



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. APPLICATION NO.E086 OF 2020**

**ELIO CHESA.....APPLICANT**

**VERSUS**

**EDWARD WASHALA MWABENA.....RESPONDENT**

**RULING**

1. The application before the Court is the **Notice of Motion** application dated **18<sup>th</sup> December, 2020** and filed on an even date. It is expressed to be brought under **Sections 1A, 1B, 3A and 63(e), 80** all of the **Civil Procedure Act Cap 21 Laws of Kenya, Order 22 Rule 51 and 52, Order 40 Rules 1, 2 and 4, Order 42 Rule 6 and Order 51 Rule 1** all of the **Civil Procedure Rules, 2010** and all other enabling provisions of the Law.

2. The application is seeking the following orders: -

**1. Spent;**

**2. Spent;**

**3. THAT this Honourable Court be pleased to allow the Applicant to Appeal the Ruling and Orders of Hon. J. M Omido, PM, delivered in Kwale PMCC, No. 128 of 2020 out of time;**

**4. THAT pending the hearing and determination of the intended Appeal, there be Unconditional STAY OF EXECUTION of the ruling and decree of Hon. J. O Omido delivered on 28/10/2020 in RMCC CASE NO. 2602 of 2011;**

**5. THAT upon granting of prayer 2 (above), the Draft Memorandum of Appeal attached be deemed as duly filed upon payment of requisite filing fees;**

**6. THAT costs of this Application be provided for.**

3. The application is premised on the grounds set out therein, and is supported by an **Affidavit** sworn on **18<sup>th</sup> December, 2020** by **Mr. Elio Chesa**, who is the Applicant herein. He avers that the Respondent filed a **Plaint** in **Kwale PMCC No.128 of 2020** seeking a declaratory order that he is the rightful owner of **Motor Vehicle Toyota Rav 4 Registration No.KBU 626 N**. He had also sought for an order for specific performance for the transfer of the said Motor Vehicle to him.

4. The deponent avers that the **Plaint** was accompanied by a **Notice of Motion** application that sought injunctive orders to bar the sale of the **Motor Vehicle Toyota Rav 4 Registration No.KBU 626 N**.

5. It has been stated that the trial court considered the said interim application and granted the Application in terms of the injunctive orders that were sought and further ordered that the OCS Diani Police Station to confiscate the Motor Vehicle and for the same to be detained at Diani Police Station until the suit is heard and determined.

6. The deponent further states that he instructed the **Firm of M/S Nyameta, Mogaka & Magiya Advocates** to prefer an Appeal against the said decision and in the interim have the said orders set aside and possession of the motor vehicle be restored to him.

7. It is the Applicant's case that the said application was filed but the orders to set aside the injunctive orders and orders for confiscation and detention of suit Motor Vehicle were not granted and instead pushed for a further mention date on the **9<sup>th</sup> December, 2020**.

8. The deponent avers that by the **9<sup>th</sup> December, 2020**, the timeline for filing an Appeal had already lapsed and yet his application to have the order issued by the trial court set aside had not been heard and was further pushed forward to the **13<sup>th</sup> January, 2021**.

9. It is the Applicant's case that he instructed his current legal Counsel on the **10<sup>th</sup> December, 2020** to prefer an Appeal on his behalf and he insists that the delay in filing the Appeal within time was therefore occasioned by circumstances beyond his control, hence he should not be punished for it.

10. **Mr. Elio**, has deponed that his Appeal raises triable issues with high chances of success. He has stated that the orders as issued by the trial court are impugned to indefinitely detain his Motor Vehicle which will cause him irreparable loss. He has added that his motor vehicle is exposed to depreciation in value and thus would render the Appeal nugatory.

11. Further, the Applicant has stated that he will suffer substantial loss as the Respondent is a man of straw and may not be able to compensate the loss associated with the loss of the said Motor Vehicle.

12. The Applicant has stated that he is willing and ready to abide by any conditions set by the court for the stay of execution including surrendering the logbook in Court until the Appeal is heard and determined.

13. It has been deponed that no party will be prejudiced if a stay of execution is granted as it would benefit no one if the Motor Vehicle is detained indefinitely and left to waste away at a police station.

### **The Response**

14. The Application is opposed vide an **affidavit** sworn on **28<sup>th</sup> January, 2021** by **Edward Washala Mwabena**, who is the Respondent herein. He avers that the application as filed by the Applicant is frivolous as the same has been brought in bad faith since it contains untrue facts and should be dismissed with costs.

15. The Respondent has deponed that the Order which the Applicant seeks to Appeal against originated from an Application for injunctive orders filed in **Kwale Civil No.128 of 2020** together with a **Plaint**, both dated **24<sup>th</sup> August, 2020**. The Respondent has stated that the Applicant was duly served with both the Application and Plaint but failed to enter appearance and or file a Defence, hence the orders the Applicant seeks to Appeal against were issued.

16. The Respondent contends that once the orders were enforced, the applicant filed an application to set aside the order vide a **Notice of Motion** application dated **23<sup>rd</sup> November, 2020** and that on the **2<sup>nd</sup> December, 2020** when the said application was to be heard, the Applicant through his Counsel, **Ms. Oguna** requested for time for the parties to negotiate. It has been stated that the matter was adjourned to **9<sup>th</sup> December 2020** for parties to confirm settlement. It is added that the parties agreed that the Motor Vehicle be maintained at the Diani Beach Police Station but by **9<sup>th</sup> December, 2020**, parties had not agreed and they were directed to file submissions by the **13<sup>th</sup> January, 2021**.

