



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI  
MILIMANI LAW COURTS**

**Civil Appeal 48 of 2010**

**TIMES CAPITAL LIMITED.....APPELLANT  
VERSUS  
JAMES ONDIMU ONGUSO.....RESPONDENT**

**R U L I N G**

1. Times Capital Limited, (hereinafter referred to as the applicant), has lodged an appeal in this court against the ruling and order of the Resident Magistrate delivered on 16<sup>th</sup> February, 2010 in Nairobi CMCC No.2020 of 2009. Filed simultaneously with the memorandum of appeal is a notice of motion dated 19<sup>th</sup> February, 2010 in which the applicant seeks an order of stay of execution of the orders issued by the trial magistrate pending the hearing of its appeal.
2. The applicant's main contention is that the orders issued by the trial magistrate effectively determine the entire suit, without summons to enter appearance being issued, or the applicant being heard. The applicant maintains that unless the order of stay of execution is issued, the order issued by the trial magistrate will be executed and the applicant's appeal will be rendered nugatory.
3. James Ondimu Onguso, who was the plaintiff in the lower court (hereinafter referred to as the respondent), objects to the application through grounds of opposition filed on 2<sup>nd</sup> March, 2010 in which the respondent contends inter alia, that the application is defective and that the applicant is not entitled to equitable orders as he has come to court with dirty hands.
4. From the affidavit filed in support of the application and the annexures thereto, it is evident that the orders which were sought by the respondent in his application subject of the order now under appeal, were as follows:
  - i. (a) Service upon the defendant/respondent be dispensed with in the first instance and the application herein be certified urgent and heard *ex parte*.
  - (b) Interim Orders be granted *ex parte* in terms of prayer 1(c), (d), (e) here below pending the *interpartes* hearing of this application.
  - (c) A temporary injunction be issued pending the hearing and determination of this suit to restrain the defendant, their servants, agents or otherwise from transferring or disposing off the motor vehicle pending the hearing of the application.
  - (d) A temporary injunction be issued pending the hearing and determination of this suit to restrain the defendant, their servants, agents or otherwise from transferring or disposing off the motor vehicle pending the hearing of the suit herein.
  - (e) The defendant be restrained by an order of the court from effecting any changes in the registration of the motor vehicle.
  - (ii) A mandatory injunction do issue against the defendant requiring him to release motor vehicle registration No.KAD 536S to the plaintiff forthwith.
  - (iii) In the alternative to prayer (ii) above, this Honourable Court be pleased to issue order for preservation of the motor vehicle registration No.KAD 536S by the plaintiff pending the determination of the suit herein.
  - (iv) In the circumstances to prayer (ii) above, this Honourable Court be pleased to issue an order for preservation of the motor vehicle registration No.KAD 536S by the plaintiff pending determination of the suit herein.
  - (v) Such further order be made as may seek just to this Honourable Court.
5. In his ruling which is also an annexure to the affidavit, the trial magistrate noting that the applicant had already sold the subject vehicle despite the court order injuncting the applicant from doing so, issued an order in the following terms.
  - (i) Defendant to pay the value of the motor vehicle (as per the valuation in the renewal notice marked as exhibit 1 in the plaintiff's submissions.) assessed at Kshs.400,000/=.
  - (ii) Costs to the plaintiff/applicant
  - (iii) Interest at court rates.
6. It is obvious at a glance that the order issued by the trial magistrate during the interlocutory application was not one of the orders sought by the respondent in his application. It is also evident that the order issued by the trial magistrate is not an interlocutory order but has an element of finality. Thus, the applicant's appeal is not frivolous. In the circumstances of this case, it is fair and just that the order issued by the trial magistrate be stayed on terms pending the hearing and determination of the appeal.
7. Accordingly an order for stay of execution pending appeal shall issue on the following conditions:
  - (i) That the applicant shall deposit a sum of Kshs.400,000/= into an interest earning account with a reputable financial

institution in the joint names of the parties' advocates within 21 days from the date hereof.

(ii) The applicant shall file and serve a record of appeal within 90 days from the date hereof.

(iii) The applicant shall take all necessary action to facilitate the speedy disposal of this appeal. In the event that the appeal is not disposed off within 12 months from the date hereof, the order for stay of execution pending appeal shall stand discharged unless otherwise extended by the court.

(iv) Costs of this application shall be costs in the appeal.

**Dated and delivered this 10<sup>th</sup> day of May, 2010**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Miss Wambui for the applicant

Advocate for the respondent absent

Eric - Court clerk