



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CIVIL APPEAL NO. 178 OF 2004**

**JOSEPH KENYATTI.....1ST**  
**APPLICANT**

**FRANCIS KAMANDE.....2ND**  
**APPLICANT**

**VERSUS**

**DEDAN NJENGA NJOROGE.....**  
**RESPONDENT**

**RULING**

This is an application for stay of execution of the judgment in CMCC No. 1144 of 1998 pending the hearing and determination of an appeal.

The applicant was ordered to deposit the decretal sum in court within 30 days from 30/8/2004 but has been unable to do so.

In his affidavit sworn in support of the application he stated that he was ready to deposit the log book of his motor vehicle KAQ 837A Toyota Van which had been proclaimed by auctioneers. He said the motor vehicle belonged to him although it had not been transferred formally. Mr. Mugambi for the applicant submitted that the applicant would suffer substantial loss if the application was not allowed as his motor vehicle aforesaid would be sold in execution of the judgment.

The respondents opposed the application saying that the applicant had not complied with the order given by the lower court requiring him to deposit the decretal sum in court. They also said that the proposal to deposit the logbook in court was not acceptable because the same was not in the applicant's name.

Mr. Ndubi for the respondent submitted that security could only be in form of money. He further submitted that the appeal could not be rendered nugatory by denial of the orders sought.

Under Order XLI Rule 4, an applicant for stay of execution pending an appeal has to satisfy the court that he stands to suffer substantial loss unless the order is made and that the application has been made without unreasonable delay. The applicant should also provide such security as the court may order.

It is not in dispute that the applicant will suffer substantial loss if its motor vehicle is sold in execution of the judgment before his appeal is heard and determined. There was also no contention that there was

unreasonable delay in filing the present application.

The respondent's main argument is that the applicant did not come to this court with clean hands, having failed to comply with the order issued by the trial court requiring him to deposit the decretal amount in court within a given period of time, which has now expired.

The above cited provision of the law provides that whether the application for stay has been granted or refused by the court appealed from, the appellate court is at liberty on application made, to consider a subsequent application for stay and make such orders as may to it seem just. Also, the applicant or any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside. The applicant herein has made a second application for stay of execution after the trial court issued a conditional order of stay. He has been aggrieved by the condition imposed by the trial court but has not applied to this court to set aside the said order. In my view, this is not a fatal omission although it would have been desirable to include in his application a prayer to have the order of the trial court set aside.

The applicant has an arguable appeal and in my view it would be in the interest of justice to grant him an opportunity to pursue his appeal while he retains his motor vehicle and other properties. He should however provide security.

In **ROSENGRENS LTD VS SAFE DEPOSIT CENTRES LTD [1984] 3 ALL ER 198** it was stated that security should be given in a way which is least disadvantageous to the party giving that security.

***“It may take many forms. Bank guarantee and payment into court are  
but two of them .....so long as it is adequate, then the form of it is a  
matter which is immaterial.”***

The Court of Appeal took the same position in **GITAHU & ANOTHER VS WARUGONGO [1988] K.L.R. 621.**

I hereby grant stay of execution of the judgment in CMCC No. 1144 of 1998 and vary the condition which had been imposed by the trial court but instead order that the applicant do provide a bank guarantee in the sum of Kshs.250,000/- within the next twenty one (21) days from the date hereof failing which the conditional order of stay granted herein will lapse and the respondents will be at liberty to execute.

The applicant will meet the costs of this application.

DATED, SIGNED & DELIVERED at Nakuru on this 21st day of October, 2004.

**DANIEL MUSINGA**

**AG. JUDGE**