



Njenga v Wairimu & 3 others (Civil Miscellaneous Application E445 of 2024) [2024] KEHC 13325 (KLR) (Civ) (31 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13325 (KLR)

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

CIVIL

CIVIL MISCELLANEOUS APPLICATION E445 OF 2024

AN ONGERI, J

OCTOBER 31, 2024

BETWEEN

JAMES KIGATHI NJENGA APPLICANT

AND

CAROLINE WANGUI WAIRIMU 1ST RESPONDENT

LEGACY SUMMIT PROPERTIES LIMITED 2ND RESPONDENT

OKUKU AGENCIES AUCTIONEERS 3RD RESPONDENT

INSPECTOR GENERAL OF POLICE 4TH RESPONDENT

RULING

1. The application coming for consideration is the one dated 15/5/2024 brought under Order 40 Rule I and Order 51 Rule 1 of the Civil Procedure Rules 2010 and Sections IA, IB and 3A of the *Civil Procedure Act* seeking the following orders:
 - i. That this Application be certified urgent, heard ex-parte and service thereof be dispensed with in the first instance.
 - ii. That the Honourable Court be pleased to direct the 4th Respondent through the Officer Commanding Station at Kware Police Station to unconditionally release motor vehicle registration number KCK 306M immediately to the Applicant pending the hearing and determination of this Application.
 - iii. That in the alternative to prayer 2 above the Honourable Court be pleased to issue a temporary injunction restraining the 4th Respondent from releasing motor vehicle registration number



KCK 306M to the 1st, 2nd or 3rd Respondents or any person acting under their instruction and/or authority pending the hearing and determination of this application.

- iv. That the Honourable Court be pleased to issue a permanent injunction restraining the 3rd and 4th Respondents or any person acting under their instruction and/or authority from taking possession of and selling or in any other way disposing of motor vehicle registration number KCK 306M or such other properties belonging to the Applicant.
 - v. That the costs of this application be borne by the Respondents.
2. The application is based on the following grounds;
- i. The 1st Respondent entered into a loan agreement with the 2nd Respondent for a sum of Ksh.3,000,000/= using the Logbook of the Applicant's motor vehicle registration number KCK 306M as security without the Applicant's knowledge or consent;
 - ii. The 1st Respondent cohabited with the applicant under the pretext of marriage, and therefore had access to most of his documents including but not limited to the logbook.
 - iii. The 1st Respondent ultimately defaulted on repaying the said loan of Ksh.3,000,000/=.
 - iv. The 4th Respondent, through the Officer Commanding Station-Kware Police Station, within Embakasi Sub-County has irregularly taken possession of and held the Applicant's motor vehicle registration number KCK 306M and is unlawfully detaining the same at the said Police Station without justification or such other lawful cause, apparently at the behest and in enforcement of the 2nd Respondent's contractual claim:
 - v. There is no offence or complaint being investigated to warrant the unlawful detention of the Applicant's motor vehicle or the otherwise abuse of police powers which go to question the suitability of the 4th Respondent's Officer and/or representative at the subject station:
 - vi. The 2nd Respondent has instructed the 3rd Respondent to take possession and dispose of the Applicant's motor vehicle registration number KCK 306M to recover the debt owing by the 1st Respondent, a debt the Applicant knows nothing about.
 - vii. The Applicant's motor vehicle registration number KCK 306M is therefore in danger and grave risk of being alienated by the 3rd Respondent under instructions from the 2nd Respondent, in collusion with the 1st Respondent;
 - viii. The Applicant was not a party to the loan agreement between the 1st and 2nd Respondents, neither does the 1st Respondent have any legal interest in the subject motor vehicle registration number KCK 306M;
 - ix. To demonstrate collusion, the 1st Respondent is capable of making the loan repayments by herself presuming the alleged funds were channeled in her Mitumba business, and it is commercially dishonest to allege that a Loan of KShs.3,000,000/- was advanced against a security of less than KShs.1,000,000/, which is the estimate value of the subject motor vehicles
 - x. The 1st Respondent being the principal borrower should be tasked to pay the sums she borrowed and not any other third parties merely by virtue of having had a relationship with her before.
 - xi. Unless the orders sought are granted the applicant stands to suffer irreparable loss as he will have no opportunity to recover from the respondents jointly and/or severally;



