The purpose for granting an order of stay was enumerated by the court in RWW vs. EKW (2019) eKLR where the court stated:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

9. The court is therefore required to balance two competing interests and not create a disadvantage. The Court of Appeal in Absalom Dova vs. Tarbo Transporters [2013] eKLR, held that:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

10. In this case, the affidavits of both the applicant and respondent point to a dispute on ownership of the vehicle. The issue of ownership is yet to be determined by the trial magistrate. The applicant is apprehensive that the vehicle will be vandalized at the police station if the orders of 29/8/2023 are complied with. The applicant also argued that it uses the vehicle as a matatu and will therefore suffer substantial loss if the vehicle is taken to the police station.
11. On the other hand, the respondent fears that if the vehicle is released to the applicant, he will remove it from the jurisdiction of the court and that the value of the vehicle will continue to depreciate if the applicant were to continue using it.
12. Order 42 Rule 6 of the Civil Procedure Rules deals with the stay of execution pending appeal to preserve the subject matter in dispute. However, in this case, I have taken into account the fact that the trial court has not had the chance to thoroughly assess the positions of the parties involved by conducting a full hearing. Consequently, issuing an order of stay at this juncture would place a considerable disadvantage on the respondent. While the court has the discretion to grant a stay order and order that the applicant deposits with the court such an amount as it may deem fit, such an order would only remain in effect until the appeal is heard and dispensed with. Furthermore, in the event of an unsuccessful appeal, the respondent would not be entitled to the deposited sum, all the while the vehicle would have continued to depreciate.
13. In the end, I decline to grant the orders sought in the notice of motion dated 11/10/2023. The application is hereby dismissed. Costs of the application shall be in cause.



DATED, SIGNED, AND DELIVERED AT BUNGOMA THIS 19TH DAY OF DECEMBER 2023.

R.E. OUGO

JUDGE

In the presence of:

Mr. Anwar -For the Applicant

Respondent - Absent

Wilkister -C/A

