



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Kimani v Mwangi & 2 others (Civil Appeal E003 of 2021)  
[2023] KEHC 3002 (KLR) (31 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 3002 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E003 OF 2021  
LN MUGAMBI, J  
MARCH 31, 2023**

**BETWEEN**

**VERONICAH WAIRIMU KIMANI ..... APPELLANT**

**AND**

**DAVID KARANJA MWANGI ..... 1<sup>ST</sup> RESPONDENT**

**PLATINUM CREDIT LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**NATIONAL TRANSPORT AND SAFETY AUTHORITY ..... 3<sup>RD</sup> RESPONDENT**

*((Being an appeal from the ruling of Hon. G. Onsarigo, Senior Resident Magistrate delivered on 17th December 2020 in Kikuyu Civil Case no. 99 of 2020))*

**RULING**

1. The appellant preferred this appeal against the ruling of the Honourable G Onsarigo, Senior Resident Magistrate delivered on December 17, 2020.
2. The Appellant (plaintiff in the trial court) sued the Respondents (Defendants in the trial court) vide a plaint dated May 26, 2020, amended on the 3<sup>rd</sup> of June 2020 and filed on even date praying for judgment against the Respondents for a permanent injunction against the 2<sup>nd</sup> respondent from attaching motor vehicle registration number KCF 710T or interfering with her possession of the said motor vehicle and/or harassing her in any way. She prayed that the court be pleased to set aside and cancel the transfer of the subject motor vehicle registration number KCF 710T to the 1<sup>st</sup> Respondent and a mandatory injunction to issue compelling the 3<sup>rd</sup> Respondent to transfer motor vehicle registration number KCF 710T to the 1<sup>st</sup> Respondents. She also asked for general and exemplary damages for negligence and illegalities committed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent.



3. By a Notice of Motion dated May 26, 2020 and later amended on June 24, 2020 brought under Order 40 Rule 1 and 2 of the *Civil Procedure Rules*, Section 3A of the *Civil Procedure Rules*, Article 47 and 159(2)(c) of *the Constitution of Kenya*, the appellant sought the following orders;
  - a. Spent.
  - b. That pending hearing and determination of the application, the 2<sup>nd</sup> defendant whether by themselves, their agents, debt collectors and/or auctioneers be restrained from attaching motor vehicle registration number KCF 710T, or interfering with the plaintiff's possession of the said motor vehicle and/or harassing the plaintiff in any way whatsoever.
  - c. That pending hearing and determination of the suit, the 2<sup>nd</sup> defendant whether by themselves, their agents, debt collectors and/or auctioneers be restrained from attaching motor vehicle registration number KCF 710T, or interfering with the plaintiff's possession of the said motor vehicle and/or harassing the plaintiff in any way whatsoever.
  - d. That pending the hearing and determination of the application, the 3<sup>rd</sup> defendant be ordered to place a caveat on motor vehicle registration number KCF 710T prohibiting registration of any transfers, charges and/or any other or further dealings in the said vehicle.
  - e. That pending the hearing and determination of the suit, the 3<sup>rd</sup> defendant be ordered to place a caveat on motor vehicle registration number KCF 710T prohibiting registration of any transfers, charges and/or any other or further dealings in the said vehicles.
  - f. That costs of this application be provided for.
4. The application was based on the grounds on the face of the application as follows;
  - i. The plaintiff vide an agreement dated August 25, 2018 purchased motor vehicle registration number KCF 710T from one Brenda Shikanda Muyendo and a log book was duly issued in her favour.
  - ii. That the said motor vehicle operates as an uber/taxify cab within Kikuyu Town.
  - iii. On or around mid-March 2020 the 2<sup>nd</sup> defendant's agents, debt collectors and/or auctioneers visited the plaintiff on a mission to proclaim and attach the said motor vehicle alleging that the said motor vehicle had been used to secure a loan facility from them.
  - iv. That the said information came as a shock since the plaintiff had not taken any loan facility with the 2<sup>nd</sup> defendant.
  - v. The plaintiff immediately visited the offices of the 2<sup>nd</sup> defendant and learnt that the loan facility in question had been obtained by the 1<sup>st</sup> defendant using her motor vehicle. She was then shocked to learn that the 1<sup>st</sup> defendant had through forgery and fraud illegally transferred the said motor vehicle from her to himself and thereafter used the vehicle to obtain a loan facility from the 2<sup>nd</sup> defendant.



