



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL NO. 712 OF 2017**

**PURITY WANJIRA MUIRURI.....APPLICANT**

**VERSUS**

**NEWDAY MOTORS LTD.....1<sup>ST</sup> RESPONDENT**

**JANE WANJUKI NJIRU.....2<sup>ND</sup> RESPONDENT**

**FRANCIS KYALO KATUNDU.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The application dated 15<sup>th</sup> December, 2017 is brought under Section 3A of the Civil Procedure Act, Order 51 rule 1 and Order 42 rule 6 Civil Procedure Rules. Principally, the application seeks orders that this honourable court be pleased to order stay of execution of the judgment and orders issued on 20<sup>th</sup> November, 2017 as against the Appellant in Milimani Chief Magistrate CMCC No. 4916 of 2012 pending the hearing and determination of this Appeal.

2. The application is based on the grounds stated therein and is supported by the affidavit sworn by the Applicant, Purity Wanjira Muiruri. The gist of the application is that the appeal herein which has prospects of success will be rendered nugatory and loss occasioned to the Applicant if execution proceeds.

3. The application is opposed as per the grounds of opposition dated 11<sup>th</sup> January, 2018 which state as follows:

**“(1) THAT the application is bad in law and ought to be dismissed forthwith.**

**(2) THAT the application lacks merit and must be disallowed with costs.**

**(3) THAT the application is not made in good faith.**

**(4) That the appellant’s application is a deliberate delay of the court process.**

**(5) That the application is frivolous, vexatious and an abuse of the court process.**

**(6) The motion must be disallowed in any event”**

4. The application was canvassed by way of written submissions which I have considered.

5. Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 provides as follows:

**“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.”**

6. The Appeal was filed timeously. The averments by the Applicant that she stands to suffer substantial loss have not been controverted by any other evidence. Although no security for the due performance of the decree has been offered, the court can in an appropriate case exercise discretion and impose conditions for stay of execution.

7. I have perused the Record of Appeal which has been filed herein. The Applicant filed the suit seeking, *inter alia*, restraining orders against the Respondents, their agents, servants and/or employers from repossessing, selling transferring or interfering with motor vehicle Registration No. KAA 816 Y Isuzu Lorry which she alleges to have purchased jointly with the 3<sup>rd</sup> Respondent from the 1<sup>st</sup> Respondent.

8. The trial magistrate dismissed the Plaintiff/Applicant's case and ordered that the motor vehicle be returned to the 1<sup>st</sup> Respondent. The Applicant was also ordered to pay Ksh.700,000/= to the 1<sup>st</sup> Respondent who had counterclaimed for the same. The judgment of the trial court brought to an end the temporary orders of injunction that the Applicant had been enjoying pending the hearing and determination of the suit.

9. The effect of the judgment of the Lower Court is that the motor vehicle goes to the 1<sup>st</sup> Respondent and that the Applicant do pay Ksh.700,000/= to the 1<sup>st</sup> Respondent. Seeking stay of execution orders would therefore in my view only affect the payment of the Ksh.700,000/=. As regards the possession of the motor vehicle pending appeal, it is noteworthy that no order was sought for the grant of a temporary injunction pending the hearing and determination of the appeal as provided for under Order 42 rule 6(6) Civil Procedure Rules. The court cannot therefore stay the negative.

10. Taking the foregoing into account, that the subject motor vehicle be returned to the 1<sup>st</sup> Respondent, and the Applicant is indebted to the 1<sup>st</sup> Respondent to the extent of Ksh.700,000/=: my view is that each party is holding almost 50% stake of the results of the impugned judgment. To balance the competing interests of both parties, I allow the application for the stay of execution in respect of the Ksh.700,000/=. Costs in cause.

**Dated, signed and delivered at Nairobi this 14<sup>th</sup> day of June, 2018**

**B. THURANIRA JADEN**

**JUDGE**