



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

**AT MACHAKOS**

**Civil Appeal 111 of 2008**

**WINFRED WANZA MBUVA ..... 1<sup>ST</sup> APPELLANT/APPLICANT**

**S.M.N. MBUVA ..... 2<sup>ND</sup> APPELLANT/APPLICANT**

**VERSUS**

**STANPONY KATEE KIMANTHI ..... 1<sup>ST</sup> RESPONDENT**

**DAVID M KYULE ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Application dated 27/6/2008 is premised on Order XLI Rule 4 (1) and Order L Rule 1 of the Civil Procedure Rules and the orders sought are as follows:-

- a. “THAT this application be certified urgent and service thereof be dispensed within the first instance.
- b. THAT there be a stay of execution of the judgment and orders given in Machakos CMCC No.880 of 2003 on the 6<sup>th</sup> June 2008 pending the hearing and determination of this appeal and the subject motor vehicle registration in KAE 250 W – which has been held at the Kileleshwa Police Station pursuant to the orders by consent in the Lower Court given do continue being held at Kileleshwa Police Station until this appeal is heard and determined or pending further orders of this Court.
- c. THAT the costs of this application be in the cause.”

2. The grounds in support are that:-

- a. “The Appellants have lodged this appeal against the judgment of the Ag. Principal Magistrate by which he ordered for the release of the subject motor vehicle to the 1<sup>st</sup> Respondent and which – if executed will take away permanently the said motor vehicle and which will render the Appellants Appeal nugatory as it will take away the substratum of the Appeal.
- b. The release of the motor vehicle will leave the Appellants without remedy in the circumstances of this case and without opportunity for restitution as the vehicle will be subject to wear and tear, deterioration, accident and even disposal by the 1<sup>st</sup> Respondent and which will occasion substantial loss to the Appellants.

c. It is in the interests of justice that the motor vehicle be preserved “in situ” to enable a determination of this Appeal be made without fettering any of the parties rights.

d. The application is further supported by the affidavit of Winnie Mbuva – the 1<sup>st</sup> Appellant herein and further reasons to be adduced at the hearing of this appeal.”

3. I have read the Supporting Affidavit sworn on 27/6/2008 by Winne Wanza Mbuva by Mr King’ara on behalf of the Applicant. I note that judgment was entered against the Applicants on 6/6/2008 and prior to that, on 17/4/2001 parties recorded a Consent Order in which it was agreed that Motor vehicle Reg. No. KAE 250 Peugeot Station Wagon would remain at Kileleshwa Police Station until the suit was heard and determined. In the judgment aforesaid, the learned trial magistrate found that the said motor vehicle properly belonged to the Respondents and the same should be released to him. The present Application seeks a stay of that order until the Appeal is finalized. The reasons are set out in the grounds set out above but more importantly, Mr King’ara has argued that substantial loss will be occasioned to the Applicants if the vehicle is released because it may be disposed off by the 1<sup>st</sup> Respondent and the whole substratum of the Appeal would be lost.

4. The 1<sup>st</sup> Respondent in her Replying Affidavit sworn on 22/8/2008 and filed on the same day, depones that the Application before me is devoid of merit and should be dismissed with costs. That she purchased the motor-vehicle subject of the suit and she is capable of repaying its value should the Appeal succeed. Finally, that the Applicant has no locus standi to bring the proceedings as she only obtained a power of attorney after the motor vehicle had already been sold and it cannot grant her such locus standi as she has now assumed.

5. On my part, I think that the matter is fairly simple; on locus standi, I have perused the Power of Attorney dated 17/6/1999 and it is properly framed and registered on 24/6/1999. It grants the Applicant complete power in relation to the disputed motor vehicle and I think that the issue raised thereto is moot.

6. On the substance of the Application, a party seeking a stay order pending appeal must abide by the following condition set out by Order XLI Rule 4 (2) of the Civil Procedure Rules;

a. that substantial loss will be occasioned unless the order is granted;

b. that the Application was brought timeously;

c. that the Applicant is ready to abide by such conditions as the court may impose as to security.

7. The only issue to address here is substantial loss. None has been shown. What is in issue is a motor vehicle which has been lying at Kileleshwa Police Station since the suit in the lower court commenced. It has been ruled by that court that the Respondent is entitled to it. I do not see what loss will be occasioned if it is released. It has a known value and the Respondent who is a banker has brought evidence that she has other vehicles which can be sold to recover the value of the disputed one. In such a case, I completely fail to see what other issue can be raised and which would sway my mind towards granting the order. Without properly showing substantial loss, the Application will fail-See New Stanley Hotel Ltd vs Arcade Tobacconists Ltd (No. 2 (1986) KLR 760.

8. The Application dated 27/6/2008 is dismissed with costs.

9. Orders accordingly.

Dated and delivered at Machakos this 17<sup>th</sup> day of **November** 2008.

**ISAAC LENAOLA**

**JUDGE**

In presence of: Mr King'ara for Applicant

**ISAAC LENAOLA**

**JUDGE**