- vi. That the plaintiff has reported the fraudulent transfer of her motor vehicle by the 1<sup>st</sup> defendant at Kikuyu Police Station vides OB No 14/26/2/2020 and the police investigations are at an advanced stage.
  - vii. That despite the foregoing the 2<sup>nd</sup> defendant and/or its agents, debt collectors and/or auctioneers have threatened to attach, cart away and sell the said motor vehicle and in early May visited the plaintiff to proclaim the same.
  - viii. That unless the orders sought are granted the plaintiff will suffer irreparable loss and damage as her only source of income will be gone and the motor vehicle will be attached and sold thereby immediately extinguishing her rights and interests in the said vehicle.
  - ix. It is in the interest of justice that the orders sought be granted so as not to sanitize the 1<sup>st</sup> defendant's illegal actions.
5. In addition to the grounds set out above, the Appellant swore the supporting affidavit dated June 25, 2020 in which she amplified the grounds stated in the application.
  6. The 2<sup>nd</sup> Respondent filed their Replying Affidavit dated June 19, 2020 sworn by Richard Simbala who deposed that he is the legal officer of the 2<sup>nd</sup> defendant. He stated that the suit and the application does not disclose any cause of action as against the 2<sup>nd</sup> defendant. He stated that on or about February 17, 2020 the 2<sup>nd</sup> defendant agreed to and entered into a loan agreement with the 1<sup>st</sup> defendant for Kshs. 100,000/= at the 1<sup>st</sup> defendant's instance and request. The 1<sup>st</sup> defendant supplied the 2<sup>nd</sup> defendant with a copy of the Direct debit authority addressed to the 1<sup>st</sup> defendant's bank authorizing deductions of Kshs. 17887/= to be made and remitted to the 2<sup>nd</sup> defendant and a pre-condition for obtaining loan facilities from the 2<sup>nd</sup> defendant, the 1<sup>st</sup> defendant and the plaintiff consented to and jointly handed over the original log book of motor vehicle KCF 710T in their joint sworn affidavit. He deposed that it was the plaintiff who personally initiated and successfully effected the transfer from her name to the joint names of the 1<sup>st</sup> and 2<sup>nd</sup> defendant from her NTSA TIMS Account and the plaintiff availed the motor vehicle to the 2<sup>nd</sup> defendant who cause the same to be fitted with a car track device and a certificate thereof issued.
  7. He continued that on April 14, 2020 the 2<sup>nd</sup> defendant issued the 1<sup>st</sup> defendant with a demand letter and a 7 days' notice to settle loan arrears of Kshs. 13367/= and that the 1<sup>st</sup> defendant breached and has continued to breach the loan repayment terms and as a result has accrued loan arrears of Kshs. 130,922.13/= as at June 2, 2020. It is within the 2<sup>nd</sup> defendant's right as a secured creditor to take possession of motor vehicle registration number KCF 710T in realization of the security offered as the 1<sup>st</sup> defendant is in default of loan repayment terms and a demand letter was duly issued.
  8. On 7/7/2020, the parties agreed to dispense with the hearing of the application by way of written submissions. The court in its ruling dated 1December 7, 2020 noted that the issue for determination before it was whether the appellant had satisfied the principles as set out in the case of *Giella v Cassman Brown Co. Ltd* (1973) EA358. The court noted as follows:

“In my view the plaintiff has made mere allegations of fraud since she did not allege that the original logbook of the motor vehicle was stolen or that her NTSA TIMS account log in details were illegally or otherwise accessed without her consent. The upshot is that the plaintiff has not been able to prove fraudulent transfer of the motor vehicle and therefore has not demonstrated prima facie case. ... If the court finds in favour of the plaintiff when



the matter proceeds for full trial, the 2<sup>nd</sup> defendant being a micro finance institution can compensate the plaintiff. The court not being in doubt, I will proceed and dismiss the Notice of Motion dated May 26, 2020 and amended on June 24, 2020 with costs to the 2<sup>nd</sup> defendant.”

