



**Alibhai v Otieno & 4 others (Civil Appeal E171 of 2023)
[2025] KEHC 3652 (KLR) (Commercial and Tax) (24 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3652 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E171 OF 2023
H NAMISI, J
MARCH 24, 2025**

BETWEEN

ALIKHAN FIROZ ALIBHAI APPELLANT

AND

KEN OTIENO 1ST RESPONDENT

SMART AUTOS LIMITED 2ND RESPONDENT

UJALA MOTORS LIMITED 3RD RESPONDENT

JAHANZAIB KHALID 4TH RESPONDENT

INSPECTOR GENERAL OF NATIONAL POLICE SERVICE . 5TH RESPONDENT

(Being an Appeal from the Ruling and Orders of Hon. L. B. Koech and Hon. A Ogonda delivered at the Chief Magistrate's Court at Nairobi on 6 June 2023 and 31 July 2023, respectively, in Nairobi MCCOMMSU No. E1058 of 2021)

JUDGMENT

1. This appeal arises from Rulings made in the trial court with respect to Notice of Motion dated 27 February 2023, in which the 1st Respondent sought the following orders:
 - i. Spent
 - ii. That the 5th Respondent do release or cause to be released motor vehicle registration KCE 090J, currently being held at Hazina Police Station, to the Applicant forthwith pending the hearing and determination of this Application;



- iii. That the 5th Respondent do release or cause to be released motor vehicle registration KCE 090J, currently being held at Hazina Police Station, to the applicant forthwith pending the hearing and determination of the main suit;
 - iv. That in the alternative to prayers (ii) and (iii) above, the orders emanating from the Ruling delivered by this Court on 29 October 2021 dismissing the Plaintiff/Applicant's Notice of Motion dated 4 August 2021 be reviewed;
 - v. That the costs of the Application be borne by the 2nd Respondent.
2. The Application was premised on numerous grounds as follows:
- a. That the Applicant bought Motor Vehicle KCE 090J from the 3rd and 4th Respondents who has been instructed to advertise and sell the same to the 2nd Respondent;
 - b. That the Applicant paid for the vehicle in full and took possession of it on 12 April 2016. He has been using it since then until 30 July 2021 when Police Officers accosted him and detained the vehicle at Hazina Police Station where it remains to date on the basis that the 2nd Respondent had reported it stolen;
 - c. That secretly and in an attempt to defeat the claim by the Plaintiff/Applicant, the 2nd Respondent move the High Court in Misc Criminal Application No. E263 of 2021 seeking release of the motor vehicle KCE 090J to him vide application dated 2 August 2021;
 - d. That on 4 August 2021, the Plaintiff/Applicant moved the Court seeking for the release of the same motor vehicle unbeknown to him the existence of High Court Misc Criminal Application No. E263 of 2021. It was not until a Preliminary Objection was filed that the Plaintiff/Applicant became aware of the High Court proceedings. Consequently, this Court declined to allow the Application dated 4 August 2021 on the basis that the issue of release of the vehicle was before the High Court;
 - e. That nonetheless, the Plaintiff/Applicant was enjoined as an Interested Party in the High Court after applying to do so. Ultimately, and fortunately for the Plaintiff/Applicant, the High Court dismissed the 2nd Respondent's Application and noted that the matter should have been canvassed before this Court;
 - f. That the High Court in its Ruling also noted that there would be no reason to detain the vehicle;
 - g. That it has been about 2 years and the vehicle is wasting away at Hazina Police Station. The Plaintiff has to date never been arraigned in Court neither has the 5th Respondent indicated any conduct of investigations as was noted by Hon. Lady Justice Mutende;
 - h. That it is clear that the 2nd Respondent was misusing powers of the 5th Respondent to impound the vehicle illegally as he rushed secretly to the High Court for release orders;
 - i. That by virtue of the High Court dismissing the 2nd Respondent's Application before it, this Court does not have any lurking impediment to making orders for release of the motor vehicle to the deserving party;
 - j. That in the event that this Application is not heard and determined urgently, the vehicle in question fully purchased by the Applicant and thus elevating him to a bona fide purchaser for value continues to waster away as it has been doing for close to 2 years now as it is the Applicant's position that it is unjustly detained by the 5th Respondent;