17. On the **13<sup>th</sup> January, 2021** when the matter came up for mention, the Applicant withdrew his Application dated **23<sup>rd</sup> November, 2020** and the matter was slated for a pre-trial on the **27<sup>th</sup> January, 2021**.

18. **Mr. Mwabena** has deponed that on the **27<sup>th</sup> January, 2021** when the matter came up, another application dated **26<sup>th</sup> January, 2021** had been filed by the Applicant's Advocates that were on record to cease from acting for the Applicant. The Respondent then states that at ground No.3 of the application, the reasons to cease acting were that the Applicant had indicated that he was no longer interested in defending **Kwale Civil Case No.128 of 2020** as he had filed another suit in Mombasa on the same subject matter.

19. It has been deponed that the Applicant's actions have been brought forth with amount of an abuse of the court process as the Application herein has not been brought in good faith.

20. The Respondent depones that the actions of the Applicant are draconian as he has preferred an Appeal against the order given on the **28<sup>th</sup> October, 2020** and again filed a similar application dated the **18<sup>th</sup> December, 2020** before the Magistrate's Court seeking similar orders, thus the Applicant is forum shopping.

21. It has further been deponed that the Applicant slept on his rights when he ignored all pleadings served through the various medium and his intentions now are to frustrate the Respondent.

22. The Respondent has averred that the Applicant has not furnished any sufficient reasons as to why he should be allowed to Appeal out of time given that he was fully aware of the statutory time limits and his ignorance should be no defence.

23. It is the Respondent's contention that the intended Appeal is ill-conceived as this court is a Court of Appeal, that will examine both facts and law, yet the Applicant has not raised any facts to challenge the Respondent's application.

24. Further, it has been stated that the Applicant has not shown this court how the vehicle will waste away as the same is safely stored at the Police Station and that the relocation of the motor vehicle makes the Respondent apprehensive that Applicant will sell it to a third party to defeat the interests of justice.

25. The Respondent filed a **Supplementary Affidavit** wherein he has stated that the Applicant has filed **Kwale Civil Suit No.E014 of 2021 - Elio Chesa –vs- Edward Washala Mwabena** vide a **Plaint** dated the **19<sup>th</sup> February, 2021** which was accompanied by a **Notice of Motion** Application dated on even date.

26. It has been deponed that the said **Notice of Motion** was allowed ex parte and that orders were issued that the **Motor Vehicle Registration No.KBU 626N** be released which is also the subject matter of the application herein.

27. The Respondent avers that the Applicant has since failed to disclose to this court that orders have been issued in his favor in a different court and thus his actions amount to an abuse of the Court process.

28. Following directions by the court on 26<sup>th</sup> January, 2021, the Application proceeded by way of written submissions. The Applicant did not file any submissions. The Respondent's submissions were filed on **22<sup>nd</sup> April, 2021**.

29. I have had the benefit of reading the written submissions of the Respondent and they replicate the averments in the **Replying and Supplementary Affidavits** in opposition of the application as captured above that I need not to duplicate the same..

### **Analysis and Determination**

30. I have considered the application dated **18<sup>th</sup> December, 2020**, the affidavits in support and against, the submissions by the Respondent, together with the cited statute and case law. I find that the issue that arises for determination is *whether the orders sought by the Applicant in the application dated 18<sup>th</sup> December, 2020 can be granted*.

31. In the Application herein, the Applicant has sought for a stay of execution of the **Ruling and Decree** granted by **Hon. J. Omido** on the **28<sup>th</sup> October, 2020** vide **Kwale PMCC No.128 of 2020** and further that he be allowed to Appeal against the said Ruling out of time.

32. In his case, the Respondent has vehemently stated that the Applicant's application dated **18<sup>th</sup> December, 2020** is an abuse of the court's process as the orders being sought will have no probative value since the Applicant has filed a suit being **Kwale Civil Suit No.E014 of 2021 - Elio Chesa –vs- Edward Washala Mwabena** where the orders issued on the **22<sup>nd</sup> February, 2021** had the **Motor Vehicle Registration No.KBU 626N** released from Diani Police station, a subject matter that is the substrata of the Appeal if the Applicant is allowed to Appeal out of time.

33. It is evident from the record that the Applicant abandoned the application as he did not file submissions as directed by the court. Also, he did not attend court on **11<sup>th</sup> March, 2021** and **26<sup>th</sup> April, 2021**. Further, I find and agree with the Respondent that the Applicant herein is forum shopping and wasting the court's time since he filed the instant application and then went on to file another sui being **Kwale Civil Suit No.E014 of 2021 - Elio Chesa –vs- Edward Washala Mwabena**. This action by the Applicant contravenes the provisions of **Section 6** of the **Civil Procedure Act**, thus the same is an abuse of the Court process.

34. Consequently, for the reasons stated above, the Applicant's Application dated **18<sup>th</sup> December, 2020** be and is hereby struck out with costs to the Respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28<sup>TH</sup> DAY OF OCTOBER, 2021.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

No appearance for and by either party

Court Assistant - Gitonga