



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL APPEAL NO. 445 OF 2014**

**TIMMEH IBRAHIM ..... ADVOCATES**

**VERSUS**

**TIPAPA OLE KIRROKOR ..... 1<sup>ST</sup> RESPONDENT**

**EQUITY BANK LTD..... 2<sup>ND</sup> RESPONDENT**

**R U L I N G**

By a notice of motion dated 8<sup>th</sup> October 2014 and filed in Court on 10<sup>th</sup> October 2014 under certificate of urgency, the appellant/applicant Timmeh Ibrahim seeks from this Court orders:-

1. Spent
2. Spent
3. Spent
4. Spent
5. That pending the hearing and final determination of this appeal, the Court do grant an order of stay of all proceedings and orders in **Nakuru CMCC 950/2014 – Tipapa Ole Kirrokor – Vs – Timmeh Ibrahim & Equity Bank Ltd.**
6. That pending the hearing and final determination of this appeal, the Court be pleased to make an order that the suit motor vehicle registration No. KBT 049K Toyota Land Cruiser be delivered by the 1<sup>st</sup> respondent for safe custody into a neutral place preferably Leakey's Storage Ltd, situated at Lunga Lunga Road, Industrial Area, or any other neutral place as may be directed by the Honourable Court.
7. That the costs of this application be borne by the 1<sup>st</sup> respondent.

The application is brought under the provisions of Order 42 rule 4(1) and (3), Order 51 Rule 1 of the Civil Procedure Rules Sections 3, 3A, 6 and 63 (b) and (3) of the Civil Procedure Act and all other enabling provisions of the law.

On the face of the application, the appellant/applicant relies on 13 grounds in support of the application. The applicant also relies on her supporting affidavit sworn on 8<sup>th</sup> October, 2014, and filed in Court on 10<sup>th</sup> October 2014. The application was served upon the respondents on 10<sup>th</sup> October 2014 as shown by the copy of acknowledgement and affidavit of service sworn by Ruth Kemunto on 11<sup>th</sup> October 2014 an authorized process server.

The application was not opposed by the second respondent who appeared through Kibatia & Co Advocates and represented in Court by Miss Ontiti holding Mr. Waithaka's brief.

The 1<sup>st</sup> respondent did not file any response to the application.

Mr Aloo advocate for the appellant/applicant argued the application on behalf of his client and urged the Court to grant the orders sought, highlighting the main grounds that the appeal as filed is arguable, that the respondent has abused the court process by filing different suits in different courts over the same subject matter, same parties and obtaining orders by means of misleading the court; all parties herein have an interest in the suit motor vehicle; that the suit motor vehicle is in danger of being wasted, damaged and or disposed of to unknown destination; that the appeal shall be rendered nugatory unless the orders sought are granted and that the applicant stands to suffer irreparable loss, damage and prejudice if the orders sought are denied.

There are two issues for determination in this application namely:

- 1) Whether the applicant has satisfied the Court on the conditions/principles laid down for stay of proceedings pending appeal and secondly, whether the order for return and preservation of the suit motor vehicle pending appeal is warranted.

On the first issue, the principles for staying proceedings pending hearing and determination of appeal were set out in the case of **Global Tours and Travels Ltd, Winding Up Cause No. 43 of 2000** where **Ringera J** (as he then was), expressed them thus:-

*“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion it should be exercised rationally and not capriciously or whimsically.*

*The sole question is whether it is in the interest of justice to order a stay of proceedings and, if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting the order. And in considering those matters it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously.”*

The above principles as stated by **Hon. Ringera J** are in my view, applicable in the instant application.