- xii. The unscrupulous use of the police resources exposes the applicant to potential risk and in particular exposure to infringement of his right to property.
- xiii. It is in the interest of justice and fairness that this application be allowed and motor vehicle registration no. KCK 306M released to its lawful owner – the applicant, immediately and unconditionally.
3. The application is supported by the affidavit of the applicant James Kigathi Njenga sworn on 15/5/2024. In it he deponed that he is the registered owner of motor vehicle No. KCK 306M Toyota Filder having bought it in September 2020.
4. That He has been in a romantic relationship with the 1st respondent from 2015 until recently when they had some disagreements.
5. That the 1st respondent had access to most of his documents including the log book to the subject motor vehicle.
6. That during the subsistence of their relationship the 1st respondent took out a loan with Sidian Bank which he acted as a guarantor. The loan was fully paid and the log book was successfully discharged.
7. That the 1st respondent without his knowledge subsequently entered into another loan agreement with the 2nd respondent on 14/6/2023 in which she cited him as a guarantor and offered the Logbook of the subject vehicle as security.
8. That He was not party to the loan agreement and it is clear that the 1st respondent deliberately misrepresented the facts to the 2nd respondents when applying for the loan.
9. He averred that it was not until 10/5/2024 when the 2nd respondent vide Messrs. Kimani Kiarie & Associates served him with a demand letter that he learnt of the aforementioned loan agreement. A second demand letter dated 10/5/2024 indicated that they would repossess the subject motor vehicle in exercise of remedies under the loan agreement.
10. That the 4th respondent through the OCS- Kware Police Station took possession of the subject vehicle and is detaining the same at the said police station.
11. That the 4th respondent's actions were unlawful as no complaint was filed at Kare Police Station or any police station involving the subject motor vehicle.
12. That during this period he has lost benefit of his motor vehicle which he used for his daily commute.
13. That unless the court intervenes by directing the 4th respondent to release the motor subject vehicle, he will suffer irreparably.
14. The 1st respondent opposed the application vide replying affidavit sworn by herself on 21/5/2024. In it she deponed that the applicant is her spouse and their union has been blessed with 2 children.
15. That through their business one of the assets that they acquired was the subject motor vehicle and they agreed that the vehicle be registered in the name of the applicant.
16. She averred that in June 2023, together with the applicant they agreed that she would take a loan of Kshs. 3,000,000 from Focus Capital Limited to boost their business operations with the suit motor vehicle as security.
17. That the loan was processed and as agreed she pumped the money into their business.
18. That they experienced constraints in their business and as a result the principal loan went unpaid.



19. The 2nd respondent issued demand letters seeking payment. On 3/5/2024 she had a quarrel with the applicant that resulted with the loss of 2 of her teeth. She sought treatment at Nairobi Women's hospital and later reported the matter to Kware Police Station.
20. That in the course of the investigations the applicant was summoned to which he drove to the police station with the suit vehicle.
21. That on suspecting that he would be charged with a criminal offence he disappeared and the left the vehicle at the police station. The applicant thereafter fled to Arusha to avoid prosecution.
22. She averred further that on 14/5/2024 the suit vehicle was released to her possession but was attached by the auctioneers the same evening on the instructions of the 2nd respondent.
23. That the applicant has therefore misled the court by concealing material facts.
24. The parties filed written submissions as follows; the applicant submitted that it is not in contention that the applicant did not sign the loan agreement dated 14/6/2023. The unsigned guarantee forms filled by the 1st respondent cannot be legally enforced. The applicant relied on the case of Abdulkadir Shariff Abdirahim & Another v Awo Shariff Mohammed T/A A. S Mohammed Investments [2014] eKLR where the court held that

“There is no general rule of law that all agreements must be in writing. The numerous advantages of a written agreement notwithstanding, all that the law requires is that certain specific agreements must be in writing or witnessed by some written note or memorandum. Section 3(1) of the *Law of Contract Act* is one such provision. The origin of this provision has been traced to section 4 of the Statute of Frauds, 1677, whose object was to prevent fraudulent claims based on perjured evidence and to protect guarantors, (See G. H. Treitel, *Law Of Contract*, 10th edition, Sweet & Maxwell, Page 161-170). Section 3(1), therefore, applies where the defendant has guaranteed the creditor that he shall answer for the debtor's debt should the debtor fail to pay. In such a situation, the guarantee agreement between the creditor and the defendant must be in writing or witnessed by some note or memorandum in writing and signed by the parties. (See also *Agricultural Finance Corporation & Another Vs Kenya Alliance Insurance Co Ltd & Another*, (2002) 1 KLR 231 where the High Court held that S 3(1) of the *Law of Contract Act* applies to suits founded on contracts of guarantee or surety).”

