



**Kaburu v Waihwa (Civil Application E902 of 2023)
[2023] KEHC 23995 (KLR) (Civ) (23 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23995 (KLR)

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

CIVIL

CIVIL APPLICATION E902 OF 2023

JN MULWA, J

OCTOBER 23, 2023

BETWEEN

JOSEPH MWITI KABURU APPLICANT

AND

JOSEPH THEURI WAIHWA RESPONDENT

RULING

1. I have read the application dated 13/09/2023, the supporting and opposing affidavits. Parties also argued the same before me.
The issue before the trial court was ownership of motor vehicle Registration no. KBZ 660T Isuzu FVZ Truck. The trial Magistrate found in favour of the Respondent, and made a finding that the purchase price was Kshs. 9.8 million, and was duly registered in the Respondent's name as exhibited in the logbook.
2. The Respondent suggested that should an order of stay be granted, the value of the motor vehicle be deposited in an interest earning account in joint names of the advocates as security for the due performance of the decree pending hearing and determination of the Appeal.
3. The Applicant on the other hand submitted that the Appeal will be rendered nugatory if the vehicle is handed over to the Respondent as ordered by the trial court. He further told the court that he would be but willing to abide by conditions that the court will deem fit so as to preserve the vehicle and suggested that the vehicle be kept in a neutral place where neither party will access it during the pendency of the Appeal.
4. Order 42 Rule 6 of the [CPR](#) provides for the conditions that an applicant ought to meet for orders of stay of execution pending appeal to be granted being: -



- a. Application to be filed within reasonable time.
 - b. Provision of adequate security for the due performance of the decree
 - c. Demonstration of irreparable loss should the orders sought are denied.
5. The subject motor vehicle is a business vehicle. If kept and unused for the intervening and unspecified period before the appeal is heard and determined, it will, without a doubt deteriorate due to tear and wear, including loss of use and profits to the detriment of the respondent who is the registered owner and has a judgment in his hands. On the other hand, if left in the possession of the appellant, by the time the appeal is determined, it may as well have lost value due to use, wear and tear.
6. The court notes that the vehicle was purchased at a price of Kshs. 9.8 million out of which 8.5 million was financed, in the year 2014. I agree with the appellant that nine years after use of the vehicle, its value cannot be as it was at the date of purchase. I however cannot take the suggested value at Kshs. 3 million as a reflection of its current value as nothing was placed before the court to back up the proposal.
7. The Respondent has urged the court to order for the full purchase price to be deposited in a joint account if it is inclined to grant the stay orders to secure the decree pending hearing and determination of the appeal.
8. To balance the rival parties' interests, and the Applicant stating that it will abide by the conditions that the court may find fit, I am inclined to allow the application dated 13/09/2023 but on the following conditions:
- a. The Applicant/Appellant shall remain with possession of the motor vehicle registration no. KBZ 660T Isuzu FVZ Truck upon depositing into a joint interest earning account of the parties advocates names a sum of Kshs. 5,000,000/= within 45 days of this ruling.

In default, the stay orders shall lapse automatically and the Respondent shall be at liberty to execute the decree without further recourse to the court.
 - b. During the pendency of the appeal, the Appellant shall not part with the subject vehicle to a third party, or deal with the same in any adverse manner.
 - c. The costs of this application shall be borne by the Appellant.
 - d. The Record of Appeal shall be filed within 60 days.
 - e. Mention for directions on 1st February, 2024.

DATED, DELIVERED AND SIGNED IN NAIROBI THIS 23RD DAY OF OCTOBER, 2023.

JANET MULWA

JUDGE