Further, in **Halsburys Laws of England 4<sup>th</sup> Edition Vol 37 pages 330 and 332**, it was discussed thus:

*“The stay of proceedings is a serious, grave and fundamental interpretation in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”*

*“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional circumstances.”*

*“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in an equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not probably succeed on the basis of the pleading and the facts of the case.”*

The Court of Appeal in **Standard Limited & Others – Vs – Wilson Kalya CA App NRB 369/2001**

developed some principles applicable in application for stay of proceedings to guide the exercise of that power of stay so that the same is not left to caprice and those guidelines are simple and direct as follows:

- a) The appellant must show that his appeal is an arguable one. In other words, he must show that the appeal is not a frivolous one
- b) The appellant must also show, in addition, that if the order of stay or proceeding is not granted, his appeal, if it were to succeed, would be rendered nugatory.

These principles are applicable in the instant application as the application is made in the appeal and the Court will hear the appeal.

The written law concerning stay of proceedings pending appeal is as espoused in Order 42 Rule 6 of the Civil Procedure Rules whose provisions, I need not restate here save that from the authorities I have cited and the applicable law under Order 42 Rule 6, the Court has unfettered discretion or order for stay of proceedings pending appeal.

I have carefully considered the appellant's application, the grounds set out in support thereof and the affidavit sworn by the appellant coupled with the highlights made by Mr Aloo in his submissions in favour of the application. It is important to note here that the usual structures that sufficient cause be shown, substantial loss, bringing of the application without undue delay and provision of security are, from the plain reading of Order 42 Rule 6 applicable only to applications for stay of execution only and not stay of proceedings.

From all the above exposition, the issue for my decision is whether the appellant has shown sufficient cause to justify the Court granting stay of any further proceedings in the matter pending in **Nakuru CMCC 950/2014**, pending hearing and determination of this appeal.

But before I determine that issue, brief facts of the subject matter of the dispute giving rise to this appeal must be outlined here for record purposes.

That the appellant herein obtained a bank loan from Equity Bank for purposes of purchasing a motor vehicle registration No. KBT 049K make Toyota Land Cruiser Chassis No. JTELB 71J70-7722284 Engine No. IHZ-0698137 and the motor vehicle was jointly registered in her names and the bankers. That later on 25<sup>th</sup> April, 2014, the appellant agreed with the 1<sup>st</sup> respondent to sell to him the said motor vehicle before she had completed paying for it and before the 2<sup>nd</sup> respondent discharging her from the debt at an agreed purchase of Sh. 4,414,000/-

The mode of payment was that 2,100,000 was by way of an assignment of a debt owing to the plaintiff/1<sup>st</sup> respondent by one Rafik Paul Ole Kayuma and a balance of Sh. 2,050,000 would be paid by the purchaser/1<sup>st</sup> respondent in installments and the last installment would be on or before 9<sup>th</sup> June 2014.

That transfer of the said motor vehicle would be effected upon completion of payment of the purchase price. The agreement for sale/purchase clearly acknowledges the interest of equity Bank as the appellant's financier for the purchase of the suit motor vehicle.

Clause 10 of the agreement gave the appellant the right to repossess the motor vehicle in the event that the purchaser failed to clear the balance on or before 9<sup>th</sup> June 2014 upon giving 7 days notice and return the amounts already paid less 10%.

To date, it is alleged that the 1<sup>st</sup> respondent has not paid for the said motor vehicle save for sh. 490,000 in bits and pieces contrary to the agreement. The clause 13 thereof provided for a mode of dispute resolution between the parties as by arbitration under the Arbitration Act (1995).

On 10<sup>th</sup> June 2014 a day after the period for completion of repayment installments lapsed, and without

completing such installment as agreed, the 1<sup>st</sup> respondent filed Milimani CMCC 3264/2014 against the appellant and Equity Bank claiming that the appellant was in the process of repossessing the motor vehicle in question yet he had paid off leaving a balance of only 1,844,000 which he was ready to settle with the 2<sup>nd</sup> respondent in order for him to get a transfer of the motor vehicle in his favour. He also sought a permanent injunction restraining the appellant from repossessing, immobilizing, grounding and or in any way interfering with his possession, ownership and use of the said motor vehicle.