- k. That the 2nd Respondent acknowledged that the said motor vehicle belonged to him and had given it to the 4th Respondent to advertise and sell it on his behalf as an agent. He claimed that he only received Kshs 750,000/- from the 4th Respondent which is a clear indication that he was aware that the vehicle had been sold as per his instructions. It is clear that the interests of the 2nd Respondent ought to lie with the 3rd and 4th Respondents;
 - l. That this Court has the inherent power to issue the orders prayed pending the outcome of a matter before it;
 - m. That it is mete and just that the application be allowed.
3. In his Supporting Affidavit, the 1st Respondent reiterated the grounds on the face of the Application. He attached a copy of the Sale Agreement with the 3rd and 4th Respondents dated 11 April 2016 for the sale and purchase of the vehicle as well as documents evidencing payment of the purchase price. The 1st Respondent was unable to complete the transfer ownership of the vehicle because the log book was not availed to him. The 4th Respondent gave a written undertaking to effect the transfer and avail the logbook before 10 February 2017, which he did not do, but instead disappeared. After efforts to obtain the log book, the 1st Respondent gave up on the quest until 30 July 2021 that the 1st Respondent was accosted by Police Officers and the motor vehicle detained at the Hazina Police Station.
 4. The 1st Respondent also produced a copy of the Ruling dated 6 June 2022 in High Court Misc Criminal Application No. E263 of 2021, in which the Court noted thus:

“The police having detained the vehicle following the complaint made were required to investigate the matter. The grounds of opposition filed by the Respondent (OCS Hazina Police Station and ODPP) do not divulge anything to suggest that investigations have been conducted. As it is, there would be no reason to continue detaining the vehicle.”
 5. The Appellant filed a Replying Affidavit in which he averred that the application was nugatory since the vehicle had been released to him after the Police finalised their investigations as ordered by the High Court in Misc Criminal Application No. E263 of 2021. He attached a copy of the same Ruling. He averred that the Court could not render the orders sought since the motor vehicle was no longer in possession of the 5th Respondent. Further, it was his contention that the 4th Respondent ought to be the one to reimburse the 1st Respondent since he is the one who negotiated the transaction and even committed himself to reimbursing the monies if the logbook was not availed.
 6. I am unable to discern the fate of the Application from the Record of Appeal. There is no Ruling attached, neither is there any mention of the same in the proceedings.
 7. The 1st Respondent filed another Notice of Motion dated 19 April 2023 seeking the following orders:
 - i. Spent
 - ii. That pending the hearing and determination of this Application, the 2nd Respondent be and is hereby ordered to deposit the original logbook for motor vehicle KCE 090J in Court;
 - iii. That pending the hearing and determination of this Application, the 2nd Respondent be and is hereby ordered to surrender possession of the motor vehicle KCE 090J to Central Police Station and the 5th Respondent do ensure compliance;
 - iv. That pending the hearing and determination of this Application, the Interested Party be and is hereby ordered to place a caveat over motor vehicle KCE 090J;



