



**Mukiri v Mutie & 2 others (Civil Appeal E026 of 2022)  
[2022] KEHC 11344 (KLR) (30 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11344 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E026 OF 2022  
EM MURIITHI, J  
MAY 30, 2022**

**BETWEEN**

**JANE MUKIRI ..... APPLICANT**

**AND**

**EUNICE NDUTA MUTIE ..... 1<sup>ST</sup> RESPONDENT**

**AYAN AUTO MOBILES LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**DOUGLAS JUMA ONDUSO ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**The application**

1. By an application dated 17/2/2022, the applicant seeks the substantive order for injunction pending appeal restraining dealings with a motor vehicle the subject of the appeal from a decision of the trial court dismissing the suit as follows:

“That this honourable court be pleased to issue a temporary order of injunction restraining the defendants whether by themselves, their employees, servants, officers, agents, auctioneers or any person whomsoever from doing any of the following acts that is to say advertising for sale, repossessing, selling whether by public auction or private treaty, transferring or otherwise interfering with the Appellant’s possession, ownership and/or title to motor vehicle registration number KCS 663R pending the hearing and determination of this Appeal.”

2. The application is based on grounds set out in the Notice of Motion dated 17/2/2022 as follows:



1. That on July 18, 2019 the appellant entered into a sale agreement for the purchase of motor vehicle registration number KCS 663R (hereinafter referred to as "the vehicle") from the 1<sup>st</sup> respondent as the Director of the 2nd respondent.
  2. That the consideration for the sale of the vehicle which was Kshs. 1,000,000 was paid to the in full.
  3. That the appellant was granted unconditional possession and use of the vehicle awaiting transfer into her names.
  4. That the Lower Court delivered judgment on February 9, 2022 in Meru Cmcno. 219 OF 2019 whereby it dismissed the Appellant's suit and as a result thereof the Appellant's motor vehicle registration No. KCS 663R is at risk of being repossessed by the respondents.
  5. That the aforesaid motor vehicle was detained at Meru Police Station by an order issued by the Superior Court.
  6. That the respondents have no known residence and therefore in the event that the motor vehicle is repossessed by the respondents and this appeal is successful the appellant will not be able to recover the same.
  7. That the defendants are now seeking to dispose of the aforesaid motor vehicle illegally thereby interfering with the Appellant's possession, ownership and/or title to the said motor vehicle.
  8. That the Appellant stands to suffer great prejudice, irreparable loss and damage and this appeal shall be rendered nugatory unless the orders of injunction sought herein are granted.
  9. That it is in the interest of justice that the Application be allowed.”
3. The Memorandum of Appeal dated 17/2/2022 and filed together with the Notice of Motion on the 18/2/2022, setting out the grounds of appeal, principally challenging the trial court's finding “that the evidence adduced by the plaintiff was not sufficient to prove the plaintiff was the owner of the motor vehicle”, as follows:

“Memorandum Of Appeal

The appellant above named appeals to this honourable court against the whole of the above mentioned decision on the following grounds namely:-

1. The Learned Magistrate erred in Law and fact in failing to hold that the plaintiff had proved her case on a balance of probabilities.
2. The Learned Magistrate erred in Law and fact in dismissing the plaintiff's suit.
3. The Learned Magistrate erred in Law and fact in finding and holding that the evidence adduced by the Plaintiff was not sufficient prove that the Plaintiff was the owner of the motor vehicle.
4. The Learned Magistrate erred in Law and fact in failing to appreciate the evidence adduced by the plaintiff.
5. The Learned Magistrate judgement was partisan and/or biased in favour of the defendants against the plaintiff, is full of errors, is against the weight of evidence, bad in law and a travesty of justice.

