



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO.49 OF 1998**

**FELISTA WANJIRU NYINGI ..... APPELLANT**

**VERSUS**

**SAMUEL CHEGE GACHIE..... RESPONDENT**

**RULING**

This application dated and filed herein on 19th December 2002 seeks in the main, an order of stay of execution pending the hearing and determination of the appeal filed in the court of appeal. It arises from a ruling by Honourable Judge Ransley on 18th December 2002 allowing prayers 3 and 4 of an application filed herein on 7th November 2002.

These prayers related to unconditional release of motor vehicle registration number KAP 587 N as well of the release of Ksh.273,933/= deposited with the Senior Principal Magistrates Court at Muranga.

The main reason to the application was that the release of the respondents motor vehicle and the money deposited at Muranga court will occasion prejudice and substantial loss and damage to the appellant, that the order for the release of the motor vehicle and the cash deposit was made without hearing arguments by counsel for the applicant and the respondent and that the applicant has already filed Notice of Appeal in the Court of Appeal.

The application arose from the ruling of Hon. Ransley J in two applications heard before his or 18th December 2002. These applications were dated 7th November and 19th July 2002. The application dated 19th July 2002 had sought an order of this court to strike out/dismiss the appeal filed in this court on 2nd March 1998 on the grounds that it was misconceived, incompetent and bad in law while the one dated 7th November 2002 sought the following orders, namely, leave for the firm of Messrs Njengo & Co. Advocates to come on record for the appellant; for the respondents, agents (a firm of auctioneers), or tenants to be ordered and compelled to release unconditionally motor vehicle Registration No.KAP 587 N to the appellant forthwith and then a sum of Ksh.237,933/= deposited by the appellant with the Senior Principal magistrate's Court Muranga be ordered to be released to the appellant forthwith. In both applications there were prayers for costs too.

When the matter was heard, the Learned Judge allowed the firm of advocates to come on record, the lower court to release the motor vehicle and the cash but did not strike out the appeal prayed. This is the order against which this application for stay of execution has been made, grounds whereof have been stated. There is an appeal pending in this court over the decision of the Resident Magistrate's Court Muranga.

An application for stay of execution was refused on 11th July 2002. It was refused because the applicant there wanted a change of terms for the stay of execution which had been granted by the said Resident Magistrate which this court felt it could not entertain.

The applicant did not tell the Learned Judge who made the order of 18th December 2002 whether the magistrates terms had since been complied with because if that was so then advocate for the respondent could not possibly make the application for the release of the cash and the motor vehicle as the deposit is a condition in the pending appeal.

On the other hand, if the attachment was carried out because the applicant had not complied or satisfied the conditions as to the deposit of the decretal amount and, yet this was done after this courts order of 11th day of July 2002, then this was a matter to be discussed between the parties and the agreement as to payment of the court broker's fees; but all these matters were not brought to the notice of the learned Judge and have not also been brought to my notice in this application.

In any case, this application is inform of an appeal against the order of the learned Judge which this court, being of equal jurisdiction, cannot entertain.

Moreover, with this appeal pending in this court, I don't see any logic in filing an appeal in the same matter to the court of appeal other than expeditiously processing and prosecuting the pending appeal first.

I refuse and/or dismiss this appeal with no order as to costs.

Delivered this 1st day of April 2003

**D.K.S. AGANYANYA**

**PRINCIPAL JUDGE**