9. Being dissatisfied with the decision of the trial court, the appellant lodged the Memorandum of Appeal dated January 4, 2021 and filed on the January 4, 2021 listing the grounds of appeal as follows;
  - a. That the learned magistrate erred in law and in fact in finding that the Appellant had not alleged that her original log book was stolen whereas the Appellant had in the plaint set out the particulars of fraud perpetrated by the 1<sup>st</sup> Respondent against her which included fraudulently, clandestinely and illegally dispossessing the Appellant of her legal ownership of vehicle registration number KCF 710T (hereinafter referred to as ‘the motor vehicle’).
  - b. The learned magistrate erred in law and in fact in finding that the Appellant had not alleged that her NTSA TIMS account log in details were illegally or otherwise accessed without her consent whereas the Appellant had at paragraph 6 of the Further Affidavit sworn on July 1, 2020 and filed on July 2, 2020 averred that she did not initiate the transfer of her motor vehicle to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent and the same was fraudulent, null and void.
  - c. The learned magistrate erred in law and in fact in failing to appreciate that since it was uncontested that the Appellant was the registered owner of the motor vehicle on February 17, 2020, when the 2<sup>nd</sup> Respondent advanced the loan to the 1<sup>st</sup> Respondent, then the 2<sup>nd</sup> Respondent ought to have called upon the Appellant to sign off on the loan as a guarantor in the presence of the 2<sup>nd</sup> Respondent’s officers which they failed to do.
  - d. The learned magistrate erred in law and in fact in failing to find and appreciate that it was improper for the 2<sup>nd</sup> Respondent to rely solely on the impugned affidavit allegedly sworn on February 14, 2020 before Wanjira Mwaniki advocate in Nyahururu as evidence that the Appellant had consented to the use of her motor vehicle as security.
  - e. The learned magistrate erred in law and in fact in failing to appreciate the importance of the letter dated September 21, 2020 wherein Wanjira Mwaniki advocate in a letter to the Directorate of Criminal Investigations Kikuyu Office disowned the affidavit allegedly sworn before her on February 14, 2020 as an outright forgery.
  - f. That the learned magistrate erred in law and in fact in failing to find that the 2<sup>nd</sup> Respondent did not exercise due diligence in accepting the Appellant’s motor vehicle as security for the loan advanced to the 1<sup>st</sup> Respondent.
  - g. The learned magistrate erred in law and in fact in failing to properly analyse the evidence laid before him by the Appellant.
  - h. The learned magistrate erred in law and in fact in failing to find that the Appellant had established a prima facie case and further demonstrated that she would suffer irreparable loss and damage in the event her application was not allowed.



- i. The learned magistrate erred in law and in fact in totally disregarding the Appellant’s pleadings and submissions.
10. The Appellant prayed that the appeal be allowed and the ruling delivered on December 17, 2002 be set aside together with the consequent orders thereto and substituted with an order allowing the Appellant’s Notice of Motion dated May 26, 2020 and amended on June 24, 2020 with costs. She asked for the costs of this appeal and the proceedings at the lower court be awarded to her.
11. On 6/10/2022 the appeal was admitted for hearing and the Court directed that the Record of Appeal be filed and that the appeal be canvassed by way of written submissions. The Record of Appeal was filed on the 5<sup>th</sup> of March 2021.

