



REPUBLIC OF KENYA



**Mwithiga v Njeru & another (Civil Appeal 1182 of 2024)  
[2025] KEHC 12217 (KLR) (Civ) (8 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 12217 (KLR)

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

**CIVIL**

**CIVIL APPEAL 1182 OF 2024**

**TW CHERERE, J**

**MAY 8, 2025**

**BETWEEN**

**BENSON MWITHIGA ..... APPELLANT**

**AND**

**SILAS NJERU ..... 1<sup>ST</sup> RESPONDENT**

**MAMALO AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

“Justice is not served by motion after motion while the main suit gathers dust. The courtroom is no refuge for tactical delay—it is a forum for resolution.”

1. This is the second application brought by the Appellant yet the substantive appeal remains unprosecuted. The Court is reminded of the caution by Ringera J.(as he then was) in [Uhuru Highway Development Ltd v Central Bank of Kenya](#) [1995] eKLR that

“litigation is not a game of chess where players keep trying new moves hoping one will succeed.”

2. The Appellant by Notice of Motion dated 18<sup>th</sup> November 2024 brought under Order 51 Rule 1 of the [Civil Procedure Rules](#), Section 5(1) of the [Judicature Act](#), Sections 1A, 1B and 3A of the [Civil Procedure Act](#) and all other enabling provisions of the law seeks the following substantive reliefs:
  1. An order compelling Mamalo Auctioneers to return Motor Vehicle Registration Number KAA[particulars withheld] forthwith in the same condition as before seizure;



2. An order for compensation for loss and damages allegedly sustained due to the alleged contempt of court orders dated 15<sup>th</sup> October 2024; and
3. Costs of the application.
3. The application is supported by the Appellant's affidavit sworn on 18<sup>th</sup> November 2024. The Appellant avers that pursuant to this court's orders issued on 15<sup>th</sup> October 2024 granting stay of execution, the Respondents were duly served. However, despite such service, 2<sup>nd</sup> Respondent allegedly seized Appellant's motor vehicle KAA [particulars withheld] on 13<sup>th</sup> November 2024, occasioning him substantial financial loss.
4. The application is opposed. The 1<sup>st</sup> Respondent, through a replying affidavit sworn on 22<sup>nd</sup> November 2024 by Betty Isoe, contends that at the time of seizure of the vehicle, they had not been served with the memorandum of appeal, the Notice of Motion dated 14<sup>th</sup> October 2024, or the directions issued on 15<sup>th</sup> October 2024.
5. Upon consideration of the pleadings on record, two issues fall for determination:
  1. Whether the order for return of the motor vehicle is merited;
  2. Whether the court can grant compensation for alleged loss and damages through the present application.
6. With respect to the first issue, it is not contested that motor vehicle registration number KAA [particulars withheld] had been released prior to the hearing of the present application. In view of that development, the prayer seeking its return has been rendered nugatory. The subject matter having ceased to exist, no purpose would be served by issuing the order sought. It is a well-established principle that courts do not grant orders in vain. (See *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR).
7. On the second issue, the Appellant seeks compensation for losses allegedly sustained due to what he characterizes as the Respondents' contemptuous conduct. The Court of Appeal in *Jogoo Kimakia Bus Services Ltd v. Electrocom International Ltd* [1992] KECA 48 (KLR) stated that:

“The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.”
8. Whereas the allegations of financial loss raised by the Appellant are serious, the appropriate recourse lies in a properly instituted claim for damages, where such assertions can be subjected to evidentiary scrutiny.
9. As stated hereinabove, the motor vehicle having already been released, the prayer for its return has been overtaken by events. The claim for damages, on the other hand requires proof through a substantive suit.
10. Accordingly, the Notice of Motion dated 18<sup>th</sup> November 2024 is unmeritorious and it is dismissed with costs to the 1<sup>st</sup> Respondent.



**DELIVERED AT NAIROBI THIS 08<sup>th</sup> DAY OF May 2025**

**WAMAE.T. W. CHERERE**

**JUDGE**

Appearances

Court Assistant - Nyambala

For Appellant - Mr. Ngugi for C.N.Ngugi & Associates Advocates

For 1<sup>st</sup> Respondent - Mr. Ndungo for Ndungo James Gachiri Advocate

For 2<sup>nd</sup> Respondent – N/A

