

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
MISCELLANEOUS CIVIL SUIT NO. 280 OF 2018
(Formerly JR No. 519 of 2009)

AFRICAN BANKING CORPORATION LIMITED EX PARTE
APPLICANT
VERSUS
THE COMMISSIONER OF POLICE
RESPONDENT
AND
DAVIS MAINA MAHINDA INTERESTED PARTY /
APPLICANT

RULING

Background

1. Before this Court is the Notice of Motion dated 12th April 2025 brought by the Interested Party/Applicant, **Davis Maina Mahinda**. The Applicant seeks, inter alia, the setting aside of the *ex parte* stay orders issued on **9th September 2009** and **19th December 2012**, which orders are alleged to have effectively prohibited the National Police Service from investigating allegations of fraud and forgery in relation to a Hire Purchase Agreement for motor vehicle **KAR 866Z**.

2. The Applicant further seeks an order compelling the Respondent to produce mandatory registration documents, specifically '**Form A**' and the '**Original Joint Registration Receipt**', and a declaration that failure to produce these constitutes evidence of forgery and criminal conduct.
3. The Application is supported by the affidavit of the Applicant, sworn on 12th May 2025, and is predicated on the grounds on its face.
4. The Applicant's contention is that he entered into a Hire Purchase Agreement with ABC Bank, the ex parte Applicant herein, on 15th May 2004 to purchase a new Isuzu lorry. He asserts that despite paying a total of **Kshs 7,201,382.00**, which included an overpayment of Kshs 97,964.00, the bank failed to provide the ownership documents.
5. The Applicant contended that the bank obtained the stay orders through the concealment of material facts. He points out that the bank admitted in its own verifying affidavit that the vehicle was repossessed by Kenya Commercial Bank (KCB) as an asset of a third party, **Titus Kilonzo**, even though the Applicant was the bona fide purchaser.
6. It was the Applicant's assertion that stay orders lasting over sixteen years violate Article 159(2)(b) of the Constitution, which mandates that justice shall not be delayed.

7. The Ex-Parte Applicant/Respondent, through the Replying Affidavit of **Kajuju Marete** dated **3rd July 2025**, opposed the application, arguing that the subject matter of the present application is inextricably linked to **HCCC 507 of 2005**, where a ruling by **Justice Lesiit** delivered on 22nd February 2008 found prima facie evidence that the funds used to liquidate the Applicant's loan were fraudulent proceeds from an embezzlement scheme at KCB.
8. It was therefore the Respondent's contention that the Applicant's remedy lies within the civil suit (**HCCC 507 of 2005**), which is still subsisting, and that no sufficient basis has been laid to warrant setting aside the orders of 2009 and 2012.
9. The Respondent maintained that the reliefs sought in the present application, such as discovery, enlargement of time, joinder, and costs, relate to a separate suit and are procedurally unavailable in judicial review proceedings.
10. It was further the Respondent's assertion that Applicant has already moved to file an Amended Defense and Counterclaim in HCCC 507 of 2005 against the Bank, and therefore, allowing this application would be an abuse of the Court process.
11. The Respondent therefore asserted that the application amounts to an abuse of the Court process, intended to re-

litigate issues pending before another court of concurrent jurisdiction.

12. The application was canvassed by way of written submissions. The Applicant filed his submissions dated 28th October 2025, whilst the Respondent, through Muriu Mungai & Company Advocates LLP, filed submissions dated 4 November 2025.

Analysis and Determination

13. Having carefully considered the application, the response thereto, and the parties' submissions, the Court distills the following as issues requiring determination:

- i. Whether the Interested Party has laid a proper basis for setting aside the ex parte orders of 9th September 2009 and 19th December 2012.
- ii. Whether the reliefs sought compelling production of documents and issuance of declaratory orders are available within these judicial review proceedings.

14. Before considering the issues identified, the Court finds it necessary to set out the facts of this case in brief detail.

15. This dispute dates back to 11 May 2004, when the Interested Party/Applicant, **Davis Maina Mahinda**, applied for

a hire purchase facility totaling from the Respondent (ABC Bank) in the sum of **Kshs 4,540,000.00** for the purchase of a new Isuzu lorry, registration number **KAR 866Z**, from Central Farmers Garage Limited (CFG).