### **Appellant’s submissions**

12. The Appellant filed her submissions on November 2, 2022 and restated the facts of the case. She submitted that she is the bona fide owner of the suit motor vehicle which she purchased from the previous owner one Brenda Shikanda Muyendo and it was operating as an uber taxi within the Kikuyu town and it was her only source of income. Around mid-February 2020 the 2<sup>nd</sup> Respondent’s debt collectors and/or auctioneers visited her on a mission to proclaim and attach the motor vehicle on the allegations that the same had been used as a collateral to secure a loan facility advanced to the 1<sup>st</sup> respondent which information came as a shock to the appellant. When she made further enquiries, she learnt that the 1<sup>st</sup> respondent had fraudulently used the motor vehicle as a security for a loan advanced to him and also fraudulently transferred the motor vehicle into the joint names of the 1<sup>st</sup> and 2<sup>nd</sup> respondent and she was not aware of this nor had she given consent to the transfer or use of the motor vehicle as a collateral.
13. She submitted that the 2<sup>nd</sup> respondent did not call her to their offices to sign off as a guarantor to the 1<sup>st</sup> respondent’s loan or to confirm that she had consented to have her motor vehicle used as security for the loan advanced to the 1<sup>st</sup> respondent. No agreement has been exhibited between the appellant and the 2<sup>nd</sup> respondent to show that she agreed to be a guarantor for the 1<sup>st</sup> respondent’s loan.
14. On whether she has demonstrated a prima facie case, she urged the court to be guided by the case of *MRao v First American Bank of Kenya Limited & 2 Others* (2003) KLR 125, where a prima facie case was described as follows;

“ a prima facie case in a civil application includes but is not confined to a ‘genuine and arguable case’. It is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
15. She stated that she has demonstrated that she will suffer irreparable loss and damage since if the vehicle is attached and sold she will be left without any source of income and without a means of fending for herself. She urged the court to be guided by the case of *Panari Enterprises Limited v Lijoodi & 2 Others* (2014) eKLR where it was held that:

“Does an award of damages suffice to the Plaintiff? Land is unique and no one parcel can be equated in value to another. Though the value of the suit property can be ascertained, it would not be right to say that the Plaintiff can be compensated in damages. I hold the view



that damages are not always a suitable remedy where the Plaintiff has established a clear legal right or breach.”

16. She submitted that the balance of convenience shifts in favour of her since the 2<sup>nd</sup> Respondent can still recover the loan arrears from the 1<sup>st</sup> respondent using other means and further since the vehicle will still be available and in the appellant’s possession when the appeal is determined and in the event the court rules in their favour they will still be able to attach and sell the same.
17. On whether the motor vehicle attachment was legal and if she was entitled to return of her motor vehicle, she submitted that she is entitled to unconditional release of the motor vehicle for the following reasons; firstly, the 2<sup>nd</sup> Respondent’s auctioneers and/or agents never issued her with a Proclamation Notice and/or a Notification of Sale prior to attachment of the motor vehicle as required under Rule 12(1)(b) and (c) Auctioneer’s Rules 1997. In the case of *Samuel Mutuku Mutunga v Steep Makers Limited; Joseph Kaboro Mundia T/a Upstate Kenya Auctioneers (auctioneer)* (2020) eKLR, where the court in a similar scenario where attachment was done without proper proclamation as per the auctioneer rules it was held that;

“ Auctioneers are regulated under the *Auctioneers Act* and the Rules thereto and particularly under Rule 12, an auctioneer, upon receipt of the warrant of attachment or instructions is required to inspect value and prepare an inventory of the proclaimed goods and serve notice upon the judgement debtor... This is contrary to the applicable rules with regard to execution of this court judgements and orders; the process undertaken by the auctioneers to proclaim the respondents moveable properties is irregular and unlawful and contrary to the due process. Such cannot be sanctioned by the court.”
18. Secondly, the attachment of the subject motor vehicle was done on December 29, 2020 in violation of the provisions of Order 50 Rule 4 of the *Civil Procedure Rules 2010* which provides that time does not run between 21<sup>st</sup> December and 13<sup>th</sup> January in respect of doing any act under an order of court. In the circumstances they urged the court to hold that the attachment of the motor vehicle on December 29, 2020 was illegal, unlawful and irregular and order that the said motor vehicle be released unconditionally to the Appellant and allow the appeal with costs.