It Is Proposed To Ask This Honourable Court For The Orders:-



- (a) That this appeal be allowed and the Judgment of the Learned Magistrate in Meru Cmcc Civil Case No. 219 Of 2019 dated and delivered on 9th, February, 2022, be quashed and set aside entirely.
- (b) That This Honourable Court do supersede the Lower Court's Judgment and find that the Appellant had proved and discharged her burden of proof on a balance of probabilities against the Respondents and enter judgement against the Respondents in favour of the Appellant as prayed in the Plaint dated July 25, 2019.
- (c) That the costs of this appeal and in the lower court be awarded to the appellant."

4. The judgment of the trial court which is sought to be appealed from was not attached although from the supporting Affidavit hereafter set out, the appellant seems to assert a right as a bona fide purchaser for value of the suit motor vehicle. The Supporting Affidavit set out the facts relied upon as follows:

1. That I am the appellant/applicant herein and hence competent to swear this affidavit.
2. That on or about July 18, 2019 I purchased motor vehicle Registration Number KCS 663R from the 1st respondent who was the managing director of the 2<sup>nd</sup> respondent at a consideration of Kshs. 1,000,000 which I paid in full. Annexed hereto and marked as Exhibit JM 01 is a copy of the banking slip.
3. That before purchasing the suit motor vehicle I obtained a motor vehicle copy of records and realized that the suit motor vehicle was registered in the name of the 2nd Respondent. Annexed hereto and marked as Exhibit JM 02 is a copy of the motor vehicle copy of records.
4. That the aforesaid Directors granted me possession of the motor vehicle alongside other motor vehicle documents inter alia the original logbook, KRA PIN certificate and Certificate of Incorporation while awaiting duly executed transfer form to enable me change the ownership of the said motor vehicle in my name. Annexed JM 03- a, b & c are copies of the logbook, KRA PIN certificate and Certificate of Incorporation.
5. That the lower court delivered judgment in Meru Cmcc No.291 OF 2019 on February 9, 2022 whereby it dismissed the suit and as a result thereof the motor vehicle registration No. KCS 663R is at risk of being repossessed by the Respondents. Annexed and marked as exhibit JM-4 is a copy of the order.
6. That I am advised by my Advocates on record which advice I verily believe to be true that the intended repossession of the said motor vehicle by the Respondents violates the law and my legal rights will have been unlawfully invaded.
7. That therefore I urge this honourable court to issue a temporary order of injunction restraining the Respondents from disposing of the aforesaid motor vehicle.
8. That I stand to suffer great prejudice, irreparable loss and damage and this appeal shall be rendered nugatory unless the orders of injunction sought herein are granted.
9. That I swear this affidavit in support of the application herein and pray that the same be allowed with costs to the defendant.
10. That what is deponed to hereinabove is true to the best of my own personal knowledge, information and belief, the sources and full particulars whereof have been disclosed."