16. Under the terms of the agreement, the Applicant was required to pay monthly installments of Kshs 149,000.00 over a period of 36 months.

17. The Applicant consistently serviced the loan for 11 months.

18. On 27th April 2005, a "bullet payment" of **Kshs 3,427,000.00** was received via Electronic Funds Transfer (EFT) from Kenya Commercial Bank (KCB), which liquidated the hire purchase account, leaving a credit balance of **Kshs 47,482.00** (which the Applicant claims eventually grew to Kshs 97,964.00 due to continued servicing).

19. Despite the liquidation of the loan, the registration documents were never released to the Applicant because, in September 2005, ABC Bank was served with pleadings in **HCCC 507 of 2005 (KCB vs. Titus Kilonzo & Others)**, in which KCB alleged that one of its employees, **Titus Kilonzo**, had embezzled approximately **Kshs 104,288,250.60**.

20. KCB Bank contended that its investigations revealed that the "bullet payment" used to clear the Applicant's loan at ABC Bank originated from these allegedly stolen funds.

21. Consequently, KCB instituted proceedings in **HCCC 507 of 2005 (KCB vs. Titus Kilonzo & Others)** with a view to repossessing and preserving the lorry (KAR 866Z) as a suspected asset of Titus Kilonzo. By a **ruling dated 22nd February 2008, this Court (Lesiit J - as she then was)** found the payment was prima facie fraudulent, and ordered preservation of the vehicle.

22. Aggrieved by the bank's refusal to release documents, the Applicant lodged a criminal complaint with the police against ABC Bank for *Obtaining Money by False Pretences*, and the Bank's Managing Director was thereafter summoned by the police in August 2009. As a result, the bank instituted Judicial Review Proceedings (**JR 519 of 2009**) to block the investigation.

23. On **9th September 2009, Justice Muga Apondi** (as he then was) granted ex parte leave for the bank to apply for prohibition, which leave operated as a stay against any police investigation or criminal charges.\

24. **On 19th December 2012**, the matter was stayed by **Justice Lenaola** (as he then was) pending the final determination of the ownership dispute in the 2005 KCB suit.

25. The Applicant now challenges the continued subsistence of those ex parte stay orders (9th September 2009 and 19th

December 2012), contending that they have been in force for an inordinate period and have impeded the investigation of his complaint.

Whether the order for setting aside of the stay orders is warranted

26. The Court's jurisdiction to set aside ex parte orders is provided under Order 51 Rule 15 of the Civil Procedure Rules, as read with Sections 1A, 1B, and 3A of the Civil Procedure Act.
27. The applicable principles were set out in **Shah v Mbogo & Another [1967] EA 116**, that the discretion to set aside ex parte orders is intended to avoid injustice, but must not be exercised to aid a party who deliberately seeks to obstruct or delay justice.
28. The Applicant contends that the orders have subsisted for over sixteen years, thereby violating constitutional principles, including the right to a fair hearing and the requirement that justice shall not be delayed.
29. The Respondent, on the other hand, asserts that the stay orders were issued to await the outcome of **HCCC No. 507 of 2005**. The rationale for the stay was to prevent parallel processes dealing with the same subject matter, potentially leading to conflicting outcomes.

30. The Court agrees with the Respondent's position. It is clear from the record that the stay of proceedings ordered by the Court on **19th December 2012** (Lenaola J - as he then was), directed a stay of proceedings in the present matter "pending the hearing and determination of the **HCC 507/2006 (Commercial Division).**"
31. The Court has also perused the pleadings in **HCCC 507 of 2005 (KCB vs. Titus Kilonzo & Others)**, and notes that the Interested Party/Applicant has, since 2022, actively moved the Commercial Court in HCCC No. 507 of 2005 seeking extension of time to file an amended defence and counterclaim, which application is pending ruling.
32. From the foregoing, it is therefore evident that the subsisting stay in this matter remains anchored on the pendency of HCCC No. 507 of 2005, a suit in which the Applicant is an active participant and through which his substantive grievances against the Bank may be fully ventilated.
33. This Court is not persuaded that the mere passage of time, without more, constitutes sufficient cause to set aside subsisting orders whose justification is tied to proceedings that remain undetermined.
34. The Court is guided by the principle in **Global Tours & Travels Ltd HC Winding Up Cause No. 43 of 2000** that a