## **2<sup>nd</sup> Respondent’s submissions**

19. The 2<sup>nd</sup> Respondent filed their submissions on January 19, 2023 and outlined four issues for determination by this court. On whether the appellant was the bona fide owner of the subject motor vehicle, they submitted that it was never in dispute that the Appellant was the initial owner of motor vehicle registration number KCF 710T. The motor vehicle was just tendered as security and/or collateral with respect to loan facilities advanced to the 1<sup>st</sup> Respondent and the Appellant swore an affidavit consenting to the said motor vehicle to be used as security and handed over her original log book to the 2<sup>nd</sup> Respondent. They submitted that the appellant subsequently effected the transfer of the said motor vehicle from her account to the joint names of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and further supplied copies of her national ID and Kenya Revenue Authority PIN Certificate.
20. On whether the 2<sup>nd</sup> Respondent failed to exercise due diligence in accepting the vehicle as security, they submitted that they exercised due diligence as illustrated hereunder:
  1. That security was provided for, there was an affidavit sworn by the Appellant consenting to the motor vehicle being used as security. In the said affidavit, the Appellant handed over the



original log book to the 2<sup>nd</sup> Respondent. The said affidavit was duly drawn by an advocate and execution witnessed by a commissioner for oaths as required by law.

2. The Appellant initiated and successfully effected transfer of the subject motor vehicle from her name to the joint names of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
  3. The subject motor vehicle was duly registered as a security pursuant to the provisions of Movable Securities Act No 13 of 2017.
21. On whether the appellant has demonstrated a prima facie case, they submitted that though the Appellant denies having initiated and/or successfully made the transfer of ownership of the suit motor vehicle in her further affidavit sworn on 1<sup>st</sup> July 2020 she failed to give an explanation as to how her NTSA TIMS account was accessed and also did not allege that the same were accessed fraudulently for purposes of effecting a transfer. It is the 2<sup>nd</sup> Respondent's contention that the Appellant and the 1<sup>st</sup> Respondent further availed the suit motor vehicle physically and caused the same to be fitted with a car tracking device and a certificate was issued to that effect. They cited the decision in *Koinange & 13 others v Koinange* (1968) KLR 23 where it was held that;

'allegations of fraud must be specifically pleaded and strictly proved on a standard below beyond reasonable doubt but above the usual standard in Civil Proceedings, that is, on the balance of probabilities.

22. It was their submission that the Appellant has failed to prove the fraudulent transfer of the suit motor vehicle and thus failed to demonstrate a prima facie case. They submitted that the burden of proof in fraud cases was elaborated in the case of *Christopher Ndaru Kagina V Esther Mbandi Kagina & Another* (2016) eKLR where the court stated as follows:

"Its trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care needs to be taken in pleading allegations of fraud or dishonesty. In particular the pleader needs to be sure that there is sufficient evidence to justify the allegations. In the Case Central Bank of Kenya Ltd v Trust Bank Ltd & 4 Others[26] the Court of Appeal in considering the standard of proof required where fraud is alleged stated that fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof is much heavier on the person alleging than in an ordinary Civil Case.

The burden of proof lies on the applicant in establishing the fraud that he alleges. In Belmont Finance Corporation Ltd v Williams Furniture Ltd [27]Buckley LJ said:

"An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognised rule of practice. This does not import that the word 'fraud' or the word 'dishonesty' must be necessarily used. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be so clear, and in such a case it is incumbent upon the pleader to make it clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegation of its dishonest nature will not have been pleaded with sufficient clarity."

23. The 2<sup>nd</sup> Respondent submitted that the appellant alleges she stands to suffer irreparable harm if the injunctive order is not granted for the sole reason that the suit motor vehicle is her only source of income but failed to annex any licensing from the relevant authorities to demonstrate she is authorised to conduct taxi business at Kikuyu town. They stated that the 1<sup>st</sup> Respondent is in default of loan



repayment terms and they have issued all requisite notices. The value of the suit motor vehicle can be ascertained and the appellant can be later compensated by way of damages.

24. It was their submission that the balance of convenience tilts in favour of them as the suit motor vehicle is currently registered in their name and that of the 1<sup>st</sup> Respondent and further delay in realization of the security will most significantly diminish the value of the security whereas the indebtedness of the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent continues to compound day by day.
25. On whether the appellant has made out a case that would warrant this court to interfere with the trial court's decision, they submitted that Section 78 of the Civil Procedure Act espouses the role of a first appellate court which is to 're-evaluate, reassess and reanalyse the extracts of the record and draw its own conclusions.' They stated that the appellant has not demonstrated any grounds that would warrant this court to interfere with the decision of the trial court and the only document introduced at the appeal stage is a report from a document examiner indicating that a signature was forged. They urged the court to find that the appeal lacks merit and be dismissed with costs.