- v. That pending the hearing and determination of the main suit, the original log book for motor vehicle KCE 090J be deposited and held in Court;
 - vi. That pending the hearing and determination of the main suit, motor vehicle KCE 090J be released to the Plaintiff/Applicant;
 - vii. That in alternative to prayer 6 above, pending the hearing and determination of the main suit, motor vehicle KCE 090J be surrendered to and held by the 5th Respondent in a neutral Police Station and the 5th Respondent do ensure compliance;
 - viii. That pending the hearing and determination of the main suit, the Interested Party be and is hereby ordered to place a caveat over motor vehicle KCE 090J;
 - ix. That in the alternative to prayers (vi) and (vii) above, the orders emanating from the Ruling delivered by this Court on 29 October 2021 dismissing the Plaintiff/Applicant's Notice of Motion dated 4 August 2021 be reviewed;
 - x. That costs of this Application be borne by the 2nd Respondent
8. The grounds on the face of the Application were mostly similar to those in the Notice of Motion dated 27 February 2023. In the Supporting Affidavit, the 2nd Respondent averred that the Appellant had managed to infiltrate the Police Force and have the motor vehicle released to him yet the High Court was categorical that it did not release the vehicle to him. He further averred that he had learnt that the Appellant had applied for a forced transfer of the vehicle to himself from the 1st Respondent and as at 18 April 2023, the vehicle was registered in the name of the Appellant.
9. In response thereto, the Appellant raised a Preliminary Objection on the following grounds:
- i. That the Application is sub judice as it is seeking the same orders as those in the application dated 27 February 2023;
 - ii. There was neither a formal application brought before the Court for the Interested Party to be enjoined nor did the Plaintiff/Applicant seek leave of the Court to have the said "interested party" enjoined.
10. The Appellant also filed a Replying Affidavit in which he averred that upon conclusion of investigations, he was the only person to whom the motor vehicle could be released, since he is the registered owner. He averred that the 1st Respondent was spewing allegations without providing any evidence yet he admitted that the Appellant was the registered owner of the vehicle.
11. Parties were directed to file their written submissions. When the matter was mentioned on 6 June 2023 to confirm filing of submissions, Hon. Koech (Mrs) Senior Principal Magistrate made the following orders:
- i. That the 2nd Defendant do deposit the logbook in court before the next hearing date;
 - ii. That status quo as regards possession of motor vehicle be maintained;
 - iii. That parties to file written submissions;
 - iv. That mention on 29 June 2023 to confirm submissions.
12. On 29 June 2023, the Court directed that the matter be heard by Hon. Ogonda, who rendered a Ruling on the Application. In her Ruling, the trial Magistrate found no basis for the argument for sub judice since there was no other similar application pending before any other court on the matter. The trial



Magistrate further noted that the court, when making a determination on the Application dated 27 February 2023 downed its tools stating that the matter was pending before the High Court. There was no determination on merit. The trial Court disallowed the preliminary objection.

13. With respect to the Application dated 19 April 2023, the trial Court observed that the 1st Respondent was not charged with stealing. The Appellant did not explain how the 1st Respondent ended up with the motor vehicle. The Appellant had no intention of refunding the monies received as purchase price or at the very least had not expressed the desire to do so. In a bid to preserve the subject matter, the trial court issued the following orders:
 - a. The log book of the motor vehicle registration KCE 090J to be deposited in court within 14 days from the date hereof;
 - b. The motor vehicle registration KCE 090J to be surrendered to the Central police Station by the 2nd Defendant/Respondent and to be detained within 14 days at the said Police Station pending hearing and determination of the suit;
 - c. The 5th Respondent to ensure compliance with the court order.
14. Being aggrieved, the Appellant lodged this appeal on the following grounds:
 - i. That learned Magistrate Hon. Koech erred in law by issuing the orders for deposit of the logbook into Court as the same prematurely determined the application dated 18 April 2023 without appreciating all the pleadings on record;
 - ii. The learned Magistrates erred in law by issuing orders based on an application that was a violation of the sub judice principle;
 - iii. That the learned Magistrates erred in law by issuing the order for deposit of the logbook when the application dated 18 April 2023 was coming up for mention for directions and the application dated 27 February 2023 was pending hearing and determination;
 - iv. That the learned Magistrate erred in law by issuing the order to deposit the logbook and issuing the order for maintenance of status quo simultaneously thereby highly prejudicing the Appellant;
 - v. The learned Magistrate Hon. A Ogonda erred in law by ordering the Appellant to deliver the motor vehicle registration number KCE 090J to Central Police Station despite acknowledging that he was the registered owner;
 - vi. The learned Magistrate erred in law in issuing drastic orders in a suit and application where about 5 Respondents are named and in which only the Appellant has entered appearance to defend the suit and application yet the orders totally prejudice him;
 - vii. The learned Magistrate erred in fact and law in not interrogating or insisting on service of the other Respondents by way of affidavits of service yet proceeded to issue orders in the absence of most of the parties named in the suit thereby arriving at an extremely biased, discriminatory and prejudicial Ruling;
 - viii. The learned Magistrate's orders violate the Appellant's right to property as envisaged in Article 40 of *The Constitution* being the registered owner of the motor vehicle KCE 090J
15. Parties canvassed the Appeal by way of written submissions. Only the Appellant and 1st Respondent filed submissions.