Simultaneous with the plaint dated 10<sup>th</sup> June 2014, the 1<sup>st</sup> respondent filed an application for an injunction against the appellant and Equity Bank from repossessing, immobilizing, grounding or in any manner interfering with his possession or ownership and use of the suit motor vehicle. His affidavit sworn on 19<sup>th</sup> June 2014 attached copies of the sale agreement, copy of logbook, certificate of security device installation, motor insurance, inspection report and the assignment of a debt to serve as part payment. He also attached acknowledgments for part payments received by the appellant.

On 10<sup>th</sup> June 2014 Hon. Teresia Ngugi issued an interim injunction in the 1<sup>st</sup> respondent's favour pending interpartes hearing on 23<sup>rd</sup> June 2014. The order was issued on 12<sup>th</sup> June 2014.

On 19<sup>th</sup> June 2014, the appellant herein filed a replying affidavit opposing the application for injunction and also filed an application dated the same day seeking to discharge the interim orders granted on 10<sup>th</sup> June 2014 on account that the 1<sup>st</sup> respondent had withheld material facts from the Court at the time he obtained the ex parte injunction by misrepresenting facts to the Court among them, that he had breached the agreement and having failed to pay the installments, as agreed he was now abusing the court process. In addition, that he failed to disclose the interest of Equity Bank in the suit motor vehicle and the fact that 2.1 million was an assignment of a debt not cheque or cash payment made to the appellant as alleged.

It was contended that ex parte injunctive orders ought to be discharged as they were an abuse of the court process.

The record shows that on 18<sup>th</sup> September 2014, the interim ex parte injunction issued in favour of the 1<sup>st</sup> respondent was discharged by the Court which also dismissed his application dated 10<sup>th</sup> June 2014 and on 19<sup>th</sup> September, 2014 the appellant wrote to the 1<sup>st</sup> respondent asking him to deliver back to her the suit motor vehicle.

The order of 18<sup>th</sup> September 2014 discharging the injunction also ordered the parties to list the matter for pretrial conference. The Court condemned the appellant to pay costs of all the three applications.

The appellant was dissatisfied with the part of the ruling and filed an appeal herein vide memorandum of appeal dated 8<sup>th</sup> October 2014 and filed in Court on 10<sup>th</sup> October 2014.

Immediately the said 1<sup>st</sup> respondent's application was dismissed by the order of 18<sup>th</sup> September 2014, by a notice of withdrawal of suit dated 25<sup>th</sup> September, 2014 signed by Koceyo & Co Advocates, the 1<sup>st</sup> respondent purported to withdraw Milimani CMCC 3264 of 2014.

In the meantime, the appellant had filed a statement of defence and counterclaim against the 1<sup>st</sup> respondent's claim on 21<sup>st</sup> July 2014. The same is dated 14<sup>th</sup> July 2014 and filed all his list of documents and witnesses in preparation for the pre-trial directions.

No sooner had the 1<sup>st</sup> respondent purported to unilaterally "withdraw" his suit from **Milimani CMCC 3264/2014** than he rushed to the Nakuru Chief Magistrate's Court and filed **NKR CMCC No. 950/2014** vide plaint dated 1<sup>st</sup> October 2014 and filed on the same day, seeking in prayer 3 for a permanent injunction restraining the appellant herein and Equity Bank Ltd from repossessing, attaching, seizing, impounding or immobilizing the motor vehicle KBT 049K. in paragraph 5 thereof he averred that he had filed **NRB CMCC 3264 of 2014** between him and the appellant herein and Equity Bank Ltd which he

withdrew on 26<sup>th</sup> September 2014 and that therefore there was no other suit pending between him and the same defendants in any other court over the same subject matter. The suit was filed by the firm of Karanja Mbugua & Co Advocates of Nakuru.

Simultaneous with the filing of the plaint he also filed his written and signed statement outlining his side of the story concerning his claim which story is the same as what he had presented before Milimani CMCC 3264/2014. He also attached copies of sale agreement, logbook, acknowledgement of payments for the suit motor vehicle. And by the same suit, the 1<sup>st</sup> respondent filed an application for an injunction and he did on 1<sup>st</sup> October 2014 obtain an ex parte injunction issued by **Hon. R. Amwayi Resident Magistrate Nakuru** restraining the other parties to the suit – the defendants from repossessing, seizing, immobilizing and or in any way interfering with motor vehicle KBT 049K. the said order set the application for interparties hearing on 14<sup>th</sup> October 2014.