## The responses

5. The 1<sup>st</sup> respondent did not file any response.
6. The 2<sup>nd</sup> respondent filed a replying affidavit through its sales manager Nicholus Ngoli Inyangala indicating that it had sold the suit motor vehicle to the 3<sup>rd</sup> respondent and that the purported sale by the 1<sup>st</sup> Respondent was invalid as she was not the registered owner of the vehicle, as follows:
  1. That I am the Sales Manager of the 2nd respondent herein therefore competent to respond to the application dated the 17th day of February, 2022 herein by way of notice of motion
  2. That the application is bad in law as it is not based on any known procedure to approach the honourable court herein.
  3. That the application is bad in law devoid of merit as the applicant did not proof any reasons as to why she was alleging that she bought the vehicle from the 1<sup>st</sup> Respondent who did not attend the court as she was supposed to serve her and if she was served then she was to pay the applicant the money paid to her and not the said motor vehicle properly owned by the 2nd respondent herein.
  4. That the 2nd respondent imported the motor vehicle and sold it to the 3rd respondent herein annexed hereto is a copy of the sale agreement and copy of the said logbook for motor vehicle KCS 663R marked NNI 1'.
  5. That the application by the applicant is not clear if she is appealing as she has not served any memorandum of Appeal nor any request for proceeding.
  6. The court determined the suit after parties presenting evidence to the Honourable court as non was given as opposed to the ownership of the said motor vehicle the applicant ought to follow up with the 1st Respondent for the refund of any money if they ever was paid to the I SI Respondent by the applicant as no clear evidence was given on any payments to the 1st respondent.
  7. The applicant knows that she was not buying sweat as she required a sale agreement which she did not produce and therefore the court cannot believe if there was any sale agreement.”
7. The 3<sup>rd</sup> respondent filed ground of opposition dated 8<sup>th</sup> February 2022 and a replying affidavit challenging the competence of the application as an “anticipatory appeal” in view of a prior application dated 17/2/2022 filed after the judgment by the 3<sup>rd</sup> respondent in the trial court for the release of the vehicle, and setting out the facts of his case as follows:
  1. That I am the 3RD respondent herein, hence competent to swear this affidavit.
  2. That I have read the application dated 17<sup>th</sup> February, 2022 together with the supporting affidavit of one Jane Mukiri and it is in reply thereto that I do swear this affidavit in opposition to the same.
  3. That the alleged intended appeal is yet to be endorsed, no memorandum of Appeal has been served and as such this application is founded on an appeal which is not properly before which makes the application itself improper.
  4. That the applicant has jumped the gun as the said motor vehicle is yet to be released and there is a pending application before the trial court which is yet to be determined seeking release of the said motor vehicle and the applicant is making this application in anticipation of what the



orders of the trial court would be which amounts to "anticipatory appeal" which does not exist legally and it is a bad procedure of practice. (attached herewith and marked DJO 1 is a copy of the application in the trial court)

5. That the applicant herein filed the suit being Civil suit No 219 of 2019-Jane Mukiri Vs Eunice Nduta Mutie, Ayan Automobiles Limited and Douglas Juma Onduso.
6. That the applicant subsequently filed an application to have her retain the motor vehicle registration No.KCS663R pending hearing and determination of the suit (attached herewith and marked DJO 2 is a copy of the order)
7. That all along the motor vehicle has been held at Meru Police Station and has been wasting
8. That the honourable court delivered a judgment dismissing the plaintiff's (now intended appellant) suit on 9th February, 2022 and as such the said motor vehicle should be released. (attached herewith and marked DJO 3 is a copy of the order)
9. That the averments in paragraph 3 of the supporting affidavit by one Jane Mukiri are untrue as the copy of the motor vehicle copy of records shows that she did the search on July 24, 2019 while according to the plaint she purchased the same on July 18, 2019. Therefore, the alleged search was only done to fit the applicant's case theory in the lower court which did not suffice. (attached herewith and marked DJO 4 is a copy of records as presented by the applicant in the lower court)
10. That the applicant failed to produce any sale agreement or document as proof of sale. She further failed to produce original copy of the log book to prove her case 11. THAT as opposed to plaintiff's contention that she is the owner of the subject motor vehicle herein, I am indeed the rightful beneficial owner of the motor vehicle registration No KCS663R having purchased it from Carhouse Limited which is a subsidiary company to Ayan Motors, the 2nd defendant in this suit. (attached herewith and marked "DJO "5" "6" and "7" are copies of the sale agreement, Hire Purchase Agreement, an Affidavit of Motor Vehicle Sale and Responsibility and a copy of motor vehicle search respectively)
12. That as per the sale agreement the said motor vehicle was to cost Kshs.2,350,000 where I paid a deposit of Kshs. 700,000 in cash upon execution of the agreement and the balance of Kshs. 1,650, 000 was to be cleared within eighteen (18) months. (attached herewith and marked "DJO 8" is a bundle of invoices from and receipts by Car House Ltd in relation to payment of the purchase price)
13. That Carhouse Ltd was to retain the log book to motor vehicle registration No. KCS 663R as a collateral until the full payment of the purchase price (attached herewith and marked "DJO9" is a copy of the log book in the name of Ayan Motors Limited)
14. That although the vehicle belonged Ayan Motors Limited, the company had given authority to sell to Carhouse limited (attached herewith and marked DJO 10 is a copy of the said authority to sell)
15. That being a business person involved in the business of car renting, the said motor vehicle was to be used for Car Hire business.
16. That on 15.07.2019 I rented the subject motor vehicle to Henry Nzyoka Mbithi for a period of four (4) days where the same was to be returned on 19.07.2019. (attached herewith and marked "DJO11'~"12" and "13" are copies of car rental agreement between myself and Henry Nzyoka Mbithi, a copy of his driving licence and a copy of identification card)