Analysis and Determination

16. I have read the Record of Appeal, Supplementary Record of Appeal and respective submissions. It is the duty of a first appellate court to re-appraise and re-analyse the evidence on record and arrive at its own conclusion and give reasons either way – see *Sumaria & Another vs Allied Industries Limited* [2007] 2 KLR. The Court has also to appreciate that in the discharge of its aforesaid mandate the Court should be slow in moving to interfere with a finding of fact by a trial court unless it was based on no evidence, it was based on a misapprehension of the evidence or the Magistrate had been shown demonstrably to have acted on wrong principle in reaching the finding he did –see *Musera vs Mwechelesi & another* [2007] 2 KLR 159.
17. In his submissions, the Appellant has identified the following as issues for determination:
 - i. Whether the Application dated 19 April 2023 was properly handled by the learned Magistrate;
 - ii. Whether the orders to deposit the logbook of the motor vehicle in court and surrendering the motor vehicle to Central Police Station violated the Appellant’s right to property;
 - iii. Whether the learned Magistrate erred in allowing the Application dated 19 April 2023 without confirming service upon all parties;
 - iv. Who shall cater for the costs of the appeal.
18. Having keenly read the material placed before me, I have summarised the issues for determination as follows:
 - i. Whether the trial court was right in overruling the preliminary objection;
 - ii. Whether the 1st Respondent was entitled to the orders sought in the Application of 19 April 2023.
19. The Appellant’s first ground of objection was that the Application was sub judice since the same sought orders similar to those in the Application of 27 February 2023.
20. The provisions of Section 6 of *Civil Procedure Act* define the above principle or the doctrine as follows;

No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim litigating under the same title, where such suit or proceeding is pending in the same court or any other court having jurisdiction in Kenya to grant the relief claimed.
21. In *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR, Justice Mativo discussed sub judice as follows:-

“...there exists the concept of sub judice which in Latin means “under Judgement.” It denotes that a matter is being considered by a court or judge. The concept of sub judice that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit goes on. In such a situation, order is passed by the subsequent court to stay the proceeding and such order can be made at any stage.”
22. The concept of sub judice is one that bars a Court from trying a matter that is in one way or other before another Court of competent jurisdiction by way of a previously instituted suit as long as it is between



the same parties canvassing it under the same title. The rationale behind the rule is to prevent situation of having conflicting orders emanating from two or more different courts over the same subject matter. In this instance, the two applications were before the same Court. As rightly pointed out by the trial court, perhaps the doctrine that the Appellant intended to raise was that of *res judicata* and not *sub judice*.

23. With regard to the second limb of the Preliminary Objection, the trial court noted thus:

“I do not intend to give any order touching on the NTSA therefore turns on the objection with regard to joinder of the Interested Party.”

24. Based on the foregoing, I find no reason to interfere with the trial court’s holding with respect to the Preliminary Objection.

