



**Tri State Capital Ltd v Kimani & another (Miscellaneous Civil Application
E105 of 2022) [2023] KEHC 3177 (KLR) (Civ) (30 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 3177 (KLR)

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

CIVIL

MISCELLANEOUS CIVIL APPLICATION E105 OF 2022

CW MEOLI, J

MARCH 30, 2023

BETWEEN

TRI STATE CAPITAL LTD APPLICANT

AND

FELIX DAVID NJENGA KIMANI 1ST RESPONDENT

CAROLINE NKATHA MICHIRA 2ND RESPONDENT

RULING

1. For determination is the motion dated March 4, 2022 by Tri State Capital Ltd (hereafter the Applicant) seeking inter alia leave to appeal out of time, against the ruling in Nairobi Milimani Commercial Suit No. E1132 of 2021 delivered on December 1, 2021 and that pending hearing and determination of the intended appeal, an order be directed against Felix David Njenga Kimani and Caroline Nkatha Michira (hereafter the 1st and 2nd Respondent/Respondents) to maintain the status quo with respect to ownership and possession of motor vehicle registration number KBZ 992U. The motion is expressed to be brought inter alia under sections 3A, 79G & 95 of the *Civil Procedure Act* and Order 50 Rule 6 of the Civil Procedure Rules inter alia.
2. The motion is premised on grounds on the face of the motion as amplified in the supporting affidavit sworn by Silas Gachanja Macharia who describes himself as a director of the Applicant, competent and duly authorized to depose.
3. The gist of the affidavit is as follows. That a ruling in respect of a motion filed in Nairobi Milimani Commercial Suit No. E1132 of 2021 scheduled for delivery on November 23, 2021 was not delivered on the said date and counsel for the Applicant advised that it had been rescheduled for December 2, 2021. On the latter date the matter was not included in the day's cause list and despite sustained follow-up with the registry no information was forthcoming. Eventually, upon requesting on February 14,



- 2022 for a mention date before the court, counsel was informed that the ruling had been delivered on December 1, 2021. He complains that no notice was issued to the Applicant and therefore the ruling was delivered in the absence of both the Applicant and his counsel.
4. The Applicant further expresses apprehension that motor vehicle registration no. KBZ 992U may be disposed of to defeat his claim before hearing and determination of the intended appeal, thereby rendering the same nugatory. That the intended appeal has a high chance of success and that he was ready and willing to abide by any conditions set by the court once leave to file the intended appeal is granted.
 5. The 1st Respondent opposed the motion by way of grounds of opposition dated May 8, 2022. The grounds are to the effect that the motion is misconceived, incompetent, bad in law and an abuse of the court process; that the Applicant cannot benefit from its own mistake; that the Applicant's prayer for status quo to be maintained with respect to motor vehicle registration number KBZ 992U is untenable as Applicant did not seek any injunctive orders in the suit before the subordinate court concerning motor vehicle registration number KBZ 992U; that the Applicant had no registrable or beneficial rights in the said motor vehicle registration; and that the claim in the lower court is pecuniary in nature and the Applicant can be adequately compensated by way of damages.
 6. The 2nd Respondent on her part filed a replying affidavit dated May 11, 2022 in opposition to the motion. She asserts that on November 23, 2021 when the Applicant's motion was scheduled for ruling the court was not sitting and the matter was rescheduled to 02.12.2021. That on latter date the matter was not cause listed and later the court registry informed her counsel that the ruling had been delivered on 02.12.2021. She accuses the Applicant of failing to follow up with the court registry to ascertain the status in the matter so as to file its appeal in time. She contends that by 14.02.2022 the Applicant was aware of delivery of the ruling and is guilty of unexplained and inordinate delay.
 7. She views the intended appeal as vexatious, frivolous, and an abuse of the court process. She asserts that whereas the motor vehicle registration number KBZ 992U is registered in her name she was not a party to the agreement between the Applicant and the 1st Respondent. In conclusion, she asserts that the Applicant has not shown sufficient cause to warrant extension of time to file an interlocutory appeal out of time.
 8. By a supplementary affidavit, the Applicant contended that the ruling of the lower court was delivered in the absence of the parties on 01.12.2021 and not 02.12.2021 as notified by the trial court and cited the certified copy of the ruling in support of his assertions. Reiterating earlier depositions, the deponent stated that the delay in filing the instant motion was some seventeen (17) days and occasioned by delay in getting certified copy of proceedings of the lower court.
 9. Responding to the 1st Respondent's grounds of opposition, the deponent asserted that an order of status quo is justified to prevent any party from having undue advantage pending determination of the appeal. And to forestall the risk of the motor vehicle registration No. KBZ 992U being alienated by the 2nd Respondent to defeat the intended appeal thereby rendering it an academic exercise.
 10. Directions were made by the court for parties to file their respective submissions on the motion. Only the Applicant and 1st Respondent complied.
 11. Counsel for the Applicant in pressing the prayer for maintenance of status quo in respect of the motor vehicle registration number KBZ 992U, cited a raft of decision including *Fatuma Abdi Jillo v Kuro Lenesen & Another* [2021] eKLR, *Republic v National Environmental Tribunal Ex Parte Palm Homes Limited & Another* [2020] eKLR, *Kenya Airline Pilots Association (KALPA) v Co-operative Bank of Kenya Limited & Another* [2020] eKLR, *Texaco Ltd v Mulberry Ltd* [1972] 1 WLR 814,



