



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL DIVISION**  
**HIGH COURT CIVIL APPEAL NO. 328 OF 2016**

**FULGENCE MBELENGA SEMBUA.....APPLICANT**

**VERSUS**

**MWANANCHI CREDIT LIMITED.....RESPONDENT**

**RULING**

1. The amended notice of motion dated 19<sup>th</sup> September, 2016 principally seeks the following orders:
  - (a) **That this Honourable Court do order a stay of the ruling delivered on 25<sup>th</sup> May, 2016 and the subsequent orders of the Lower Court pending the hearing and determination of this appeal.**
  - (b) **That pending the hearing and determination of the appeal, this Honourable Court do issue an injunction restraining the defendant from transferring, repossessing, attaching, disposing or in any way dealing with that motor vehicle registration number KBA 933C**
  - (c) **That pending the hearing and determination of the suit, this Honourable Court do issue an injunction restraining the Defendant from transferring, repossessing, attaching, disposing or in any way dealing with motor vehicle registration number KBA 933C**
2. The application is predicated on the grounds stated in the body of the application and is supported by the affidavit and further affidavit sworn by the Applicant, Fulgence Mbelenga Sembua. The Applicant's case is that he used his motor vehicle registration No. KBA 933C make Mercedes Benz as security for a loan of Kshs.300,000/= obtained from the Respondent. That he signed a blank transfer form and gave the Respondent the original Log Book for the said motor vehicle. The Applicant's complaint is that he has fully repaid the Loan but the Respondent has refused to discharge the security deposited and without any basis has proceeded to demand a further sum of Ksh.423,893/=.
3. It is further stated that the Applicant filed suit in the lower court and applied for an order of injunction which was granted on 25<sup>th</sup> May, 2016 on condition that the sum of Ksh.423,893/= be deposited in a joint interest earning bank account of the advocates for both parties. According to the Applicant, the said order is oppressive and amounts to prematurely determining the case. That his former advocates did not inform him of the said conditional orders until time had almost lapsed and it was too late to raise the deposit amount within time. The Applicant then instructed his current advocates who lodged an appeal and filed

the application in the lower court for stay of execution pending appeal. That the said application ended up being dismissed for non-attendance on a day that it was not causerlisted. That the application for stay was later reinstated but ended up being dismissed again on 4<sup>th</sup> August, 2016 for non-attendance although once again it had no hearing date on the day it was dismissed. The Applicant's contention is that he faces the danger of losing his motor vehicle which is valued at Ksh.1,800,000/=. The Applicant further stated that the Respondent is in possession of the Log Book and the transfer form and that the Respondent's counterclaim is well secured if it succeeds.

4. The application is opposed. It is stated in the replying affidavit that the supporting affidavit sworn by the Applicant refers to annexures which are not exhibited. It is further stated that the application is an abuse of the process of the court as the Applicant failed to deposit the sum of Ksh.423,893/= as ordered by the lower court. That the lower court dismissed the Applicant's application for non-attendance. That the Applicant has not applied for the orders of dismissal dated 4<sup>th</sup> August, 2016 to be reviewed, set aside or the application reinstated and therefore the instant application is an abuse of the court process. It is contended that the Applicant has also not given any security for the due performance of the decree. Accordingly to the Respondent, the Applicant has a remedy against his former advocate for professional negligence for failure to attend court. It is further stated that the Applicant has the possession of the motor vehicle in question and has hidden it in an unknown place.

5. The application was argued by way of written submissions which I have duly considered.

6. 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.”**

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

**“ Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”**

8. The orders the subject of the application under consideration were made on 25<sup>th</sup> May, 2006. The application at hand was filed on 31<sup>st</sup> August, 2016. In the meantime the Applicant made an application before the lower court seeking stay orders pending appeal. The application was dismissed on 30<sup>th</sup> June, 2016 for non- attendance but later reinstated. The application however ended up being dismissed again for non-attendance on 4<sup>th</sup> August, 2016. Although the Applicant has explained that the application was dismissed on a date that it had no hearing date, there is no evidence from the Applicant to show that he applied for the review or setting aside of the dismissal orders and have the application reinstated. The Applicant has therefore not given a satisfactory explanation for the delay in filing the instant application. The Applicant chose to make further applications before the lower court then appears to have abandoned the same.

9. The Respondent's contention is that the application at hand is an abuse of the process of the court. Under order 42 rule 6(1) Civil Procedure Rules the Applicant has a leeway to come to this court on an application for stay despite the dismissal or grant of the same by the lower court. However, the Applicant opted to go to the lower court where he made a subsequent application which was dismissed for non-attendance. Coming to this court without seeking to have the dismissal orders reviewed or set aside by the lower court and have the application reinstated amounts to an abuse of the court process.

10. It is noted that although it is stated in paragraph No. 12 of the Applicant's affidavit in support that was sworn on 19<sup>th</sup> September, 2016 that the application made in the lower court for stay orders pending appeal has been exhibited herein, there is no such application on record. Indeed there are no annexures at all attached to the affidavit in support of the application dated 19<sup>th</sup> September, 2016. Even the application dated 31<sup>st</sup> August, 2016 which was subsequently amended and which the Applicant's counsel has argued contains all their annexures does not have the said application.

11. The Applicant has the possession of the motor vehicle while the Respondent has the possession of the motor vehicle's documents. Although the Applicant has stated that the Respondent will not suffer any prejudice if the application is allowed, on the other hand the Respondent complains that the motor vehicle has been hidden by the Applicant in some unknown place. From what I can discern from the material before me, the Respondent has a counter claim to the suit that is pending before the lower court. However, in the replying affidavit herein, the Applicant has not controverted the Applicant's evidence that the loan has been repaid by the Applicant in full. Consequently, based on the affidavit evidence before me, I am satisfied in the circumstances of this case that the Applicant has established a *prima facie* case.

12. As stated by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR:**

**“.....a prima facie case” I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

13. The subject of the suit is a motor vehicle. A motor vehicle may be of a sentimental value but it is noted that the Applicant gave it out as security for the loan, thereby making it a disposable commodity that can be compensable in monetary terms. However, the balance of convenience would favour the preservation of the motor vehicle pending the hearing and determination of the appeal herein. Thus the Applicant's case meets the threshold of grant of injunctive orders as per the principles set out in the case **Giella vs Cassman Brown (1973) EA 358.**

14. The issuance of injunctive orders calls for deposit of security as to damages. The grant of orders of stay of execution also require deposit of security for the due performance of the decree. The Applicant was given stay orders by the lower court on condition that the sum of Kshs.423,893/= be deposited in a joint interest earning bank account in the names of the both advocates on record. The period within which the said deposit was to be made has since lapsed. Although the Applicant complains that the said orders amount to a premature determination of the case in favour of the Respondent's counter-claim which is for the same amount, the nature of the orders he seeks require the deposit of security. Consequently, I allow the application on condition that the Applicant do deposit the sum of Kshs.423,893/= as ordered by the lower court or deposit security valued at not less than Ksh.500,000/= within 30 days from the date hereof. The security to be assessed by the Deputy Registrar of this court. In default the application stands dismissed.

15. The record of appeal to be compiled and served and appeal to be fixed for directions within 30 days from the date hereof.

16. Costs of the application in cause.

Dated, signed and delivered at Nairobi this 21<sup>st</sup> day of June, 2017

**B. THURANIRA JADEN**

**JUDGE**