



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**

**CIVIL APPEAL NO. 131 OF 2011**

**PETER THEURI NDIRANGU .....APPELLANT/APPLICANT**

**VERSUS**

**MOSES KARIUKI MWANIKI.....RESPONDENT**

*(Being an Appeal from the Judgment of M. WACHIRA Chief Magistrate Embu in PMCC NO. 62 on 4/10/2011)*

**R U L I N G**

This is the application by way of Notice of Motion dated 3rd May 2012. It seeks an order of stay of execution of the judgment delivered on 4th October 2011 until the appeal is heard and determined. The grounds are on the face of the application. The main ground is that in the civil case the subject of the appeal the Chief Magistrate awarded the motor vehicle KAS 157N to the Respondent. And if the motor vehicle is released he will suffer great prejudice.

The Respondent filed a replying affidavit opposing the application saying a similar application had been made before the Chief Magistrate's Court and was dismissed. Further he says the Applicant has not deposited any security for the stay. He annexed the Ruling by the Chief Magistrate in the lower Court civil case.

When the application came for hearing Mr. Njage for the Respondent though served did not appear. The Respondent did not also appear. In his oral submissions Mr. Kebuka for the Appellant/Applicant reiterated that if the motor vehicle in issue is not released the appeal would be rendered nugatory. In a Criminal Case No. 2514/05 the Court had made an order that the said motor vehicle be released to another person. He asked the court to recall the vehicle if it had been released.

I would start by saying that it is not disputed that the appellant/applicant had made an application similar to this one before the Chief Magistrate and the same was dismissed on 19/4/2012. Does this bar him from making a similar application before the court he has appealed to? Order 42 Rule 6(1) of the Civil Procedure Rules provides As follows:-

***“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”***

My finding from this provision is that after the refusal of his application by the Chief Magistrate the applicant could either appeal against that order of refusal OR file a fresh application before this court for its consideration. He chose the latter. His application is therefore properly before this court.

In a judgment the subject of this appeal ownership of the motor vehicle KAS 157N was awarded to the Respondent. The application before me is dated 3/5/12 and filed on 4/5/12. The application was not prosecuted because there was a pending criminal case No. 2514/05 whose judgment the parties were waiting for and they felt it may have a bearing on this appeal. Nothing has been done even in this appeal which was filed on 4/11/11. It has not been admitted to date. The awaited for judgment finally came. I have looked at the said judgment which is undated. An extracted order shows that the learned trial magistrate on 11th June 2013 issued an order releasing the motor vehicle registration No. KAS 157N and another to the complainant. The complainant must be the complainant in the criminal case and who is not the appellant/applicant. A perusal of the charge sheet shows the complainant as Johana Kinyua Mwaniki, who is not the appellant/applicant nor the respondent. It is only that court which can therefore clearly indicate who it released the motor vehicle to.

The appeal herein is from the decision in the civil case and not the criminal one. For stay of execution pending appeal to be granted the following must be established as provided for under Order 42 Rule 6 (2) of the Civil Procedure Rules and case Law.

- I. ***Substantial loss may result to the applicant if the order is not made.***
- II. ***He has an arguable appeal.***
- III. ***Security for due performance of the decree should be made.***

It is the duty of the applicant to demonstrate to the court that if stay of execution is not granted he will suffer substantial loss. And that he has an arguable appeal. This is what the Court of Appeal in the case of ***ABOK JAMES ODERA T/A A.J. ODERA & ASSOCIATES VS JOHN PATRICK MACHIRA T/A MACHIRA & CO. ADVOCATES Civil Appeal No. Nairobi 28/02*** (Tunoi, Owour & Keiwa JJA as they were then).

***“Where the applicant has not shown that his appeal would become nugatory because of the inability on the part of the respondent to refund any sums he would be found liable to refund to the applicants, application for stay of execution pending appeal not granted”.***

All that the appellant/applicant is saying in paragraph 8 of his supporting affidavit is that if stay is not granted the appeal will be rendered nugatory. He does not explain how it will be rendered nugatory.

This motor vehicle has been laying at the police station since 2005. It is not clear if it has been released following the court order of 11/6/2013. And if it has been released to whom has it been released? The order releasing that motor vehicle on 11/6/2013 is not the subject of this appeal and has not been challenged. It is true this court has wide discretion and may order for the motor vehicle to be retained at the police station. But such orders can only be made judiciously after considering all relevant facts. Since this court is not sure of the whereabouts of the said motor vehicle, it would not be prudent to make any orders touching on its retention especially in view of the fact that there is an unchallenged order of release of the said vehicle to another person who may not be a party to these proceedings. The appellant/applicant has not shown that the respondent is a man of straw and would in the event of a successful appeal not be able to return him the motor vehicle or its value.

My finding is that the appellant/applicant has failed to demonstrate that he would suffer substantial loss if the order for stay is not granted. He has also failed to show that it would be impossible to recover the motor vehicle or its value from the respondent in the event of a successful appeal.

The application is therefore dismissed with costs.

**DELIVERED, SIGNED AND DATED AT EMBU THIS 17TH DAY OF JULY 2013.**

**H.I. ONG'UDI**

**JUDGE**

**In the presence of:-**

**Ms. Kainga for Kebuka Wachira for applicant**

**Njue CC**