Abdullah & 4 Others & 4 Others in Mombasa High Court Misc. Civil Cause No. 11 of 2012 and Thugi River Estate Limited & Another v National Bank of Kenya Limited & Other [2015] eKLR.

12. It was counsel's contention that the issue of ownership of the said motor vehicle is in question whereas the vehicle was used as security by the 1st Respondent to obtain a loan from the Applicant. Further, that the 2nd Respondent who was a wife to the 1st Respondent currently holds possession and ownership of the vehicle. That an order to maintain the status quo will prevent prejudicing the matter pending determination of the intended appeal.
13. Submitting on the prayer for extension of time counsel cited Order 50 Rule 4 & 6 of the Civil Procedure Rules, Section 79G and 95 of the *Civil Procedure Act*, the decisions in Thuita Mwangi v Kenya Airways Ltd [2003] eKLR and Cecilia Wanjiku Wathithi v Ndurumo Elizabeth & Another [2021] eKLR meanwhile reiterated the affidavit material in that regard. He urged the court to allow the motion as prayed.
14. On his part, the 1st Respondent's counsel confined his submissions to the status quo prayer and relied on Raila Amolo Odinga & Another v IEBC & 2 Others [2017] eKLR to support his submission that parties are bound by their pleadings. He views the prayer for maintaining the status quo as an attempt by the Applicant to steal a march on the 1st Respondent. Because while the Applicant has failed to seek an injunction, if granted, the order for maintenance of status quo would effectively operate as an injunctive order interfering with the 2nd Respondent's right to her property. In defence of the 2nd Respondent's title to the subject motor vehicle, counsel called to aid the decision in Atogo v Agricultural Finance Corporation & Another [1991] KLR and prayed that the motion be dismissed with costs.
15. The Court has considered the rival affidavit material and submissions made in respect of the motion. I propose to first deal with the prayer for leave to appeal out of time. The power of the Court to enlarge time for the late filing of an appeal is expressly donated by Section 79G, as well as generally, by Section 95 of the *Civil Procedure Act*.
16. Section 79G of the *Civil Procedure Act* provides that:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

17. The principles governing leave to appeal out of time are settled. The successful applicant must demonstrate “good and sufficient cause” for not filing the appeal in time. In Thuita Mwangi v Kenya Airways [2003] eKLR, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in pari materia with Section 79G of the *Civil Procedure Act*, reiterated its decision in Mutiso v Mwangi [1997] KLR 630 as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding



if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

18. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court’s discretion in his or her favor. See also the decisions of the Supreme Court in case of *Telkom Kenya Limited v John Ochanda And 996 Others* [2015] eKLR and *Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 Others* [2019] eKLR.
19. The Supreme Court in the case of *Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others* [2014] eKLR enunciated the applicable principles in an application for leave to appeal out of time. The Court stated inter alia that:

“(T)he underlying principles a court should consider in exercise of such discretion include;

1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case- to-case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;
6. Whether the application has been brought without undue delay.
7.”

See also *County Executive of Kisumu v County Government of Kisumu & 8 Others* [2017] eKLR.

