

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 161 OF 2010

JOSEPH GITARI WAMBURI. RESPONDENT/APPELLANT

VERSUS

GENERAL MOTOR LIMITED..... APPLICANT/RESPONDENT

RULING

The application before the court is the Notice of Motion by the Respondent's in this appeal. The application is dated 1st August and seeks mainly the following orders: -

- a. **That the order by the trial magistrate granting the Appellant an unconditional stay pending the final determination of the appeal, be set aside.**
- b. **That in the alternative to a) above, the Appellant be ordered to deposit the decretal sum in a joint interest-earning account as may be directed.**

The application is based on the grounds that the stay order should not have been granted without proper exercise of the discretion exercisable in such cases.

The Respondent, during the hearing of the application, argued that the lower court failed to consider the principles of granting stay. That he failed to consider the need for security from the Appellant and failed to consider whether or not the Appellant would suffer any substantial loss if the order of stay was not granted.

I have examined the ruling of the lower court which granted the stay. It is very brief. It states as follows:-

“I have considered the 2nd Defendant’s Notice of Motion application dated 11th May, 2010 and the able submissions by learned counsel for the parties. The application seeks stay of execution pending appeal. The same is allowed as drawn. M K Kiema.”

Clearly, the trial court does not show he considered the principles or terms for granting a stay of execution. The Honourable trial magistrate does not show what issues he took into account and whether or not he considered, particularly the issue of security required to be taken into account under order 42 rule 6 of the Civil Procedure Rules. On that point this court agrees with the view expressed by the Respondent.

On the second point assuming that the trial court considered the issue of substantial loss, this court is of the view that a more balanced approach should have included security.

The conclusion that the court reaches is accordingly as follows: that the Appellant should have stay of execution pending the determination of appeal but he must also deposit in the bank in a saving, interest earning joint counsel operated account, the decretal sum of Ksh.561,865/-, within 30 days. In default of which, the order of stay on record shall automatically stand discharged. Orders accordingly.

Dated and delivered at Nairobi this 19th day of February 2014.

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D A ONYANCHA

JUDGE