17. That I reported the matter at Kasarani Police Station on the July 21, 2019 through OB number 93/21/7/19. (attached herewith and marked "DJO14" is a copy of the said OB report)
18. That on July 23, 2019 I was called by an officer from Kasarani Police Station who informed me that the said motor vehicle had been found within Meru County and was being held at Meru Police Station
19. That I went to Meru Police Station and I saw the vehicle and confirmed that it was my motor vehicle registration Number KCS663R but the colour of the motor vehicle had changed from silver to black and 9 seats out of fourteen seats were missing
20. That I was informed that the motor vehicle was found in possession of the applicant who claimed to have bought it from a third party but the investigating officer had not arrested the said woman, Henry Nzyoka Mbithi or any othersuspect
21. That since 2019, the subject motor vehicle has been wasting at the police station causing me so much loss.
22. That the continued detention of the subject Motor Vehicle has caused me and continues to cause loss as I am not able to service the loan as agreed and I risk recovery suit from the owner of the motor vehicle.
23. That the application herein is vexatious, frivolous and meant to delay the cause of justice and there being a judgment in my favour, I pray that the plaintiff's suit be dismissed and the motor Vehicle Registration No. KCS633R be released to me to avoid further losses
24. That the applicant herein has not demonstrated any ability to compensate me for the losses I have already incurred and the loses I may continue to incur if the subject motor vehicle continues to be detained at her expense
25. That I urge the Honourable court, if it is to grant the orders sought, to direct the applicant to deposit Kshs.3,000,000 in court as security."

### Submissions

8. Counsel for the applicant and the 2<sup>nd</sup> respondent filed written submissions on their respective contentions. Counsel for the 3<sup>rd</sup> respondent indicated that he would rely solely in the Replying Affidavit filed. For the applicant, the case was presented as one for interlocutory injunction which is governed by the Rule in *Giella v. Cassman Brown* (1973) EA 358, and citing *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR and *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, the applicant contends that she has demonstrated a *prima facie* case she is in possession of the suit property, the vehicle which she placed in safe custody of the police through Meru Police station; that she purchased the vehicle from the 2<sup>nd</sup> respondent through the 1<sup>st</sup> respondent as a director of the 2<sup>nd</sup> respondent and paid full consideration; that the trial court erred in law and fact in arriving at the decision to dismiss the plaintiff's suit entirely and the application by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents dated 17/2/2022 sought to alienate the vehicle from he applicant and from the court's jurisdiction. On the likelihood of irreparable injury the applicant said that "the pending application before the trial court for the release/handing over of the suit vehicle to the 2<sup>nd</sup> respondent who in turn intends to hand it over to the 3<sup>rd</sup> respondent would occasion irreparable injury to the plaintiff who would be without the vehicle or any security to hold in the event the present appeal succeeds." Finally, she urged that the balance of convenience clearly tilted in favour of preserving the status quo where the vehicle was at the Meru Police station for safe keeping.