20. That the lower court ruling earlier scheduled for 23.11.2021 was rescheduled is not in dispute. This fact is corroborated by 2nd Respondent’s annexure marked “CNM-1” being the court’s notice indicating that the ruling among others had been rescheduled to 02.12.2021. However it is clear from the Applicant’s annexure marked “SGM-1” to the supplementary affidavit that the ruling was delivered on 01.12.2021 and not 02.12.2021 as notified in the court notice and or as purported by the 2nd Respondent. In addition to the annexure marked “SGM-1” in the Applicant’s further affidavit (described as a supplementary affidavit) is the annexure marked “SGM-2” being the certified copy of the ruling .
21. The certified copy above indicates that the ruling was delivered on 01.12.2021 in the absence of the parties whereas the uncertified ruling, also annexed, while confirming the same date of delivery indicates that counsel for the Applicant was in attendance. Given the disparities, the court is prepared to hold, based on the certified copy of the ruling, that in all likelihood, the ruling was delivered on 01.12.2021 (and not 02.12.2021) in the absence of the parties and hence without notice, a fact acknowledged in the 2nd Respondent’s affidavit.



22. The Applicant’s further assertion that they only learned of the fact of the delivery on 14.02.2022 when the matter was mentioned at their request is not controverted. The instant motion was filed on 04.03.2022, some eighteen (18) days after counsel learnt of the delivery of the ruling. The reason given for the delay in filing the instant motion is the duration taken to obtain a certified copy of the lower court proceedings. Cumulatively, the delay herein is about three months. In the court’s view the delay is not inordinate and has been reasonably explained.
23. Section 79G of the *Civil Procedure Act* states that a successful applicant ought to demonstrate ‘good and sufficient cause’ for the court to exercise its discretion. The court is satisfied with the Applicant’s explanation. There is no evidence that granting leave will occasion undue prejudice on the Respondents, as in my view, costs will be adequate compensation. In addition, the Court can impose conditions to ensure that the matter is expedited.
24. Regarding the viability of the intended appeal, a review of the draft memorandum of appeal attached to the Applicant’s affidavit and marked annexure “SGM-7”, reveals what appears to be issues serious enough to deserve the court’s consideration on appeal. The Court of Appeal in *Vishva Stone Suppliers Company Limited v RSR Stone [2006] Limited [2020] eKLR* stated that an arguable appeal is not one that will necessarily succeed “so long as it raises a bona fide issue for determination by the Court.”
25. In that case, the Court emphasized the right of appeal in the following terms:
- “Turning to the request to allow the applicant to exercise his now undoubted constitutionally underpinned right of appeal, the position is.... crystallized in the case of *Richard Ncharpi Leiyagu v IEBC & 2 Others* (supra); *Mbaki & Others vs. Macharia & Another* [2005] 2EA 206; and the Tanzanian case of *Abbas Sherally & Another vs. Abdul Fazaiboy*, Civil Application No. 33 of 2003; for the holding inter alia that:
- (i) the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;
 - (ii) the right to be heard is a valued right; and
 - (iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice...”
26. Considering all the foregoing, the court is persuaded that, to facilitate the Applicants’ undisputed right of appeal, leave ought to be granted to file an appeal out of time.
27. Moving on to prayer seeking an order to maintain the status quo in respect of the possession and ownership of motor vehicle registration number KBZ 992U, it is premised on the asserted apprehension by the Applicant that the said motor vehicle could be disposed of in a bid to defeat the Applicant’s claim before determination of the intended appeal. And that such an eventuality would render the appeal nugatory. Admittedly, the said motor vehicle though presently registered in the name of the 2nd Respondent and in her possession was used as security by the 1st Respondent to obtain a loan from the Applicant. The 2nd Respondent on her part asserts her title to the vehicle and denies being party to the agreement between the Applicant and the 1st Respondent. See annexure “SGM-1” and the security agreement marked as annexure “SGM-4”.



