



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL DIVISION**  
**HCA CASE NO. 298 OF 2015**

**SIMON CHEGE WAMBIRI .....1<sup>ST</sup> APPLICANT**  
**JOSEPH GITHUKA NJAMBI.....2<sup>ND</sup> APPLICANT**  
**VERSUS**  
**NEWDAY MOTORS LTD .....RESPONDENT**

**RULING**

1. The Notice of Motion dated 3<sup>rd</sup> June 2015 seeks orders, *inter alia*, that the execution of the orders made herein by the Magistrate's Court, (Milimani) Hon S.Atambo (Mrs.),Principal Magistrate in CMCC 4204 of 2014-Newday Motors Limited versus Simon Chege Wambiri & another on 20<sup>th</sup> May 2015, be stayed pending hearing and final determination of this appeal.
2. The application is based on the grounds stated on the face of the application and the affidavit in support sworn by the 1<sup>st</sup> Applicant, Simon Chege Wambiri.
3. The genesis of the dispute is a sale agreement made between the 1<sup>st</sup> Applicant and the Respondent on 25<sup>th</sup> June, 2014 for the sale of two units of Toyota Hilux D/Cab motor vehicles at the price of kshs.2,500,000/=. A dispute arose between the parties as to who was to pay customs duty for the motor vehicles to be cleared from the port. The Applicants held the view that the customs duty was not part of the purchase price of the motor vehicles while the Respondent's position was that the customs duty was to be deducted from the purchase price. The matter ended up in court. The Lower Court in a ruling in an interlocutory application made orders for the release of the motor vehicles documents to the Respondent. The Applicants are apprehensive that the Respondent may transfer the motor vehicles to a third party hence the appeal herein.
4. A replying affidavit was filed in opposition to the application. It is deposed that the two motor vehicles the subject of the sale agreement were due for auction by Kenya Revenue Authority (KRA) for non-payment of duty and port charges at the port of Mombasa. That the purchase price of Kshs.2,500,000/= was inclusive of duty and port charges and the Respondent had paid the same in full. According to the Respondent, it was the Applicant who rescinded the contract by seeking to be paid an additional sum of kshs.2,500,000/= over and above the agreed purchase price in order to release the motor vehicles together with the original import and clearance documents.

5. The Respondent's contention is that the contract of sale was clear and valid and the parties are bound by the same. That it was therefore proper for the lower court to grant orders of mandatory injunction at an interlocutory stage. The Respondent further stated that the time lines for the registration of the motor vehicles have passed and the Respondent stands to suffer substantial loss due to the delay and the depreciation of the motor vehicles.

6. The Application was canvassed by way of written submissions. I have considered the said submissions together with the list of authorities filed.

7. Appeals to the High Court are governed by Order 42 of the Civil Procedure Rules. Order 42 rule 6 (2) provides as follows:

**“No order for stay of execution shall be made under subrule**

**(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. Stay of execution is a discretionary remedy. As stated by the Court of Appeal in the case of **Absalom Dove vs. Tarbo Transporters [2013] eKLR:**

**“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 which is not a question of discrimination”.**

9. In the case at hand, the application for stay was filed on 15<sup>th</sup> July, 2015. The impugned ruling was delivered by the trial magistrate on 20<sup>th</sup> May, 2015. It has been explained in the supporting affidavit that the ruling was delivered after a delay of nine months and without notice of the delivery date to the parties. This position has not been controverted by the Respondent. The ruling has been exhibited herein and it reflects that it was delivered in the absence of the parties. The delay was not inordinate and it has been explained. The applicants have also offered to deposit security.

10. On the issue of substantial loss what is at stake is the amount of money payable as customs duty for the motor vehicles. The said amount of money is known. There are no allegations that the Respondent is not capable of refunding the said amount if the court so orders. There is no dispute between the parties that the contract of sale was for the sale of the motor vehicles by the 1<sup>st</sup> Applicant to the respondent. In my view, there is no good reason for the continued detention of the motor vehicles. Consequently, I hold that the Applicant will not suffer any substantial loss if the Lower Courts orders are not stayed.

11. As stated by the Court of Appeal in the case of **Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) KAR 1018:**

**“If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdiction for granting stay.”**

12. With the foregoing, I find no merit in the application and dismiss the same with costs.

Dated, signed and delivered at Nairobi this 18<sup>th</sup> day of August, 2016

**B. THURANIRA JADEN**

**JUDGE**