



**Mwangi v Munywoki & 2 others (Civil Suit E012 of 2024)
[2024] KEHC 13218 (KLR) (Civ) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13218 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT E012 OF 2024

JN MULWA, J

OCTOBER 31, 2024

BETWEEN

HEMSLEY ATSLAYA MWANGI PLAINTIFF

AND

DAVID NZIOKI MUNYWOKI 1ST DEFENDANT

ANTIQUA AUCTIONS AGENCIES 2ND DEFENDANT

PLATINUM CREDIT KENYA LIMITED 3RD DEFENDANT

RULING

1. This ruling is in respect of two applications before the court dated 22/1/2024 and 1/3/2024 both brought by the Applicant herein.
2. The first Application dated 22/1/2024 is premised upon Article 159 (2) (d) of the Constitution of Kenya 2010, Section 1A, 1B, 3A, 3B of the Civil Procedure Act (CAP 21), Order 40 Rules 2 and 4 of the Civil Procedure Rules 2010. It is grounded on the sworn affidavit of the Applicant for which he seeks the following orders:
 - a. Spent
 - b. Pending the hearing and determination of this suit, this Honourable Court be pleased to grant a temporary order of injunction restraining the defendants, either by themselves, agents, or servants from trespassing the plaintiff's premises, selling, disposing of, transferring, wasting, alienating or in any other manner interfering with the plaintiff's motor vehicle, Nissan Note KDH 780B purchased by the Applicant.



- c. The auctioneer's Repossession Notice dated 16/1/2023 is defective, unlawful, and illegal for failure to comply with the law hence null and void as per the Auctioneer's Act 1997.
 - d. An order do issue restraining the 2nd Respondent, Antique Auctions Agencies, from repossessing and selling the motor vehicle Registration Number KDH 780B, purportedly over an alleged debt of Kshs. 455,104.04 owed by the 1st Respondent.
 - e. The court grants a caveat, prohibiting the 2nd Respondent from proceeding with any sale of the said motor vehicle pending the hearing and determination of this application.
 - f. This Application be heard inter parties on such a date and time the Honourable Court may deem fit.
3. In the Second Application Dated 1/3/2024 the Applicant seeks same orders as in the first application in addition to:
 - a. An order for the return of the car to the Applicant and the reversal of any covert car tracker removal by the 3rd Respondent.
 4. The Applicant also swore the supporting affidavit on an even date.
 5. Both applications are opposed by a Replying Affidavit sworn on 11/4/2024 by Richard Simbala, a legal officer of the 3rd Respondent filed a defence to the suit together with a Preliminary Objection to the application dated 1/4/24 stating that the Applicant's application dated 1/3/2024 is subjudice and that the interim orders granted to restrain repossession of the motor vehicle have since been overtaken by events.
 6. It avers that the Applicant's applications are an abuse of the court process as they are frivolous and vexatious. It contended that vide a loan agreement dated 10/6/2023, the 1st Defendant obtained a loan facility for Kshs. 430,000/= which was secured by the Motor Vehicle Registration No. KDH 780B. The loan facility went in arrears and the 3rd Respondent began its recovery process by writing a demand letter. It stated that by virtue of the loan it was registered as the owner of the motor vehicle KDH 780B and was not aware of any attempt to sell the vehicle by the 1st Respondent neither did it consent or authorize any such sale.
 7. By nature of the two applications it is appropriate to determine them simultaneously upon flagged issues as follows:
 - a. Whether the Applicant has established a *prima facie* case with probability of success to warrant a grant of a temporary injunction.
 - b. Whether the Applicant shall suffer irreparable loss and damage if the injunctive orders are denied.
 8. In the celebrated case of *Giella v. Cassman Brown & Co Ltd* (1973) EA 358, the three tests that the court must consider before granting an order of injunction, whether interim or permanent, are whether the applicant has established:
 - a. A *prima facie* case with a probability of success
 - b. The likelihood that the Applicant might suffer irreparable injury which would not adequately be compensated by an award of damages.
 - c. If the court is in doubt, it will decide an application on the balance of convenience.



9. In *Mrao v First American Bank Ltd and Others* (2003) KLR 125 a *prima facie* case is described as a case in which on the material presented to the court properly directing itself will conclude that there exists a right which has apparently been infringed by the opposing party as to call for an explanation or rebuttal from the latter.
10. The applicant states that he purchased the subject motor vehicle from the 1st Respondent, believing that he was the absolute owner of the motor vehicle.
11. There's no dispute that the 3rd Respondent advanced a loan to the 1st Respondent who offered Motor Vehicle Registration Number KDH 780B as security for the loan and by virtue of the loan was registered as the owner of the motor vehicle KDH 780B.
12. Section 6 of the *Movable Property Security Act*, 2017 states that;-
 6. Creation by execution of a security agreement
 - (1) A security right is created by a security agreement, provided that the grantor has rights in the asset to be encumbered or the power to encumber it.
 - (2) A security agreement may provide for the creation of a security right in a future asset, but the security right in that asset is created only at the time when the grantor acquires rights in it or the power to encumber it.
13. In court's considered view, the Applicant has not established any *prima facie* case capable of succeeding. It was his duty to conduct due diligence to ensuring that the 1st Respondent had absolute ownership of the motor vehicle before he could enter into a sale agreement with the 3rd Respondent. On the other hand, the 3rd Respondent's rights of ownership have been infringed as it was not aware of any attempt to sell the vehicle by 1st Respondent, nor did it consent or authorized any such sale.
14. As to irreparable loss or damage to the Applicant, the court finds that the Applicant would not suffer irreparable loss should the motor vehicle be repossessed as such loss would be compensated in damages.
15. At this stage of proceedings, nothing has been proved and the court would be doing an injustice to the parties to assume that the Applicant as the Plaintiff would come out successful at the end of the trial. The balance of probability in court's opinion tilts in favour of the Respondents.
16. For the foregoing, the orders sought by the Applicant are denied. The two applications are without merit and are dismissed with no orders on costs.

It is so ordered.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF OCTOBER 2024.

JANET MULWA

JUDGE