### **Analysis and Determination**

26. From the application, memorandum and record of appeal together with the submissions, the following issues arise for determination;
  - a. Whether the appeal is merited;
  - b. Who should pay the costs of this appeal?
27. There is no doubt that the 1<sup>st</sup> and 2<sup>nd</sup> respondents are the current joint owners of the subject motor vehicle registration number KCF 710T as has been shown by the logbook annexed to the appellant's application. The appellant is the immediate former owner who has denied that she gave the 1<sup>st</sup> and 2<sup>nd</sup> respondents permission to use the subject motor vehicle as security and facilitated the transfer of the said motor vehicle to the 1<sup>st</sup> and 2<sup>nd</sup> respondents. She filed a complaint at the police station under OB No 14/26/2/2020 and the matter was under investigation by the time the appellant had filed this appeal. The 2<sup>nd</sup> respondent has stated that through an affidavit dated February 14, 2020, the appellant gave the subject motor vehicle as security and released the logbook to the 1<sup>st</sup> respondent to obtain the loan. The appellant has faulted the trial court for failing to find that the transfer of the motor vehicle to the 1<sup>st</sup> and 2<sup>nd</sup> respondents was fraudulent.
28. The 2<sup>nd</sup> Respondent took the firm position in its replying affidavit sworn on June 19, 2020 by Richard Simbala that the Appellant (then plaintiff in the lower court) had on February 17, 2020 sworn a joint affidavit with the 1<sup>st</sup> Respondent (then 1<sup>st</sup> defendant) in which they consented to jointly handed over the original log-book of the motor vehicle KCF 710T to the 2<sup>nd</sup> Respondent.
29. This assertion was countered by the Appellant before the trial court who sought and was granted leave vide ruling of November 16, 2020 to include a further annexure which was a letter dated September 21, 2020 emanating from the firm of Ndegwa Wahome & Co Advocates that was said to have drawn and witnessed the said joint affidavit that the 2<sup>nd</sup> Respondent had exhibited in its replying affidavit to assert that the Appellant had executed.
30. The said firm disowned the joint affidavit and outlined various reasons to demonstrate that the said affidavit was not drawn by Advocate Wanjira Mwaniki or commissioned at their firm by Ndegwa Wahome as indicated.



31. Further, the appellant was granted orders to file additional evidence and filed a supplementary record of appeal dated May 26, 2022 and filed on the same day. She exhibited the charge sheet drawn against the 1<sup>st</sup> Respondent on forgery contrary to Section 349 of the Penal Code. There is also a DCI Forensic Document Examiner's Report dated January 11, 2021 whose author after comparing the specimen and known signatures of the appellant with the signature in the questioned document (being the joint affidavit dated February 14, 2020) rendered an opinion that those signatures were made by different authors. The trial court was however not privy to this additional evidence as at the time of the ruling the matter was still under investigation.
32. Nevertheless, even without the benefit of that evidence, the trial court should have been jerked by the fact that the additional annexure it allowed to be provided vide its ruling of November 16, 2020 was a letter by the Firm of Advocates which disowned the joint affidavit that the 2<sup>nd</sup> Respondent was relying on to insist on the liability of the appellant. That the letter was corroborative of the Appellant's stated position in her supporting affidavit. It was wrong for the trial court to turn a blind eye to this crucial piece of evidence considering that the Appellant's case is based on fraud.
33. Due diligence in Black's Law Dictionary 11<sup>th</sup> Edition is described as "the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." The appellant has faulted the 2<sup>nd</sup> respondent for not exercising due diligence in using the subject motor vehicle as security for she was not called to the 2<sup>nd</sup> Respondent's offices to sign as a guarantor to the loan facility nor did she give her consent. The 2<sup>nd</sup> Respondent said that they undertook due diligence before they extended the loan facility to the 1<sup>st</sup> Respondent and the appellant initiated and successfully transferred the logbook to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent.
34. As part of due diligence, the 2<sup>nd</sup> Appellant relied on an affidavit purportedly signed by the appellant which permitted the motor vehicle KCF 710T to be used as security. The appellant disowned and it was also disowned by the firm of Advocates that was said to have drawn and commissioned it.
35. Section 6(3) of the *Movable Property Security Rights Act* No 13 of 2017 provides that a security agreement shall be in writing and signed by the grantor, identify the secured creditor and the grantor, except in the case of an agreement that provides for the outright transfer of a receivable, describe the secured obligation and describe the collateral as provided in Section 8.
36. Since the affidavit dated February 14, 2020 was the only document that the 2<sup>nd</sup> Respondent had to prove that the appellant had consented to using the subject motor vehicle as collateral, it seems to me that the due diligence exercised by the 2<sup>nd</sup> Respondent missed key essential verifications and was thus unreliable.
37. The Court of Appeal In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2003) eKLR expounded on what a prima facie entails as follows:

