



**REPUBLIC OF KENYA**

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

**Civil Appeal 283 of 2004**

**ANNE MUTHONI MWANGI.....APPELLANT**

**VERSUS**

**VIJAY MORJARIA.....RESPONDENT**

**RULING**

The applicant filed an application by way of a notice of motion seeking to set aside an order of the subordinate court in **CMCC No. 1370/04** granting conditional stay of execution. She also urged the court to grant unconditional stay of execution of the judgment entered by the subordinate court.

In her affidavit in support of the said application, the applicant deposed that the judgment was for a sum of **Kshs.420,000/-** plus costs of **Kshs.54,475/-** together with interest at **Kshs.29,400/-**. The applicant made an application to set aside the *ex parte* judgment but the same was dismissed by the subordinate court subsequent to which she filed an appeal to challenge the trial magistrate's discretion in refusing to set aside the *ex parte* judgment. The applicant then applied to the subordinate court for stay of execution pending appeal and on 9th May, 2005 the court ordered conditional stay of execution for 30 days and ordered the applicant to deposit **Kshs.210,000/-**. The applicant stated that the circumstances of the case did not warrant conditional stay since the respondent already had in his custody a motor vehicle registration number UAQ 16113 which was the subject matter of the dispute.

The applicant further deposed that the respondent had caused an auctioneer to proclaim her two other motor vehicles registration numbers KAC 482Q and KWV 122 as well as household assets in an effort to execute the said judgment.

Mr. Odhiambo for the applicant submitted that the appeal would be rendered nugatory if the application was not granted as the applicant would have to pay the decretal sum.

Mr. Kimatta for the respondent opposed the said application saying that the applicant had sold to the respondent a foreign registered vehicle but did not give him any documents at all, despite having been paid **Kshs.420,000/-**. The said motor vehicle was worthless to the respondent and he sued to recover the money paid and judgment was entered for refund of **Kshs.420,000/-** plus costs and interest. Counsel further submitted that the applicant was at liberty to take back the said motor vehicle as it was not of any use to the respondent. He urged the court to dismiss the application or grant stay of execution on condition that the applicant deposited the sum of **Kshs.420,000/-**.

It is now well settled in law that an appellate court will not interfere with the exercise of discretion of a lower court unless it is shown that in exercising its discretion, the lower court misdirected itself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the

trial court was clearly wrong in exercise of its discretion and thereby occasioned a miscarriage of justice, see *MBOGO VS SHAH [1968] E.A. 93, PITHON WAWERU MAINA VS THUKU MUGIRIA [1982-88] 1 KAR 171.*

The applicant did not show that the subordinate court misdirected itself in any way in the exercise of its discretion in refusing to set aside the *ex parte* judgment that had been entered against the applicant. Equally, it was not shown that it exercised its discretion in an unjudicial manner in granting conditional stay of the said judgment.

I therefore decline to set aside the order of the trial magistrate wherein she granted conditional stay of execution. I believe she took into consideration all the relevant factors that were canvassed before she gave the said ruling. Turning to the second limb of the applicant's prayer, that is for grant of unconditional stay of execution of the judgment entered by the trial court, such an application is governed by the provisions of Order XLI Rule 4(2). The court has to consider whether substantial loss may result unless the stay is granted, whether the application is made without undue delay and whether the applicant has given security.

It is not enough for a party to simply depose that he will suffer substantial loss unless stay of execution is granted. It has to be shown in a detailed manner how that substantial loss will be occasioned. If for example the applicant's business is likely to collapse upon payment of the decretal sum if the application for stay is not granted, that must be stated. In my view, the applicant did not succeed in showing that she will suffer substantial loss unless the order sought is granted.

Turning to the requirement for provision of security, if I were to grant an order for stay of execution, I would certainly require that the applicant provides some security in more or less the same terms that were imposed by the trial court. The car registration number UAQ 16113 which was sold to the respondent by the applicant cannot be security because firstly, it is of very little use without its registration documents and secondly, the respondent has already paid for it and a respondent's decretal sum cannot be secured by an item that he has purchased but for which he seeks a refund of his money due the applicant's default in providing vital documents for the same without which its value is minimal. The applicant wants an unconditional order of stay of execution of the judgment of the trial court but in the circumstances of this matter I cannot grant the same. The appeal is also not likely to be rendered nugatory unless the orders sought are granted. Nowhere was it suggested that the respondent will be unable to refund the decretal sum in the event that the applicant succeeds in her appeal and the respondent is required to refund the decretal sum.

In conclusion, I dismiss with costs the application dated 7th June, 2005.

DATED, SIGNED & DELIVERED at Nakuru this 13th day of July, 2005.

**D. MUSINGA**

**JUDGE**

**13/7/2005**