25. The applicant submitted that it is evident that the transfer of the motor vehicle registration No. KCK 306M was obtained through fraud and non-disclosure of material facts by the 1st respondent.
26. The only thing tying the applicant to the agreement between the respondent is the said transfer of the suit motor vehicle. By concealing material facts about the loan the 1st respondent effectively misrepresented the purpose for which the applicant's motor vehicle was being transferred.
27. The applicant argued that it is only upon the principal borrower's inability to repay the loan that the guarantor ought to be asked to make good on the said loan. That abandoning the principal debtor in pursuance of a guarantor is to permit the principal debtor to benefit from her breaches.
28. The applicant urged the court not to allow the same as the applicant has proved on a balance of probabilities that the 1st respondent business has active cash flow capable of repaying the loan.



29. The 1st respondent submitted that the suit vehicle is not in police custody but was attached by Icon Auctioneers with regard to the loan taken by the 1st respondent and thus the order being sought by the applicant has been overtaken by events.
30. On a permanent injunction against Okuku Agencies Auctioneers and the Inspector General of Police the 1st respondent argued that it is untenable. The two have no nexus or reason to deal with the applicant with regard to the suit vehicle or any other of his assets
31. The 1st respondent submitted that the applicant was a guarantor to the loan taken by the 1st respondent.
32. The 1st respondent further argued that by the action of transferring the suit vehicle into the joint names of the lender's nominee company, the applicant accepted to become the guarantor and expressly pledged his proprietary interest in the suit vehicle as collateral for the loan.
33. The 2nd respondent argued that the application herein is incompetent and untenable. The applicant approached the court by way of a miscellaneous application premised on order 40 rule 1 and other general provisions of the *Civil Procedure Act* and Rules.
34. That it is Order 40 that empowers the court to issue injunction Orders, whether prohibitive or mandatory. It is however now settled that order 40 is only applicable to instances where an applicant has a substantive suit and not a miscellaneous application.
35. The issues for determination in the application dated 15/5/2024 are as follows;
 - i. Whether the application is competent.
 - ii. Whether this court should direct the 4th Respondent through the Officer Commanding Station at Kware Police Station to unconditionally release motor vehicle registration number KCK 306M immediately to the Applicant.
 - iii. Whether this court should issue a permanent injunction restraining the 3rd and 4th Respondents or any person acting under their instruction and/or authority from taking possession of and selling or in any other way disposing of motor vehicle registration number KCK 306M or such other properties belonging to the Applicant.
36. On the issue as to whether the application dated 15/5/2024 is competent, I have considered the application together with the averments in the affidavits filed herein and the rival submissions, I find that the applicant is seeking permanent orders in a miscellaneous suit.
37. Courts have taken the position that substantive orders cannot be issued in Miscellaneous Applications.
38. This position was adopted in the case of *Witmore Investment Limited vs County Government of Kirinyaga & 3 Others* (2016) eKLR where the court held that;

“... So where a party such as an applicant herein seeks an order that in effect appears to resolve with finality an issue in controversy or a contested issue, the application ceases to be interlocutory and it is a misconception to describe it as such. If the applicant wanted to move this court for a final resolution of the issues in controversy raised in the application, it should have moved this court properly in the manner provided by law.”
39. The plaintiff is seeking release of motor vehicle registration no. KCK 306M make Fielder black in colour alleging it belongs to him.



- 40. The applicant is also seeking a permanent injunction restraining the 3rd and 4th Respondents or any person acting under their instruction and/or authority from taking possession of and selling or in any other way disposing of motor vehicle registration number KCK 306M or such other properties belonging to him.
- 41. In the case of Nairobi West Hospital Limited vs Joseph Kariha & Another (2018)eKLR, it was held as follows in a similar matter;

“.... In my view this substantive order which for all intents and purposes cannot be issued through a miscellaneous application. A perusal of Order 3 Rule 1 of the Civil Procedure Rules will reveal that a suit may be commenced by way of a plaint, a petition and or originating summons which is not the case here. The miscellaneous application may not offer the parties the opportunity to be heard”.
- 42. The 1st respondent alleges the applicant is her husband of 10 years and further that the motor vehicle was jointly acquired during the subsistence of their marriage.
- 43. I find that the application dated 15/5/2024 is not competent since the orders sought by the applicant cannot be obtained through a miscellaneous application.
- 44. Having found so I need not go into determining the other issues touching on the facts of the case. I find this application is not merited and I strict it out with no orders as to costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 31ST DAY OF OCTOBER, 2024.

A. N. ONGERI
JUDGE

In the presence of:

..... for the Applicant

..... for the 1st Respondent

..... for the 2nd Respondent

..... for the 3rd Respondent

..... for the 4th Respondent

