



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**MISC. CIVIL APPLICATION NO. E087 OF 2021**

**SAMUEL KIMANI..... 1<sup>ST</sup> APPLICANT**

**GLADYS MUTHONI TUMUTI.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**DOMINIC KAMIRI KARANJA.....RESPONDENT**

**RULING**

1. The latest motion is chronologically the third application brought by **Samuel Kimani** and **Gladys Muthoni Tumuti** (hereafter the Applicants) and is dated 30<sup>th</sup> June 2021. It will henceforth be referred to as the third motion. The motion seeks that the court be pleased to set aside its orders issued on 30<sup>th</sup> June, 2021 to expunge the Applicant's supplementary affidavit sworn by **Chris Kabita** and that the court be pleased to admit the said affidavit. The said affidavit had been sworn in support of the Applicant's motion dated 16<sup>th</sup> April 2021, (hereafter the second motion) which primarily sought reinstatement of the Applicants' motion dated 2<sup>nd</sup> March 2021 (sometimes erroneously shown as dated 2<sup>nd</sup> January 2021, and hereafter referred to as the first motion) which was dismissed on 22/3/2021 for want of prosecution.

2. On 20<sup>th</sup> September 2021, the Court directed that the third motion be heard first. The third motion is expressed to be brought under Section 3A and 63(e) of the Civil Procedure Act, Order 22 Rule 22, Order 50 Rule 5, and Order 51 Rule 1 of the Civil Procedure Rules. The grounds on the face of the motion are amplified in the supporting affidavit of **Mandela K. Chege** counsel for the Applicants. To the effect that counsel had filed a supplementary affidavit sworn by **Chris Kabita** dated 2<sup>nd</sup> June, 2021 with the intention to seek leave from the court to have the same duly admitted on record. That on 30<sup>th</sup> June, 2021 when the matter was coming up counsel erroneously failed to attend to the matter by confusing it with **HCCA No. E087 of 2021** which was listed lower in the courts' cause list and thus proceed to attend to another matter in the subordinate court before the present matter was called out.

3. Counsel goes on to aver it is only upon conclusion of the matter before the subordinate court that he had logged into the proceedings before **Ong'udi J** before whom this cause was listed on that date only to realize that the instant matter had already been called out. That upon enquiry concerning the orders issued, he learned that the affidavit by Chris Kabita dated 2<sup>nd</sup> June, 2021 had been ordered expunged from the court record and although he sought the court's indulgence to have the said order set aside, he was advised to reach out to the Respondent's counsel to log into the court session to facilitate possible setting aside of the said order by consent. He further deposes that attempts to reach the Respondent's counsel to join the session proved futile necessitating the instant motion. Counsel asserts that the said affidavit is pertinent to the instant proceedings as such it is in the interest of justice that the motion be allowed, and that the Respondent would not be prejudiced as he can file further affidavit if necessary.

4. The motion is opposed through the replying affidavits of the **Ambrose K. Kariuki** on behalf of **Dominic Kamiri Karanja** (hereafter the Respondent). The affidavits are dated 14<sup>th</sup> July, 2021 and 5<sup>th</sup> October, 2021. The deponent describes himself as a Recoveries Officer at The Kenya Alliance Insurance Company Ltd, the insurers of the Respondent's motor vehicle **KBV 101 K** which was involved in an accident with the Applicants' vehicle, giving rise to the lower Court suit between the parties herein, namely **Nairobi CMCC No. 5440 of 2019**. (See the replying affidavit by the same deponent sworn on 17<sup>th</sup> March 2021 in response to the first motion). The deponent proceeds to state in his two affidavits in opposition to the 3<sup>rd</sup> motion that he is duly authorized to swear the affidavit.

5. He deposes that the third motion comes on the heels of a similar motion (second motion) seeking to set aside of orders on grounds of non-attendance by the Applicants' counsel, which demonstrates neglect of duty and abuse of the court process. That the third motion runs counter to and is in violation of the overriding objective requiring the expeditious dispensation of justice in manner that promotes the efficient use of court resources and minimizing of litigation costs. He challenges the Applicants' counsel's deposition asserting that he confused the instant matter with **HCCA No. E087 of 2021** by stating that it is self-evident from the particulars of the two matters on the day's cause list that

while the instant matter is a miscellaneous cause the other is an appeal. Further, that no sufficient cause has been demonstrated for the Applicants' counsel failure to attend court thus there is no accident, inadvertence, excusable mistake, or error upon which this court can exercise its discretion. He views counsel's admission that he first proceeded to handle the matter before the subordinate as evidence of a reprehensible attitude towards the hierarchical court system and particularly the position of this court in the administration of justice.