"The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are well settled. In *Giella v Cassman Brown* to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner he was considering, which was in relation to the pleadings that had been put forward in that case....So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."



38. In *Nguruman Limited v Jan Bonde Nielsen & 2 others* (2014) eKLR, the Court of Appeal agreed with the definition of a prima facie case in the Mrao case and stated:

“We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.”

39. The appellant’s suit against the respondents is for a permanent injunction against the 2<sup>nd</sup> respondent and an order to set aside and cancel the transfer of the subject motor vehicle registration number KCF 710T. She outlined the particulars of illegality and negligence on the part of the 1<sup>st</sup> and 2<sup>nd</sup> respondents in paragraph 12 of the plaint. There is no doubt that the appellant is the immediate former owner of the subject motor vehicle before the 1<sup>st</sup> respondent used it as security for the loan facility. The 1<sup>st</sup> respondent did not enter appearance and neither did he file a response to the appellant’s application in the trial court.
40. It is therefore my finding that although the 1<sup>st</sup> and 2<sup>nd</sup> respondents are currently registered as joint owners of the subject motor vehicle; the appellant has through affidavit evidence succeeded in demonstrating a prima facie case of fraud with a high likelihood of success. This on the basis that she did not sign the affidavit which the Respondent relied on to demonstrate that she agreed to surrender her motor vehicle to be used as security.
41. On whether she will suffer irreparable injury, the appellant has said that the subject motor vehicle was being used as a uber/taxi in Kikuyu and it was her only source of income. The 2<sup>nd</sup> Respondent has refuted those claims as the appellant did not produce any documents to show that the motor vehicle was used as an uber/taxi and being a reputable financial institution, they were in a position to compensate her for any loss she might incur from the attaching of the subject motor vehicle. I am not persuaded that the appellant will suffer irreparable injury should the orders not be granted as the value of the motor vehicle can be ascertained and therefore she can recoup the value of the motor vehicle if the suit succeeds.
42. The balance of convenience however tilts in favour of the appellant as she has denied that she offered the subject motor vehicle as security for the loan facility offered to the 1<sup>st</sup> Respondent by the 2<sup>nd</sup> Respondent. Though the 2<sup>nd</sup> Respondent would be in a position to compensate the appellant should the court find in her favour, there is lingering doubt as to why the 2<sup>nd</sup> Respondent should be allowed to take the vehicle if prima facie it was never offered as security by the owner.
43. It is therefore my finding that this appeal is succeeds. The ruling of the lower court dated February 17, 2020 is hereby set aside. The application dated May 26, 2020 and amended on June 24, 2020 is thus



allowed as prayed. The appellant is awarded the costs of this appeal. The costs in the trial court shall be in the cause.

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 31st DAY OF MARCH 2023.**

**L.N MUGAMBI**

**JUDGE**

**In the presence of: -**

**Coram:**

Court Assistant- Etyang

Appellant: - absent

Advocate for Respondent- absent

Advocate for the Appellant- absent

**COURT**

To be transmitted digitally by the Deputy Registrar to the Parties Advocates on record through their respective email addresses.

**L.N. MUGAMBI**

**JUDGE.**

