



Roy Transmotors Ltd & another v County Government of Mombasa; Energy Petroleum Regulatory Authority & 3 others (Interested Parties) (Petition E008 of 2023) [2025] KEHC 3001 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEHC 3001 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION E008 OF 2023
G MUTAI, J
FEBRUARY 27, 2025**

BETWEEN

ROY TRANSMOTORS LTD 1ST PETITIONER

EAST AFRICA PETROLEUM TRANSPORTERS ASSOCIATION 2ND PETITIONER

AND

COUNTY GOVERNMENT OF MOMBASA RESPONDENT

AND

ENERGY PETROLEUM REGULATORY AUTHORITY INTERESTED PARTY

THE COUNCIL OF GOVERNORS INTERESTED PARTY

MINISTRY OF ENERGY AND PETROLEUM INTERESTED PARTY

THE ATTORNEY GENERAL INTERESTED PARTY

RULING

1. Before the court is a notice of motion dated 4th November 2024 vide which the appellants/applicants seek seven orders, of which the most relevant are prayers 2 and 5, which seek:-

“2. This honourable court be pleased to grant the applicant leave to lodge an appeal out of time against the decision delivered on 10th September 2024 by the Principal Judge, Honourable Justice Olga Sewe, sitting on Mombasa’s Petition No. E008 of 2023;

...



5. This honourable court be pleased to issue injunction stopping the respondent from arresting /clamping the applicant’s motor vehicles pending the hearing and determination of the appeal;
 6. This honourable court be pleased to issue an order directing the respondent to unconditionally release/remove clamp put on the applicant’s motor vehicle registration number KBY 684B; and
 7. Costs of the application be provided for.”
2. The grounds upon which the application is promised, as indicated in the body of the motion and also as stated in the supporting affidavit sworn by Ms Nairobi Frida Makena on 4th November 2025, is that the proposed appeal has a high chance of success. The delay in filing the notice of appeal was caused by the fact that the judgment was delivered in their absence as their advocate was indisposed and that they became aware of it on 15th October 2024. At the time they became aware of the judgment, it was way past the time when they could lodge an appeal.
 3. It was stated that the respondent had begun the execution of the judgment and had arrested or clumped truck registration number KBY 648B. The appellants/applicants averred that unless an injunction was issued, they would suffer irreparable harm and loss. Consequently, it was prayed that the application be allowed.
 4. The application was opposed by the respondent, who filed a replying affidavit sworn by Mr Jimmy Waliaula, the County Attorney, on 25th November 2024. The deponent averred that the judgment was delivered on 19th September 2024 and not 10th September 2024. He deposed that no explanation was given for the delay of 46 days in filing the notice of appeal. The deponent urged that this honourable court is functus officio as it had delivered its judgment and that it would be wrong for it to sit on appeal against its own decision.
 5. It was urged that the application for the remedy of an injunction pending appeal was a clever ploy by the appellants/applicants to obtain the orders they had failed to get in the judgment. Mr Waliaula deposed that stay orders would occasion the respondent serious loss of revenue.
 6. He denied that the appellants/applicants’ counsel was unaware of the delivery of the judgment on the ground that the decision of the court was communicated to him via WhatsApp on 19th September 2024 and that he was logged into the court session when the judgment was delivered. Mr Waliaula also denied that this court has jurisdiction to extend the time the appeal could be filed.
 7. For the forgoing reason, it was urged that the application be denied.
 8. The application was canvassed by way of written submissions. The submissions of the applicants are dated 10th December 2024.
 9. The appellants/applicants urged that the time within which the appeal could be filed be extended as the judgment was delivered in the absence of its counsel. Its counsel urged that the principles that govern the exercise by the court of its discretion in an application for extension of time were set by the Supreme Court of Kenya in the case of *Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] KESC 12 (KLR).
 10. It was urged that the delay in filing the notice of appeal was not inordinate and had been explained. Further, upon becoming aware of the adverse decision, the appellants/applicants moved the court