Those are the brief facts of the dispute herein.

With the above facts in mind, it is surprising that the appellant/applicant herein has not annexed copy of the ruling of 18<sup>th</sup> September 2014 delivered by the **Hon. Teresia Ngugi**, part of which she was dissatisfied with. Which would have enabled this Court to determine whether the appellant has an arguable appeal or whether the same is frivolous on the face of it.

That notwithstanding, it is clear that the 1<sup>st</sup> respondent bid to retain the suit motor vehicle by hook or crook is unstoppable.

First, he purported to withdraw suit from the Milimani Commercial Courts when he knew very well that the same was defended and therefore a notice of withdrawal filed by him on 25<sup>th</sup> September 2014 was non consequential for the following reasons:

a) Under Order 25(1) of the Civil Procedure Rules, the plaintiff can only withdraw suit which has not been set down for hearing by filing a notice of withdrawal of suit and serving upon all parties. He never served the notice of withdrawal of suit on affected parties and even if he did, under Sub rule 2 thereof, where a suit has been set down for hearing it may only be discontinued or any part of the claim withdrawn upon the filing of a written consent signed by all the parties.

In the suit therein, the matter had been heard by way of an application and his quest for an injunction had been unsuccessful hence, he required the consent of all the other parties as pleadings had even closed and it was only pending pre-trial directions under Order 11 of the Civil Procedure Rules as directed by the magistrate on 19<sup>th</sup> September 2014.

b) Under Rule 2(2) of Order 25, where a suit has been set down for hearing the Court may grant the plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise as may be just and under subrule (3) this rule applies to counter claims.

It is clear from the above provisions that the 1<sup>st</sup> respondent could not purport to withdraw suit which was fully defended and action already taken in the matter with the defendants therein having filed a counter claim, without notice to the parties, their consent, or without leave of court: and proceed to file another suit in a Nakuru court seeking for the same orders which the court in Nairobi Chief Magistrate's Court had denied him, and obtain such orders ex parte.

It is for the above reasons that I shall not hesitate to grant the application herein on both limbs (1) for stay of proceedings in **Nakuru CMCC 950/2014** on account that the appellant is bound to suffer serious prejudice, unless the orders sought are granted at this stage. The subject matter of the dispute is a moveable property which is capable of being damaged, wasted, modified or even disposed of within and without the jurisdiction of Kenyan courts. The conduct of the 1<sup>st</sup> respondent calls for the issuance of the

second limb that he has abused the court process by shopping for a soft forum from which he can casually obtain injunctions and take off never caring the effect those injunctions have on the adverse party. He has shown that he is a dishonest person who cannot be trusted in a transaction and even with court orders. He hoodwinked the appellant into believing that he had the means to purchase her motor vehicle only to turn around and seek to deny the appellant the right to receive the purchase price and even purported to seek leave of court to pay the balance of the purchase price to the Equity Bank wherein the appellant had sourced financing for the purchase of the said motor vehicle, then terminated the suit unilaterally and took off to another court in Nakuru where he obtained what I can only describe as flying orders! This is unlawful. It offends the provisions of Sections 6 and 7 of the Civil Procedure Act.

On whether I should grant prayer 6 of the application, this is a case that calls for a mandatory injunction too, to preserve the subject matter of the dispute. The 1<sup>st</sup> respondent knew that the agreement provided for a clause for arbitration as a dispute resolution mechanism available to the parties in the event of a disagreement but he opted out first by filing the dispute in court and has become unstoppable as far as obtaining court injunctions through concealment of material facts is concerned. The appellant/applicant has by the elaborate documentation in support of her application ably demonstrated that she deserved the orders sought. Whether or not she has an arguable appeal, she is likely to suffer irreparable loss and damage if the orders sought are not granted, as the 1<sup>st</sup> respondent has by his conduct demonstrated that he is unable to pay for the motor vehicle he purported to purchase from the appellant.

