



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL APPEAL NO. 4 OF 2013**

CFC STANBIC BANK LTD. .... 1ST  
APPELLANT

VERSUS

TALIB OMAR SAID .....1ST  
RESPONDENT

ROSEMARY WAWERU

T/A THAARA AUCTIONEERS ..... 2ND  
RESPONDENT

HENRY KURIA KARARA

T/A WESTMINSTER ..... 3RD  
RESPONDENT

**RULING**

The application by way of a Notice of Motion dated 21st January, 2013 and brought under section 1A 1B of the Civil Procedure Act and order 42 rule 6 of the Civil Procedure Rules seeks orders for an interim stay of execution of the order of mandatory injunction compelling the Appellants to return to the 1st Respondent trailer registration number ZC 6220, given by the subordinate Court on the 11th day of January, 2013 in Mombasa Senior Resident Magistrate's Court No. 1779 of 2012 Said Omar Talib – Vs- CFC Stanbic Bank Ltd. & 2 Others pending the hearing and determination of the appeal.

The grounds are that the order appealed against requires that the Appellant release trailer registration number ZC 6220 to the 1st Respondent.

That the 1st Appellant has a strong legal claim to the vehicle.

Thirdly if the vehicle is released as ordered, the legal claim by the 1st Appellant to the vehicle will be extinguished thus resulting to substantial loss.

That the appellant is aggrieved by the order appealed against as it ignored the fact that the claim by the appellant to the vehicle was a serious legal claim and the order therefore flew on the face of the well

settled principle that mandatory injunctions are only available in clear cases.

Further that if the vehicle is released as ordered by the subordinate Court, its value will be incapable of being maintained for the benefit of the applicant who has a strong claim over it and this would occasion substantial loss.

That the Appellant is ready to abide by terms on security if so ordered by the Court.

That it is in the interest of justice that the execution of the order appealed against be stayed pending the determination of the appeal that has been lodged in the high Court.

This application is opposed on the grounds that it does not meet the threshold for grant of stay pending appeal.

That the appeal filed by the appellant is frivolous and has no chances of success and that no strong legal claim exists as alleged.

That the appellant has no claim over the trailer against the 1st Respondent and any further detention will occasion further loss to the Respondent who has to service a loan.

That the trial magistrate did find that special circumstances existed in granting the order of mandatory injunction.

Further that the appellant had discharged the Respondent from any obligation regarding the trailer ZC 6220 which discharge was express and unequivocal.

That the appeal would not be rendered nugatory if stay is not granted as the trial magistrate had released the trailer to the respondent on the condition that he should not sell, transfer or alienate it.

In this case the plaintiff filed a suit in the subordinate Court claiming that the Defendant had wrongfully attached trailer registration number ZC 6220.

That though the trailer had been treated as security on advances made to him, the Appellant had discharged that security.

An application was filed seeking among other orders a mandatory injunction for the release of the trailer.

On the 11th day of January, 2013 the subordinate Court granted the mandatory injunction. The Court of Appeal in the case of **Kenya Breweries Ltd. & Another – Vs- Washington Okeyo C.A. Civil Appeal No. 332 of 2000** at page 3 held,

**“The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halbury's Laws of England 4th Edition paragraph 918 which reads, “A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the Defendant attempted to steal a March on the plaintiff ..... a mandatory injunction will be granted on an interlocutory application”.**

From the facts of this case, the learned trial magistrate does not seem to have appreciated that there were serious legal issues to be addressed.

The case before him was not a clear one and no special circumstances presented themselves before him.

I am satisfied that the appellant has a strong legal claim over the trailer registration number ZC 6220 and

in effect has an arguable appeal.

The subject matter of this case is a vehicle which if released to the Respondent would be placed in use hence its value would diminish.

The appellant was on 24th January, 2013 ordered to deposit a bank guarantee of Ksh. 3, 451, 645/= which he did. The first Respondents position is therefore secured.

I find the application has merit and its granted as prayed. Costs to the Applicant.

Ruling delivered dated and signed this **6th** day of **February, 2014**.

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**M. MUYA**

**JUDGE**

**6TH FEBRUARY, 2014**

**In the presence of:-**

Learned Counsel for the Applicant Simiyu holding brief Walker Kontos.

Learned Counsel for the Respondent Mr. Mburu holding brief Adhoch.

Court clerk Mr. Musundi