- quickly for appropriate remedies. Counsel stated that parties should be given every reasonable and available opportunity to vent their grievance, “within the available ranks of our judicial system.”
11. Counsel submitted that upon granting leave, the court should give an order of injunction as its appeal was not frivolous, and it should not be rendered nugatory if successful. It was urged, relying on the decision of the Court of Appeal in *Mrao Ltd vs First American Bank of Kenya Ltd and 2 others* [2003] eKLR, that injunctive relief, which is separate from stay pending appeal ought to be issued so that the appeal couldn't be rendered nugatory
 12. Regarding costs, it was urged that costs should abide the outcome of the appeal.
 13. The respondent's submissions are dated the 13th day of December 2024. The learned counsel for the respondent, Mr Tajbhai identified two issues as coming up for determination to wit:-
 - a. Whether the applicants can seek an extension of time to file a notice of appeal out of time before this honourable court; and
 - b. Whether the applicants ought to be granted the orders of injunction pending the hearing and determination of the appeal.
 14. Counsel urged that the proper court where the prayer for extension of time ought to have been made was the Court of Appeal and not this court. To buttress his argument, counsel relied on Rule 77 of the Court of Appeal Rules.
 15. He urged that applicants had not provided cogent reasons for the delay in so much as no evidence of the alleged illness of the applicants' counsel had been provided. He submitted that the counsel was, in fact, aware of the delivery of judgment.
 16. Mr Tajbhai submitted that the order sought could not be issued. Reliance was placed on the decision of the Court in *Western College of Arts and Applied Sciences v EP Oranga & 3 others* [1976] KECA 15 (KLR) and *Exclusive Estates Ltd v Kenya Posts and Telecommunication Corporation and Postel Housing Cooperative* [2004] eKLR.
 17. Further, it was submitted that the orders of injunction could not be issued as the applicants would not suffer irreparable injury that could not be compensated by an award of damages as they could be paid back whenever they had paid. Grant of the orders sought would amount to this court sitting on appeal against its own orders. That there was, in fact, no appeal and also that the court was functus officio.
 18. It was thus urged that the application be dismissed.
 19. I have considered the application, the responses thereto, and the parties' written submissions. In my view, the issues in this application are:-
 - a. Whether the High Court can extend the time within which an appeal may be filed to the Court of Appeal;
 - b. Whether the delay in filing the notice of appeal was sufficiently explained;
 - c. Whether an order of injunction could be issued.
 - d. Who should pay the costs?
 20. The High Court has the discretion under Section 95 of the *Civil Procedure Act* to enlarge the time within which any act prescribed or allowed by the Act may be done. Section 66 of the *Civil Procedure Act* provides that appeals from the decision of the High Court may be made to the Court of Appeal.



21. In my view, the application or extension of time may be made either at the Court of Appeal or in the High Court. Having the decision made by this Court is an act of prudence as the Court of Appeal is relieved of this rather mundane task.
22. Having found as above, I now turn to whether the extension of time should be issued in this case.
23. The Supreme Court settled that principles that guide the court in the exercise of its discretion to extend time in the case of *Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] KESC 12 (KLR)

“Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court; A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court; whether the court should exercise the discretion to extend time is a consideration to be made on a case-to-case basis; whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court; whether there will be any prejudice suffered by the respondents if the extension is granted; whether the application has been brought without undue delay; and whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

24. I now turn to the question of the delay. Was the delay explained?
25. The applicants’ reason is that their advocate was indisposed. The applicants, however, never provided proof of this, nor did they rebut the assertion made by the respondent’s counsel that the advocate was informed through WhatsApp on the said date of the decision and that he was logged in at the time of the delivery by the court of its decision.
26. In the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] KECA 701 (KLR) the court succinctly stated as follows:-

“(12) The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

27. The reasons given by the applicants are not entirely plausible. That said, given the nature of the matter, I am inclined to extend the time within which the appeal may be lodged in the interest of justice.
28. Should I grant an injunction relief pending appeal? The respondent avails that this court is *functus officio*, having delivered its judgment. Is that the case?
29. It would appear to me that once the Court has delivered its judgment, it ceases to have jurisdiction, save for purposes of hearing applications for review or stay of execution.
30. The scope of *functus officio* was discussed in the court in the case of *Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR where the Court expressed itself as follows:-

“*Functus officio* is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th



Century. In the Canadian case of *CHANDLER vs ALBERTA ASSOCIATION OF ARCHITECTS* [1989] 2 S.C.R. 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);

“The general rule that a final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal *In re St. Nazaire Co.*, (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:

1. Where there had been a slip in drawing it up, and,
2. Where there was an error in expressing the manifest intention of the court. See *Paper Machinery Ltd. vs. J.O. Rose Engineering Corp.*, [1934] S.C.R. 186”

The Supreme Court in *RAILA ODINGA v IEBC* cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, “The Origins of the *Functus Officio* Doctrine, with Special Reference to its Application in Administrative Law” (2005) 122 SALJ 832 in which the learned author stated;

“The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued.”

31. It would seem to me, on the basis of the above decision, that this court may not issue an injunctive relief as it is a *functus officio*. The correct court to approach for such a remedy would be the Court of Appeal, which has the discretion under its rules to issue injunctions pending appeal.
32. Having found that the court is *functus officio*, it is not necessary for me to consider whether the test for the grant of injunction has been met.
33. The upshot of the foregoing is that in the interests of justice, I grant the applicants leave to lodge the appeal out of time and deem the notice of appeal filed herein as duly filed subject to payment of the requisite court fees. This court declines to allow the prayer for an injunction pending appeal. In essence, granting an order of injunction allows a stay of execution of negative orders made by the Court. I do not think that such an order would be fair.
34. The prayer for an injunction pending appeal is therefore declined.
35. Although the applicants have been partly successful, it is my view that they authored their own misfortune. In the circumstances, I award the respondent costs.
36. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF FEBRUARY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE



In the presence of:-

Mr Tajbhai, for the Respondent;

No appearance for the Applicants; and

Arthur – Court Assistant.