28. It appears on a perusal of annexures marked “SGM-5a” and “SGM-5b” that the 1st and 2nd Respondent were husband and wife when the security agreement was executed but seemingly became estranged subsequently. Therefore, the question of the ownership of the said motor vehicle appears pertinent to the dispute. Equally, the Applicant’s apprehension of likely alienation thereof pending appeal, and hence prejudice, does not appear farfetched.
29. The 1st Respondent has asserted that the grant of an order to maintain the status quo herein will effectively be an injunctive order against the Respondents. And that no such injunction had been sought in the lower court suit and before this court. The court has not had the advantage of reviewing the pleadings in the lower court. In this matter however, the Applicant could not, as proposed by the 1st Respondent, seek an injunction pursuant to Order 42 Rule 6(6) of the Civil Procedure Rules in the absence of an existing appeal. See *Abubaker Mohamed Al-Amin v Firdaus Siwa Somo* [2018] eKLR.
30. The Court of Appeal in *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR defined an order of status quo as follows;-
-“It is in the circumstances important to define what status quo means and what it meant for purposes of this appeal. We are apt to mention however, that when that order was made, none of the parties in Court sought any clarification from us as to what the status quo entailed. The presumption therefore must be that everybody knew the meaning and import of that order. “Status quo” in normal English parlance means the present situation, the way things stand as at the time the order is made, the existing state of things. It cannot therefore relate to the past or future occurrences or events. We fail to see what can be ambiguous about that order. All it meant was that everything was to remain as it was as at the time that order was given. If there was any transaction of whatever nature that was going on in respect of the land in question, it had to freeze and await the discharging of the Court order.”
31. Recently, the same Court in *Mwadzaya Wachanda Clan Welfare Registered Trustees & 58 others v Petro Oil Kenya Ltd & 6 others (Civil Application E055 of 2021)* [2022] KECA 402 (KLR) described as status quo order as; -
- “We have considered the arguments and submissions canvassed by the Applicants and 1st Respondent. Mr. Gikandi has raised the preliminary issue of this Court’s jurisdiction to grant the orders sought. It is notable in this regard that the Court’s powers and discretion under Rule 5 (2)(b) is wide and this Court can order a stay of execution, injunction or stay of further proceedings on such terms as the Court deems just. Status quo orders preserve the subject matter of litigation pending the hearing of a suit or appeal and are therefore a species of stay orders and fall within the ambit of Rule 5(2)(b).”
32. Finally, on the question, this court entirely associates itself with the sentiments of Muriithi J in *Mombasa Misc. Civil Application (J.R.) No. 26 of 2010 Republic Vs- The Chairperson Business Premises Rent Tribunal at Mombasa (D. Mochache) Ex-parte Baobab Beach Resort (Mombasa Limited) and Monica Clara Schriel*. In that case, the learned Judge distinguished an injunctive order from an order for maintenance of status quo as follows; -
- “In my view, an order for status quo to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is a substantive equitable remedy granted upon establishment of right, or at interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof. It does not depend on proof of right or prima



facie case. In its effect, an injunction may compel the doing or restrain the doing of a certain act, such as, respectively, the reinstatement of an evicted tenant or the eviction of the tenant in possession. An order for status quo merely leaves the situation or things as they stand pending the hearing of the reference or complaint.” (Emphasis added).

33. Thus, the court is not convinced that an order for maintaining the status quo will take away the 2nd Respondent’s right to property. Indeed, such an order will merely freeze the present obtaining position regarding the disputed vehicle pending determination of the appeal. The order will ensure that the Applicant’s position is not unduly prejudiced, while the substantive rights of the 2nd Respondent in the vehicle are preserved pending the determination of the appeal. Ultimately the ends of justice would thereby be met. Such is the essence of the inherent power of the Court under Section 3A of the Civil Procedure Act.
34. Consequently, the motion dated 4.03.2022 is granted in the following terms:
- a) Leave is granted to the Applicant to file an appeal within 14 days of today’s date.
 - b) Pending the filing, and determination of the interlocutory appeal, there will be an order to maintain the status quo regarding the possession and ownership of the motor vehicle registration No. KBZ 992 U.
 - c) To expedite the appeal, the Applicant shall: -
 - i) file the record of appeal within 120 (One Hundred and twenty) days of filing the memorandum of appeal.
 - ii) fully prosecute the appeal within six (6) months of today’s date, failing which, the order in (b) above shall automatically lapse.
35. Costs will be in the cause.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 30TH DAY OF MARCH 2023.

C.MEOLI

JUDGE

In the presence of:

Ms. Chamia h/b for Mr. Gitonga for the Applicant

For the 1st Respondent: N/A

Ms. Athman for the 2nd Respondent

C/A: Carol