6. The deponent proceeds to assert that in any event, the third motion is moot having been overtaken by events on the following grounds. First, the subject matter of the proceedings before this court was the Applicants' motion before the lower court dated 25<sup>th</sup> February 2021 seeking to set aside the *ex parte* judgment of the lower court dated 13<sup>th</sup> February 2020 and an order to stay the execution process regarding motor vehicle registration no. **KBZ 937Z** pending hearing and determination of the aforementioned motion. The subordinate court having declined at *ex parte* stage to grant the prayers and instead fixing the motion for hearing, the Applicants approached this court through their first seeking leave to appeal the said order and stay of execution proceedings in the lower Court pending determination of the intended appeal. The said first motion is the one dismissed by this Court on 22/3/2021 for want of prosecution.

7. It is further stated that the motion before the subordinate court was heard and dismissed in a considered ruling delivered on 9<sup>th</sup> August, 2021 and the deponent therefore asserts that the proceedings before this court are moot there being no pending application before the subordinate court necessitating the issuance of leave to appeal and stay orders in the intended appeal. Finally, he deposes that the issue of the legality of the sale of the motor vehicle **KBZ 937Z** in execution as raised in the second motion cannot be litigated in the current proceedings as what was initially presented for determination before this court pertains to leave to appeal and stay of execution proceedings pending appeal.

8. On 18<sup>th</sup> November 2021 when the third motion came up for hearing, the Court directed that the issue of mootness raised by the Respondent be argued first. **Mr. Ngugi** counsel for the Respondent took the position that the subject matter of the proceedings herein has been overtaken by events and thus the motion herein is moot. He reiterated the grounds contained in the two replying affidavits. And especially the fact that the prayers sought in the draft memorandum of appeal annexed to the first motion sought temporary stay of execution pending the hearing and determination of the motion in the lower Court. He therefore contended that by dint of the ruling of the subordinate court delivered on 9<sup>th</sup> August, 2021 the proceedings before this court had been overtaken and serve no purpose. Concerning the legality of the sale of the Applicants' motor vehicle in execution, counsel submitted that the issue cannot be canvassed within the present proceedings and if the Applicants desire to challenge the sale they should file separate proceedings.

9. Finally, counsel argued that the affidavit deponed by **Chris Kabita** on 2<sup>nd</sup> June, 2021 was expunged for having been filed without the requisite leave being sought and even if the third motion were allowed it would not change the fact that these proceedings are now moot.

10. **Mr. Mandela** counsel for the Applicants submitted that the matter is not moot, and the present proceedings are not in vain as the affidavit which is the subject of the third motion demonstrates the service of the stay orders upon the auctioneers who nevertheless proceeded with the sale of the Applicants' motor vehicle. That court orders should not issue in vain, and this court can proceed to deal with the third motion as well as the first one upon reinstatement and could issue an order reversing the sale of the motor vehicle. It was further submitted that the Respondent does not stand to suffer any prejudice if the affidavit by Chris Kabita is admitted as the Respondent reserves the right of reply to the contents therein. In a brief rejoinder Mr Ngugi reiterated his earlier submissions.