25. I now turn to the Application dated 19 April 2023.

26. On the issue of service, I have reviewed the proceedings and the Record of Appeal as presented by the Appellant. I note that the proceedings attached run from 7 December 2022 to 29 June 2023. There is nothing placed before me to indicate whether or not the other Respondents entered appearance or whether any default judgement was entered against them. Presumably, that would have happened prior to 7 December 2022 since the matter was coming up for hearing on the material day when the Advocate for Appellant herein informed the trial court that pre-trial conference had not been conducted. From the Record, however, I am able to discern that there were proceedings prior to December 2022, which have not been presented. Bearing in mind that the appeal is lodged by the Appellant, the onus is on the Appellant to place before the Court sufficient and conclusive material for the Court to appreciate and comprehend the grounds of appeal. In this case, the Appellant is inviting this Court to speculate as to whether or not the other Respondents were served based on the insufficient material before it. Furthermore, at no point did the Appellant indicate that he was appearing on behalf of the other Respondents. Which begs the question, who is the right party to be complaining about lack of service?

27. In High Court Misc Criminal Application No. E263 of 2021, the Appellant herein filed an application seeking the release of the subject motor vehicle that was detained at the Hazina Police Station. In the Application, the Appellant argued that he had entered into an agreement with an agent named Zib from the 3rd Respondent herein to sell the vehicle at a price of Ksh 1,250,000/=. He received Kshs 750,000/-, leaving the outstanding balance of Kshs 500,000/=. According to the Appellant, the motor vehicle disappeared and he reported the matter to the Police, who took no action since 2016. In May 2021, the Appellant made another report at Hazina Police Station and the vehicle was traced. It was in the possession of the 1st Respondent. The 1st Respondent was arrested on 31 July 2021 and the motor vehicle driven to Hazina Police Station. The 1st Respondent was, however, not charged because he availed all the documents pertaining to the purchase of the vehicle.

28. The High Court noted that no evidence had been adduced to prove the two reports made to the Kilimani and Hazina Police Stations. Noting that there was a civil suit pending before the trial court on the issue of ownership of the vehicle, the High Court deemed that the trial court would be the most appropriate court to seek such orders of release of the vehicle. The Court proceeded to dismiss the application.

29. Turning back to Application before the trial court, it is evident that the suit relates to ownership of the motor vehicle, with the tussle being between the Appellant and the 1st Respondent. It is not disputed that the Appellant put his motor vehicle up for sale. It is also not disputed that the 1st Respondent purchased the vehicle. In his Replying Affidavit, the Appellant admitted being in possession of the



motor vehicle, which was released to him by the Hazina Police. He states that this was done pursuant to the Order issued in High Court Misc Criminal Application No. E263 of 2021. I note that there was no order issued for the release of the vehicle.

30. Further, the Appellant averred that he was the registered owner of the motor vehicle, which he sold in 2016. He produced a copy of the logbook, transfer no xxxxxxxx. What is significant about the transfer number is the first 4 digits, which indicate the year of registration of transfer. In this case, the transfer was done in 2022.
31. Noting the foregoing, as well as the observations made by the trial court in its Ruling, one cannot help but get the feeling that something is amiss. The issue of ownership can only be determined by the trial court, upon hearing the parties and evaluating the evidence presented. In the interim, it is in the interest of justice that the subject matter be preserved, just as the trial court opined. In so doing, it is important that the court exercises discretion judiciously and in good faith, for a proper purpose and take into account all relevant factors and that the same are reasonable in the circumstances of the case. It is my considered view that the trial court properly exercised its discretion and I find no reason to interfere with its decision.
32. The upshot is that this appeal is unmeritorious and the same is dismissed with costs to the 1st Respondent assessed at Kshs 50,000/=.

DATED AND DELIVERED AT NAIROBI THIS 24 DAY OF MARCH 2025.

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

..... for the Appellant

..... for the 1st Respondent

N/A for 2nd Respondent

N/A for 3rd Respondent

N/A for 4th Respondent

Ms. Libertine Achieng... Court Assistant