stay of proceedings may be justified where it serves the interests of justice and avoids multiplicity of proceedings or conflicting decisions. The Learned Judge was clear that:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion it should be exercised rationally and not capriciously or whimsically. The sole question is whether it is in the interest of justice to order a stay of proceedings and, if it is, on what terms it should be granted....”

35. Further, in **Kenya Wildlife Service v James Mutembei [2019] eKLR**, the Court emphasized that a stay of proceedings is a discretionary remedy to be exercised where circumstances justify it.

36. In the present case, the stay orders of 19th December 2012 were issued to preserve judicial orderliness and comity between courts of concurrent jurisdiction. Lifting the stay and allowing the proceedings to proceed in this matter, outside the KCB matter (**HCCC 507 of 2005**), carries the danger of parallel, and potentially conflicting determinations.

37. It is instructive to note that by a ruling delivered by Justice Lesiit on 22nd February 2008, the Court found prima facie evidence that the bullet payment of **Kshs 3,427,000.00** made to liquidate the Applicant's hire purchase account was fraudulent, originating from embezzled funds. The Court then ordered that the motor vehicle be preserved. I agree with the Respondent's argument that vacating the stay orders now would essentially act as a collateral challenge to the Lesiit, J. ruling, thereby undermining the integrity of judicial hierarchy and the finality of court orders.

38. Further, since the Applicant has already moved to file an Amended Defense and Counterclaim in **HCCC 507 of 2005** to ventilate his grievances against the Bank, allowing this application would result in two different courts adjudicating the same facts simultaneously.

39. Accordingly, the Court is not persuaded that the prayer for the setting aside of the impugned orders is warranted on the facts of this case.

Whether the prayer for the production of documents and declaratory reliefs are merited

40. The Applicant sought orders compelling production of documents ('**Form A**' and '**Original Joint Registration**

Receipt'), enlargement of time, joinder of parties, and declarations of criminality.

41. These prayers are untenable for several reasons. First, judicial review proceedings are public law remedies, concerned with the legality of decision-making processes, not with the determination of private rights, discovery, or adjudication of contested facts.
42. In **Municipal Council of Mombasa v Republic & Umoja Consultants Ltd [2002] eKLR**, the Court of Appeal emphasized that judicial review is concerned with the decision-making process, not the merits.
43. Similarly, in **Republic v Kenya Revenue Authority ex parte Yaya Towers Ltd [2008] eKLR**, the Court emphasized that judicial review is not the proper forum for resolving contested factual issues or enforcing civil rights.
44. On the facts of this case, the Court is of the view that the prayer for production of documents is a matter properly falling within the discovery process under the Civil Procedure Rules, **HCCC 507 of 2005**, in which the Applicant is already a party (**9th Defendant**) and are not for determination in this application.

45. In any event, the Applicant has acknowledged that he has sought, in **HCCC No. 507 of 2005**, leave to amend his defence and introduce a counterclaim against the Bank touching on the same motor vehicle and transaction. That acknowledgment reinforces the conclusion that the proper forum for resolving those disputes remains the civil suit.
46. Allowing the present application would sanction multiplicity of proceedings and parallel litigation over the same subject matter.
47. In light of the foregoing, the Court finds that the present application is unmerited and hereby dismisses the same with costs to the Respondent/Ex parte Applicant.
48. It is so ordered.

**DATED, SIGNED, AND DELIVERED AT NAIROBI
THIS 17TH DAY OF APRIL 2026**



HON. MR. JUSTICE MOSES ADO
Judge of the High Court

In the presence of: -

C/A - Moses

Mahinda (in Person).....the Applicant

Kenneth Wilson.....for the Respondent/Ex Parte Applicant