11. The Court has considered the parties' submissions above. **Black's Law Dictionary Tenth Edition** defines the term "moot" as having "no practical significance; hypothetical or academic" and a "moot case" as a "matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights". I agree entirely with the sentiments of **Mativo J** in **Evans Kidero v Speaker of Nairobi City County Assembly & Another (2018) eKLR**, where the learned Judge stated *inter alia* that:

**"A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. Mootness arises when there is no longer an actual controversy between the parties to a court case, and any ruling by the court would have no actual, practical impact... No court of law will knowingly act in vain. The general attitude of courts of law is that they are loathe in making pronouncements on academic or hypothetical issues as it does not serve any useful purpose. ...A suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity..."**

**A case or issue is considered moot and academic when it ceases to present a justiciable controversy by virtue of supervening events, so that an adjudication of the case or a declaration on the issue would be of no practical value or use. In such instance, there is no actual substantial relief which a petitioner or applicant would be entitled to, and which would be negated by the dismissal of the case. Courts generally decline jurisdiction over such cases or dismiss them on grounds of mootness..."**

12. The matter herein commenced by the first motion seeking leave to appeal lower court's *ex parte* order dated 1<sup>st</sup> March 2021, therein erroneously described as a ruling, declining to grant interim stay as sought in Applicant's motion before that court. The first motion also contained prayers to stay proceedings before the lower Court pending inter partes hearing thereof and the intended appeal. The substantive prayer in the draft memorandum of appeal annexed to the supporting affidavit and marked as annexure "**KN3**" sought that this Court does "issue temporary stay orders and in particular the sale of the Appellants motor vehicle registration No. **KBZ 937Z** pending the hearing and determination of the Application filed at the subordinate court dated 2.02.2021". The actual date of the motion is 25<sup>th</sup> February 2021.

13. The said motion has now admittedly been determined by the subordinate Court *vide* the dismissal ruling delivered on 9<sup>th</sup> August 2021. The substratum of the intended appeal has therefore been overtaken by events and ceased to be of any moment. As such, the third motion has been rendered academic as the affidavit sought to be admitted was intended to be used in support of the second motion dated 16<sup>th</sup> April 2021 seeking reinstatement of the first motion dismissed on 22.3.2021. No practical value can be derived from this court proceeding to hear and

determine the third motion and any orders issuing subsequently would be in vain, the foundation of these proceedings having shifted with the delivery of the lower court's ruling. The Applicants have not presented any proceedings before this court for the determination of the question whether the sale of their attached motor vehicle was proper or done in contravention of a Court order. It is therefore not available to the Applicants to assert that because of that question, there are still live issues between the parties requiring determination.

14. In exercising its jurisdiction, this Court operates under the command of Article 159(2) (d) and the overriding objective as found in section 1A and 1B of the Civil Procedure Act. The latter provisions are to the effect that: commanding inter alia:

“1A

1. The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.  
2. The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).  
3. A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.  
1B.

1. For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—  
(a) the just determination of the proceedings;  
(b) the efficient disposal of the business of the Court;  
(c) the efficient use of the available judicial and administrative resources;  
(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties;  
(e).....”.

15. In **Hunker Trading Company Limited v Elf Oil Limited (2010) eKLR**, the Court of appeal while underscoring the “O2 principle” as they branded the overriding objective, had this to say:

“Perhaps, it is appropriate for us to observe that litigants and their advocates should note that in “O2 principle”, they have a powerful ally where they are advancing its aims and a powerful adversary where they are bent on subverting its aims. As stated severally now, in some of our recent decisions the “O2 principle” is the hub upon which the objectives of the two Acts, their provisions and the rules made thereunder turn. It is a requirement of “O2 principle” that the exercise of any power under the Act or the rules must be exercised in line with its principal aims. Similarly, the interpretation of any provision in the Acts and the rules has to be “O2” compliant.

In the case of **MRADULA SURESH KANTARIA AND SURECH NANILLAL KAPTARIA CIVIL APPEAL NO. 277 OF 2005 (unreported)** this Court observed:-  
“In this regard we believe one of the principal purposes of the double “OO principle” is to enable the Court to take case management principles to the centre of the Court process in each case coming before it so as to conduct the proceedings in a manner which makes the attainment of justice fair, quick and cheap”

16. This court would be failing in its duty if it were to allow what are essentially spent proceedings to linger on, thereby unnecessarily dissipating the Court's resources and, to the prejudice of the Respondent. In the circumstances, it is my view that the matter before me stands moot for all intents and purposes and the Court therefore dismisses the second and third motions herein with costs to the Respondent.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 24<sup>TH</sup> FEBRUARY 2022.**

C.MEOLI

JUDGE

In the presence of:

For the Applicants: N/A

For the Respondent: Mr Ngugi

C/A: Carol