The appellant has also demonstrated that by the conduct of the 1<sup>st</sup> respondent, recovery of such purchase price or motor vehicle cannot be achieved without undue difficulty.

Based on the holding in the case of **Locabail International Finance Ltd – Vs – Agro Exports Another [1986] All ER 901**, I am persuaded that the appellant herein deserves the orders sought.

In that case, the Court set out principles applicable in cases of mandatory injunctions, which are different from those applicable in interlocutory injunctions, as set out in **Giella – Vs – Cassman Brown Case [1973] EA 358**. It was thus spelt out in the Locabail case that:

***“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff (emphasis added.) moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial, it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibitory injunction.”***

These principles have been applied in our Kenyan cases of **Kamau Mucuha – Vs – The Ripples Ltd (CA NRB 186/92 UR)** where Cockar JA stated, citing the Locabail case:

***“A party, as far as possible, ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act and, without, in any way attempting to pre-decide the intended appeal or to influence a decision thereon, I am of the view that the order of the learned Judge, granting the prohibitory and mandatory injunctions ought not to be disturbed at this stage.”***

The court further observed that:

***“The courts have been reluctant to grant mandatory injunctions at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.”***

And in **Diamond Trust Bank (K) Ltd – Vs – Jaswinder Singh Enterprises [1999] 2 EA 72 n. 80.** **Owuor J** (as she then was), citing the **Shepherd Homes Ltd – Vs – S. Ham [1971] Ch 340** stated where it was stated that at the end of the action the court will, of course, grant such injunction as justice of the case require, but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted **“even if sought to enforce a contractual obligation.”** (*Emphasis added*).

In the application herein, I am persuaded that the 1<sup>st</sup> respondent is stealing a match on the appellant. I am equally convinced that there are special circumstances warranting a grant of the prayer for the delivery of the motor vehicle into the custody of this court to ensure that the subject matter of the dispute in the court below is preserved and justice is meted out without the need to wait for a full hearing of the entire case, even if such order is sought to enforce a contractual obligation between the parties and especially against the 1<sup>st</sup> respondent.

The applicant has also brought this application timeously and without any delay.

Accordingly, I order and direct that:-

- 1) Proceedings pending in **Nakuru Chief Magistrate’s Court CMCC 950/2014** be and are hereby stayed pending the hearing and determination of this appeal and the hearing and determination of **Nairobi Milimani CMC 3264/2014**.
- 2) The motor vehicle registration number KBT 049K Toyota Land Cruiser Chassis No. . JTELB 71J70-7722284 and engine No. IHZ-0698137 be and is hereby ordered and directed to be impounded, seized and or removed from the possession of the 1<sup>st</sup> respondent Tipapa Ole Kirrokor, his agents, servants and or any other person acting on his behalf or claiming through him; and be placed in the custody of this court to be stored into a place that shall be directed and ordered by the court upon the said seizing, impounding and eventual delivery of the said motor vehicle into the court’s custody.
- 3) The officer commanding Narok Police Station or any other police officer in whose jurisdiction the aforesaid motor vehicle shall be found to be lying, moving and or driven or parked is hereby ordered and directed to accompany and assist a duly appointed court bailiff to be instructed by the Deputy Registrar of this court to execute and ensure the effective execution of the orders of impounding, seizing and delivery of the aforesaid motor vehicle into the custody of this court.
- 4) The appellant/applicant to facilitate the process of enforcement of the orders herein which costs shall be recoverable from the 1<sup>st</sup> respondent Tipapa Ole Kirrokor.
- 5) The appellant shall have costs of this application payable by the 1<sup>st</sup> respondent.
6. The appeal herein be fast-tracked for expeditious disposal.

**Dated, signed and delivered at Nairobi this 24<sup>th</sup> Day of  
October, 2014.**

**R.E. ABURILI**

**JUDGE**