



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

Civil Appeal 84 of 2008

**NOAH WAFULA WANJALA.....APPELLANT**

**~VRS~**

**DAVID SIFUNA WAKHUNGU.....RESPONDENT**

(Appeal from the ruling by the Senior Resident Magistrate Hon. J. K. Ng'arng'ar at Bungoma in Civil case no.276 of 2006)

**RULING**

When the Respondent filed the suit before the lower court he was seeking the refund of Ksh.120,000/= which he had on 18/9/2004 paid to the Appellant who was selling him motor vehicle registration number KDY 494 Isuzu pick-up. The agreed purchase price was Ksh.145,000/= and therefore the Ksh.120,000/= was part-payment. The vehicle was handed over to him but on discovering that it had defects which had not been disclosed he returned it to the Appellant to undertake repairs and give back. The Appellant, however, failed to give the vehicle or refund the Ksh.120,000/= which was sought together with costs and interest. The Appellant filed a defence admitting that he had entered into the agreement and had been paid Ksh.120,000/= towards the Ksh.145,000/=. He, however, stated that the vehicle was in good repair but that the Respondent had used it without sufficient water in the radiator which had damaged the “*cylinder headasket.*” The Appellant had repaired the vehicle but the Respondent had failed to pay for the repairs to be able to collect it.

The trial court received evidence from the parties and found for the Respondent. The Appellant filed this appeal in which he made the present application for stay pending its hearing and determination. The application was opposed and the parties filed written submissions which I have considered.

It was not categorically stated by the Appellant that the Respondent is a man of straw who may not refund the decretal sum if the application is not granted and the appeal ultimately succeeds. This is because the primary consideration in such an application is whether the non-granting of stay would occasion substantial loss to the Appellant. In such a money decree the court has to be persuaded that the sum will be at risk because of the lack of means on the part of the Respondent.

Secondly, the Appellant sought stay in the subordinate court in his application dated 5/2/2009

following judgment on 27/10/2008. The application was dismissed on 11/5/2009. The present application was filed on 8/7/2009, two months later. The delay was not explained.

I agree with the Respondent that the application lacks merits and is dismissed with costs.

Dated, signed and delivered at Bungoma this 17<sup>th</sup> day of September, 2012.

**A. O. MUCHELULE**  
**JUDGE**