



**Al-Siddique Motors Limited v Attorney General (Civil Appeal
313 of 2023) [2024] KEHC 1067 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1067 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 313 OF 2023
FN MUCHEMI, J
FEBRUARY 8, 2024**

BETWEEN

AL-SIDDIQUE MOTORS LIMITED APPELLANT

AND

ATTORNEY GENERAL RESPONDENT

RULING

Brief facts

1. The application dated 22nd September 2023 seeks for orders of setting aside the ruling delivered on 5th September 2023 in Ruiru MCCCmisc No. E022 of 2023 dismissing the appellant's application dated 19th June 2023. The appellant further seeks for orders to compel the respondent to release motor vehicle registration number KDK 534D Honda Fit to the appellant.
2. In opposition to the application, the respondent filed Grounds of Opposition dated 23rd October 2023.

Appellant's Case

3. The appellant states that on 5th September 2023, the Chief Magistrate Court in Ruiru in MCCCmisc. No. E022 of 2023 dismissed his application seeking the release of motor vehicle registration number KDK 534D Honda Fit following its impounding at Mugutha Police Station which was wasting away.
4. The appellant states that he entered into a purchase agreement on 26th September 2022 with one Cynthia Wanjiru Maina for the purchase of motor vehicle registration number KDK 534D Honda Fit at a purchase price of Kshs. 1,400,000/-. The appellant was then forced to repossess the said motor vehicle when Cynthia Wanjiru Maina defaulted in the payments of the monthly installments. As such, the appellant prays that the suit motor vehicle is released to it as the registered owner.



5. The appellant contends that his advocates on record have made requests for the release of the said motor vehicle to the OCS Mugutha Police Station and the Office of the Director of public Prosecution who have stated that they have completed taking photographs of the vehicle in the investigation of the criminal case.
6. The appellant states that he stands to suffer great prejudice by the continued impounding and detainment of the suit motor vehicle as it continues to become dilapidated and losing its value. Further the appellant contends that being in the business of selling motor vehicles, it is continuing to lose revenue and incurs expenses as it acquired a loan for the purchase of the motor vehicle.
7. The appellant contends that the respondent mistakenly believed that the reason the motor vehicle was impounded concerned a civil claim, yet it was a criminal matter wherein the respondent had the authority to have the said vehicle released to him.
8. The appellant urges the court to exercise its discretion and treat the matter as a unique case before it is based on its distinct nature considering the appellant is the only person interested in having the motor vehicle released from the police station to its custody.

The Respondent's Case

9. The respondent oppose the application on the premise that it is incurably defective, bad in law and an abuse of the court process. The respondent argues that the prayers as sought in the application cannot be issued as is because it will determine the appeal in its finality rendering the appeal an academic exercise.
10. The respondent contends that the orders sought by the appellant are misplaced, misconceived and unmerited as no orders were granted in the trial court capable of being stayed.

The Appellant's Submissions

11. The appellant reiterates what was deposed in its supporting affidavit and submits that the subject motor vehicle was involved in a shooting incident and was taken into custody by the police as an exhibit. The appellant further submits that the OCS Mugutha police station had informed them that they had completed with the subject motor vehicle as they dusted the vehicle for finger prints and took photographs of the vehicle. However, the appellant contends that since it filed an application to have the motor vehicle released, the OCS can only release the said vehicle when the courts orders the same to be released.
12. The appellant further submits that the respondent does not have any lien over the subject motor vehicle as the vehicle is being held in respect of a criminal suit and not a civil suit as alleged by the respondent.
13. The appellant contends that it stands to suffer irreparably as the subject motor vehicle continues to depreciate while in police custody.

The Respondent's Submissions

14. The respondent relies on the cases of *Western College of Arts & Applied Sciences vs E.P. Oranga & 3 Others* [1976] eKLR and *Raymond M. Omboga vs Austine Pyan Maranga* Kisii HCCA No. 15 of 2010 and submits that the trial court's orders dated 5/9/2023 are negative in nature and therefore incapable of being stayed. Moreover, the respondent argues that the order seeking for the motor vehicle to be released cannot be granted or stayed as the trial court did not make any such orders.



15. The respondent submits that granting the orders sought by the applicant have the consequence of admitting that the application dismissed in the trial court was properly before the court and shall decide on the rights of the parties entirely. Thus, the appeal will be defeated and render it an academic exercise to the detriment of judicial time and resources.
16. The respondent relies on order 42 rule 6 of the *Civil Procedure Rules* and the case of *Co-operative Bank of Kenya Limited vs Banking Insurance & Finance Union (Kenya)* [2015] eKLR and submits that the appellant has failed to show that he stands to suffer substantial loss following the ruling of the trial court. It is evident that the Magistrate only dismissed the application for release of the vehicle but did not give any orders for action by any of the parties herein.
17. The respondent further argues that setting aside of the trial court's ruling is an issue that can only be argued in the substantive appeal and not in the interlocutory stage. As such, the respondent contends that the same is misguided, unmerited and an abuse of the court process. The respondent relies on the cases of *Abmed Swaleh Hemed vs Ali Swaleh Hemed* [2021] eKLR and *J.K.M vs M.A.C* [2019] eKLR to support their submissions.

The Law

Whether the application has merit.

18. The court has discretion to set aside judgment or an order to avoid injustice or hardship resulting from an accident inadvertence or excusable mistake. *Shah vs Mbogo & Another* [1967] E.A. 116.
19. Similarly in *Patel vs E.A. Cargo Handling Services Ltd* [1974] E.A. 75 the court stated that:-

There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just...The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules.
20. I have perused the court record and noted that the appellant filed an application Ruiru Misc. Civil Application No. E022 of 2023 seeking for orders of release of motor vehicle registration number KDK 534D on the basis that it was registered owner. The respondent raised a preliminary objection on the premise that the suit offended Section 3 and 19 of the *Civil Procedure Act* and order 3 rule 1 of the *Civil Procedure Rules* as it was not instituted by way of a plaint. The trial court upheld the preliminary objection and held that a suit could only be instituted by way of plaint and not through a miscellaneous application as the applicant had done. The applicant then lodged an appeal against the decision of the lower court. The business of this court in this appeal is only whether the application in Ruiru Magistrate's Court ought to have been filed in form of a plaint or a Miscellaneous application. The release of the motor vehicle in question is beyond the mandate of this court.
21. A cursory look at the orders the applicant is seeking if granted at this interlocutory stage will determine the substantive appeal without giving the parties a chance to ventilate their respective arguments in the said appeal. The appellant claims that the said motor vehicle is being held in respect of a criminal matter. If this is the position, the said impounding of the vehicle can only be resolved in the said criminal case.
22. I find no merit in this application and I hereby dismiss it with no order as to costs.
23. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 8TH DAY OF FEBRUARY 2024.

F. MUCHEMI



JUDGE