9. The 2<sup>nd</sup> respondent's submissions assert ownership of the vehicle as the registered owner and implicates the appellant in a fraudulent collusion with the 1<sup>st</sup> respondent who allegedly sold the vehicle to her when she did not have the right to sell and who has not been produced before the court. The 2<sup>nd</sup> respondent submits that the "vehicle herein is being wasted in the police station and indeed the motor vehicle was only detained by the police on the report made at Kasarani Police station at Nairobi [and] the more the vehicle stays in the police station the more it gets wasted by vandalizers and the more it is getting old and will not make any good economic value to keep it longer in the police station". (sic). On security, the 2<sup>nd</sup> respondent suggests Ksh.3,000,000/- to cover loss of vehicle and business which the motor vehicle detained at the police station continue causing the 3<sup>rd</sup> respondent.

### **Injunction pending appeal**

10. With respect to counsel for the applicant, the proper test for injunction pending appeal, as well as stay of execution or proceedings pending appeal, in the High Court is the test under Order 42 rule 6 of the Civil procedure and not the *Giella v. Cassman Brown* test for interlocutory injunction pending hearing and determination of a suit. There is already a judgment declaring the rights of the parties, and what is sought to be restrained by the injunction pending appeal, or stay of execution in cases of executory orders, is the implementation of the judgment of the court. The object of an application for injunction and stay pending appeal is to demonstrate that the intended appeal if successful, for which reasons an arguable case must be shown, would be rendered nugatory, because the injury loss in the meantime would irreparable or unremediable, if the injunction or stay pending appeal is not granted.
11. Order 42 Rule 6 (6) of the Civil Procedure Rules grants jurisdiction to the High Court in cases of application for injunction pending appeal from a subordinate court as follows:

"Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with."

12. Long before the promulgation of sub-rule 6 of Order 42 Rule 6 of the Civil Procedure Rules 2010, the Court of Appeal in *Madbupaper International Limited v Kerr* (1985) KLR 840, 846, (Kneller & Nyarangi, JJA. and Gachuhi, Ag. JA.) considered the court's power to grant an injunction pending appeal in addition to stay of execution pending appeal, and developed principles which are applicable to the High Court as well as follows:

"A judge can under the Rules of Court grant a stay execution pending an appeal. Megarry, J granted the intended injunction pending appeal which the applicant sought on the principle that-

"when a party is appealing, exercising his undoubted right of appeal, the court ought to see that the appeal if successful is not nugatory."

which was what Cotton, LJ enunciated in the leading judgment in *Wilson v Church* (No 2) [1879], 12 Ch D 454 and 458 dealing with an appeal from the Court of Appeal to the House of Lords and Pennycuik, J applied in *Orion Property Trust Ltd v Ducane Court Ltd*. [1962] 3 All ER 466 even though the action in the High Court had wholly failed and the appeal was to the Court of Appeal from it.

It is preferable for the High Court to deal with such an application, in any event, not so much as to protect this court from a sudden inconvenient dislocation of its lists but more



because this court would have the distinct advantage of seeing what the judge made of it. The learned judges of the High Court should take note of this concurrent jurisdiction which the two courts have and exercise theirs.

There are cases, however, where it would be wrong to grant an injunction pending appeal. These would include where the appeal is frivolous or to grant it would inflict greater hardship than it would avoid. And there will be others which we have not experienced yet.”

### On the evidence

13. In the present applicant both negative factors identified in *Madhupaper* exist: the applicant not having demonstrated a valid sale of the vehicle by the registered owner, or what amount to the same thing that the 1<sup>st</sup> respondent was a director of the 2<sup>nd</sup> respondent with authority to sell the vehicle, the claim to ownership cannot be said to have been demonstrated by an arguable case and the continued detention of the motor vehicle at the police station continues to cause hardship on the 3<sup>rd</sup> respondent who is said to have bought the vehicle from the registered owner’s nominee. The applicant attached a deposit slip of Ksh.1,000,000/- but there is no evidence that the money was paid to the 2<sup>nd</sup> respondent registered owner of the vehicle and in respect of the sale of the suit motor vehicle. The deposit slip is not clear to who and to what account the money was allegedly paid, although the name of the appellant is clearly printed. The alleged sale of motor vehicle and authority to sell of the 1<sup>st</sup> respondent is denied by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.
14. It is wholly unlikely that a car dealer would sell a vehicle without any form of sale agreement and transfer of the vehicle for purposes of registration. If it were so, it would require cogent evidence to prove that fact. See the House of Lords decision *in Re H & R (Minors)* [1996] 1 ALL ER 1 (per Lord Nicholls of Birkenhead) on the principle of proof by balance of probabilities that  

