

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

Civil Appeal 452 of 2005

JOSEPH NJENGA KAMAU.....APPELLANT

VERSUS

GENERAL MOTORS LIMITED..... RESPONDENT

R U L I N G

The amended Notice of Motion here seeks; stay of execution of the Decree in CMCC No. 11090 of 2003, Milimani pursuant to the exparte judgment entered against the appellant/applicant on 3/12/03 and all other consequential orders, pending the hearing and determination of the appeal herein. Then costs to be in the cause.

The application, dated 18/7/95 is brought under S. 3A of Cap. 21, Laws of Kenya and Order 21 Rule 22(1) and Order 41 Rule 4 (1) (2) & (3) and Order 50 Rule 1 of the Civil Procedure Rules.

It is on the grounds that: the appellant will suffer substantial loss if stay is not granted and the appeal will be rendered nugatory; the appeal has overwhelming chances of success, and the appellant is ready to abide by whatever conditions this court may deem fit.

In opposition, the Respondent, in its grounds, avers that the application is misconceived and frivolous; the court jurisdiction has not been properly invoked; there is no sufficient material placed before the court to enable it interfere with the lower court's discretion; and finally that there is no proof that the appellant will suffer substantial loss.

Perusing through the pleadings and submissions by the learned counsel for both sides I have reached the following findings and conclusions.

The appellant/applicant has met three of the four tenets of Order 41 Rule 4 (1) and (2) of the Civil Procedure Rules. These are: bringing the application herein without unreasonable delay; offer of such security as the court may order, and looking at the grounds of appeal, I am satisfied that the appeal is arguable. In my view, an arguable appeal is not necessarily an appeal that is as it were guaranteed of success. The last tenet in Order 41 rule 2 is satisfying the court that substantial loss my result to the applicant unless the application for stay is granted.

Substantial loss has been interpreted, by the courts to mean evidence that if the decretal sum is paid or execution is carried out prior to the determination of the appeal, and the appeal succeeds, the decretal sum will have been put beyond the reach of the appellant where the respondent is not shown to be a person of means and unable to repay the said sum.

In the case before me, the position seems to be that while the Respondent is able to repay the money if appeal succeeds, the appellant avers that the execution of the decree of the lower court can only be by attaching his lorry, the only source of livelihood for him, an old man of 70 plus years, and his family.

I have cause to disbelieve the appellant that disposal of the said asset – lorry – would render him and his family destitutes. The counsel for the Respondent has terms such situation as evidence of hardships, not substantial loss. I understand this to mean that if the lorry is sold and the appeal succeeds, the Respondent – General Motors (K) Limited can repay the proceeds from the sale of the lorry. However, it

is practically impossible for such situation transaction to put the appellant in the shoes he was in prior to the sale of the lorry.

While the right of appeal should be balanced against denying the Respondent the right to enjoy the fruits of successful litigation, as was held in **REDLAND ENTERPRISES LIMITED V. PREMIER SAVINGS & FINANCE LIMITED**. Civil Misc. Application (MSA) No. 10 of 2002, the court is duty bound, in exercising its discretion, and all stay applications and discretionary to the court, to consider the cause of justice in the exercise of that discretion, given the facts and circumstances of the case before the court.

That was the holding of the Court of Appeal in **SWANYA LIMITED V. DAIMA BANK LIMITED** – Civil Application No. NAI 45 of 2001 (VR. 27/2001).

On the strength of the above, I think this is a proper case for this court to exercise its discretion in favour of the applicant.

Accordingly, the application succeeds and a stay of execution is granted pending the determination of the appeal herein on condition that the applicant deposits with this court, K.Shs.150,000/- within the next one month from today.

DATED and delivered in Nairobi, this 29th Day of November, 2006.

O.K. MUTUNGI

JUDGE