



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO. 222 OF 2013**

**NATIONAL INDUSTRIAL CREDIT BANK.....1<sup>ST</sup> APPELLANT**

**JOMUKI ENTERPRISES.....2<sup>ND</sup> APPELLANT**

**JOSEPH WACHIRA.....3<sup>RD</sup> APPELLANT**

**JOHN NJOROGE THIGA.....4<sup>TH</sup> APPELLANT**

**VERSUS**

**CREATION DEVELOPMENT LIMITED.....RESPONDENT**

**RULING**

1. The Notice of Motion dated 23<sup>rd</sup> May 2014 has been brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21 and Orders 42 Rule 6(6) and 51 Rule 1 of the Civil Procedure Rules, 2010.
2. The Appellants seek stay of execution of the ruling made by the lower court on 14<sup>th</sup> November 2013 in Nakuru CMCC No. 274 of 2013. The application is supported by the affidavit of Henry Maina, the head, legal services of the 1<sup>st</sup> Appellant and the supplementary affidavit sworn by Kisilah Daniel Gor, Counsel for the Appellants, sworn with the leave of court, on 14<sup>th</sup> July 2014.
3. In response to the application, the director of the Respondent, Augustine Sang, swore the replying affidavit filed in this court on 9<sup>th</sup> June 2014.
4. Briefly, the undisputed facts are that the Respondent purchased motor vehicle registration number KBQ 468 J with the money advanced to it by the 1<sup>st</sup> Appellant under a hire purchase agreement. The 1<sup>st</sup> Appellant alleged that following the Respondent's breach of the terms of the agreement it repossessed the vehicle and sold it to the 3<sup>rd</sup> Appellant. The Respondent's suit before the lower court is for the return of possession of the vehicle.
5. Simultaneous with the Plaint, the Respondent filed an application for a mandatory injunction to compel the Appellants to release the vehicle. In the ruling delivered on 14<sup>th</sup> November, the learned magistrate allowed the application and issued an order compelling the Appellants to produce the motor vehicle before the court for purposes of further directions regarding its storage. The court also issued a temporary injunction restraining the Appellants from selling, transferring or handing the vehicle over to third parties or interfering with the vehicle in any way pending the hearing and determination of the suit.
6. The Application to which this ruling concerns is for stay of execution pending the hearing and determination of the appeal. The Appellants maintain that they have a strong appeal with a high

- chance of success. They argue that the trial court erred in failing to appreciate the terms of the agreement and failing to appreciate that the Respondent did not meet the threshold to warrant the granting of the mandatory or temporary injunction. The Appellants believe that the orders of the lower court are ambiguous and detrimental to the safety of the vehicle and aimed at aiding the Respondent who was in breach of an agreement which the court purported to rewrite.
7. Counsel for the Appellants referred the court to the Court of Appeal's **utt decision in Butt V. Rent Restriction Tribunal**, [1982] KLR 417, that, the power to grant or refuse an application for stay is discretionary. However, the general principle is that stay should be granted so that an appeal is not rendered nugatory unless there is an overwhelming hindrance.
  8. They further contended that if the orders sought are not granted, the appeal may be rendered nugatory. In addition, the Appellants are likely to suffer irreparable damage including possible wastage or disposal of the vehicle.
  9. The Respondent's position was that the order of the lower court was made in the interest of preserving the motor vehicle pending the determination of the suit. He was apprehensive that if the orders are not granted the vehicle, (which is in the possession of the 4<sup>th</sup> Appellant) may be wasted to his detriment.
  10. Counsel added that neither party will be prejudiced if the orders of the lower court are allowed to stand because they are intended to preserve the vehicle until the suit is finally determined.

### **ANALYSIS**

11. An order for Stay of execution pending appeal under Order 46 (6) will be granted if the court is satisfied that the Applicant demonstrates that there is an arguable appeal with overwhelming chances of success, which appeal would be rendered nugatory if the order is not granted; that the application for stay has been filed without unreasonable delay; stands to suffer substantial loss if the order is not granted; and security for the due performance of the decree or order has been tendered by the Applicant. This court will proceed to address whether the Applicant has satisfied the aforementioned settled principles and whether this is a proper case for the granting of the orders sought.
12. On the principle of timeliness, I note that this application for stay of execution was made on the 23rd May, 2014 after the ruling was delivered on the 15th May, 2014. This application is therefore found to have been brought in a timely manner and without any delay.
13. The 4th Appellant/Applicant is in possession of the subject vehicle and alleges that he will suffer substantial loss in the event the orders sought are not granted, but has not clearly demonstrated to this court how the motor vehicle was being used and the nature of the loss, damages or suffering that is likely to result if the orders sought are not granted. The Applicants have therefore failed to satisfy this requirement.
14. Reference was made to the case of **Afric Pak Motors limited V. Elizabeth Wanjiru Ngatia** but this can be distinguished as it was demonstrated therein that the motor vehicle was the respondent's only tool of trade.
15. The applicants are also required to provide security for due performance and this issue was mentioned only in the supplementary affidavit. But due to the peculiar circumstances and nature of the case, the offer was not expounded upon and was therefore left for the court to determine an appropriate security for due performance.
16. Finally, the applicant's contend that they have an arguable appeal on the grounds that the trial magistrate failed to appreciate the principles of granting mandatory injunctions particularly at an interlocutory stage particularly in instances where damages are quantifiable and would suffice.
17. This court has perused the Memorandum of Appeal dated the 2<sup>nd</sup> November, 2013 and has satisfied itself that the stay is directed to the decision against which there is an intended appeal and this court is further satisfied that the appellant/applicants have an arguable appeal.

### **FINDINGS AND DETERMINATION**

18. This court finds that from the material placed before it the applicants have satisfied most of the settled principles and that this is a suitable case where this court can exercise its discretion and grant the order sought.

19. The Applicants have demonstrated that the order for stay of execution pending appeal is merited. The application is hereby allowed. There shall be a stay of the Ruling made by the lower court on the 14/11/2013 in Nakuru CMCC.274/2013.
20. The motor vehicle to remain in the 4<sup>th</sup> Applicant's custody pending the hearing and determination of the appeal. The 4<sup>th</sup> Applicant shall not sell or dispose of or deal with the subject vehicle in any manner that will be prejudicial to the Respondents rights and interests.
21. The applicants to file in court within seven (7) days hereof a joint written undertaking for security for costs and damages.
22. Costs of the application shall abide the appeal.

Orders accordingly.

**Dated, Signed and Delivered this 4th day of March, 2015.**

**A. MSHILA**

**JUDGE**