



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT EMBU**  
**Civil Appeal 3 of 2010**

KENSILVER EXPRESS LTD.....APPELLANT  
VERSUS  
JOSPHAT MARANGU.....RESPONDENT  
**RULING**

Civil Appeal No. 3 of 2010 is an appeal against the order of Hon. NYUTU RM in Embu Chief Magistrate's Court Civil Case No. 131 of 2006 in respect of the application dated 18/1/2001.

There are only 3 grounds of Appeal as enumerated hereunder:-

1. *That the learned magistrate erred in law and fact in the manner she exercised her discretion not to certify the matter as urgent in view of the circumstances of the case.*
2. *That the learned magistrate erred in law and fact by refusing to grant temporary orders of stay in the interim referred being, had to the urgency of the matter.*
3. *That the learned magistrate erred in law and fact in ignoring the sound submissions of the counsel on record and failing to consider the grounds in support of the urgency in the application dated 12/1/2010.*

As rightly submitted by counsel for the respondent therefore, there is no appeal against any Judgment in respect of any decree on any decretal amount awarded against the appellant herein.

On the same date the appeal in question was filed, the appellant/applicant filed the notice of motion under certificate of urgency seeking the following orders.

- (a) *That this Honourable court be pleased to stay the sale of motor vehicle registration No. KAV 378 K Isuzu Bus and execution generally by the respondent pending the hearing and determination of the appeal filed herein.*
- (b) *That consequently, this Honourable court be pleased to order the release of motor vehicle Registration No. KAV 378 K Isuzu minibus belonging to the Appellant forthwith by Giant Auctioneer (sic).....*

The second prayer has been overtaken by events since the motor vehicle has since been released from the auctioneers albeit on some conditions issued by the High Court earlier on. That prayer is therefore spent and the court is therefore only concerned with prayers (a).

when I look at the affidavit in support of this application, it gives a history of the case before the subordinate court and the history or existence thereof of a particular moratorium and how the Judgment ought not therefore to have been entered or execution carried out, yet there is no appeal before me in respect of the Judgment giving rise to the execution proceedings against which the stay order is sought.

I have perused the subordinate court file just for purposes of appraising myself of the history of the matter. I can however only deal with this application within the confines of the material that have been placed before me in this particular file.

Having considered the material before me including the rival affidavits and the submissions by both counsel, I cannot say that the

applicant has shown me that he has sufficient cause in his appeal. The appeal is against the order refusing to grant stay orders. The order refusing the stay orders has not even been annexed to the supporting affidavit in order for me to see the reasons given by the learned trial magistrate for her refusal. I cannot therefore fault her **"in vacuo"**. This means therefore that the applicant has failed in the establishing the every primary requirement under Order XLI Rule 4 to show sufficient cause. He has not even remotely shown that he has a good appeal with chances of success.

He has not shown that he will suffer substantial loss nor that he is already in possession of the said motor vehicle. He has failed to show that if the money in question is released to the respondent, he will not be in a position to refund the same if and when required to do so thereafter.

The question of there being a moratorium or not has nothing to do with the appeal before me whatsoever since the same is not addressing the Judgment in question. I shall not therefore address the issue.

This application in my considered view lacks seriousness and substance. I have not been convinced or indeed given any basis for exercising my discretion in favour of the applicant herein. This application therefore fails and the same is hereby dismissed with costs to the respondent. I also order that the money deposited in court pursuant to the court's order issued on 29/1/2010 be released to the Respondent forthwith.

**W. KARANJA**  
**JUDGE**

Delivered, signed and dated at Embu this 15th day of April 2010.

**In presence of:-Both accused counsel absent**

**one Jesse Kisaina a representative of Kensilver (appellant) present.**