“The balance of probability standard means that the court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.”
15. To tilt the balance of probabilities in her favor the appellant should have shown clear linkage between the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent such as by search at Company registry records; an authority to sell as with the vendor who sold to the 3<sup>rd</sup> respondent; and evidence that the account into which the money was paid belonged to the 2<sup>nd</sup> respondent or on instructions of its instructions, together with a sale agreement of the motor vehicle to support the alleged sale. That way the applicant would effectively rebut the defence of fraudulent collusion set up by the defendants. It is the applicant’s case and it is upon her that the burden of proof fell under section 107 and 108 of the *Evidence Act*.
16. As regards the possibility of compensation by monetary award, it is clear that should the appellant eventually succeed in the appeal, the loss is clearly ascertainable and quantifiable and capable of redress by an award of damages. Moreover, the appellant should be able recover from the 1<sup>st</sup> respondent herself any monies paid to the 1<sup>st</sup> respondent without authority of (if it were established to be so), and or not



transmitted to, the 2<sup>nd</sup> respondent. As held in Nguruman Limited case, supra, the foundational basis of all injunctions is irreparable harm–

“In conclusion, we stress that it must always be borne in mind that the very foundation of the jurisdiction to issue orders of injunction vests in the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of the multiplicity of suits and where facts are not shown to bring the case within these conditions the relief of injunction is not available.”

17. Indeed, no substantial loss could, therefore, be demonstrated on the applicant’s part as would justify a stay of execution, if that were the order of the trial court to release the vehicle to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. In this application, however, the applicants seek an injunction pending appeal from the dismissal of her suit over the motor vehicle.

### **Abuse of the process**

18. There is also an aspect of abuse of process of the court when the timing of the application for injunction pending appeal is made to supercede any orders that may issue in a pending application by the respondents for the release of the motor vehicle subject of the suit. The trial court must not be hampered in making meaningful determination in exercise of its discretion. This application is premature in its effect, and it is contrary to good order in the civil process by requiring an appellate court to determine an issue of which the trial court is actively seized.
19. Although the application before the trial court is one for release of the motor vehicle and not stay of execution, for implementation rather than stay of the decision of the trial court, the applicant’s response and defence to the application must be based on the same arguments that it has now proffered before this court. Although the appellate jurisdiction of the High Court over injunction pending appeal is secured by Order 42 Rule 6 (6) of the *Civil Procedure Rules*, it should not be exercised as to defeat the lawful jurisdiction of the trial court to deal with live post-judgment proceedings to avoid the prospect of what the 3<sup>rd</sup> respondent called “anticipatory appeal”.

### **Orders**

20. Accordingly, for the reasons set out above, the Court finds that the applicant has not demonstrated an arguable case in the appeal and that greater and continued hardship will be caused that is avoided because the applicant’s loss, if any is remediable by an award of damages, and consequently, the application for injunction pending appeal is declined.

Order accordingly.

**DATED AND DELIVERED THIS 30TH DAY OF MAY 2022.**

**EDWARD M. MURIITHI**

**JUDGE**

### **Appearances:**

M/S Kiautha Arithi & CO. Advocates for the Applicant.

M/S Osoro Juma & CO. advocates for the 2nd Respondent

M/S Kuria Karatu & CO. Advocates for the 3rd Respondents.

