



REPUBLIC OF KENYA



KENYA LAW
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**Ongeri v Bashy African Credit Limited & another (Civil Appeal E039 of 2022)
[2023] KEHC 2733 (KLR) (Commercial and Tax) (31 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2733 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E039 OF 2022
A MABEYA, J
MARCH 31, 2023**

BETWEEN

MIRIAM KERUBO ONGERI APPELLANT

AND

BASHY AFRICAN CREDIT LIMITED 1ST RESPONDENT

BRIAN ELLY OPAR 2ND RESPONDENT

RULING

1. Before court is a notice of motion dated 30/3/2022 brought under section 1A,3A,3B and order 42 rule 6(6) of the *Civil Procedure Rules*. The applicant sought an injunction to restrain the respondents from attaching and offering for sale the appellants motor vehicle registration Number KCE 049G Toyota Premio. That the respondents be ordered to deposit the original logbook in court.
2. The application was premised on the supporting affidavit sworn by Miriam Kerubo. The grounds were that the appellant had filed a suit against the respondents at the Chief Magistrate’s Court for unlawful attachment of motor vehicle KCE 049G (“the said vehicle”). That she had taken a loan of Kshs 388,000/- and had repaid a total sum of Kshs 391,000/- leaving an interest of Kshs 68,158/-. That the proclamation did not indicate the amount to be recovered.
3. That the appellant’s application was dismissed and the appellant preferred an appeal to this court. That the appeal raised triable issues and the intended sale of the motor vehicle was irregular. It was contended that the amount the respondents were demanding did not reflect the actual amount.
4. In opposition to the application, the respondents filed a replying affidavit sworn by Bashiri Kipimo Mrimia. He stated that the appeal was an abuse of the court process as the appellant had defaulted on the loan repayment. It was contended that according to the parties’ contract, the loan of Kshs 388,000/-



- was to be repaid within 2 months and since the appellant had failed to honour the said terms the loan attracted interest. It was the respondent's case that the loan attracted interest of Kshs 222,525.51 for failure to pay within the first three months after receipt of the loan. It was further averred that the amount owed to the 1st respondent was Kshs 385,000/- as the appellant had only paid Kshs 201,000/-.
5. The application was canvassed by written submissions which I have considered.
 6. The appellant submitted that the respondents sought to recover from the appellant an amount that was unconscionable, irregular and illegal. It was contended that the 1st respondent did not recover from the appellant immediately the loan became non performing. That the amount sought by the 1st respondent was wrongfully computed and it went against the in-duplum rule as the proclamation was for Kshs 690,472.41.
 7. The respondents submitted that the appellant was bound by the terms of the loan agreement and which included payment of interest at the rate of 12% interest compounded monthly. It was further submitted that the appellant had not attempted to clear the balance and the application was intended to defeat justice. Counsel submitted that the vehicle was offered by the appellant willingly as security for the loan and the proclamation notice was issued after the default of payment. The cases of *Morris & Co vs Kenya Commercial Bank* [2003] 2EA, *Bii vs Kenya Commercial Bank Ltd* [2001] KLR and *Andrew Muriuki Wanjobi & Others vs Equity Building Society Ltd & 2 Others* [2006] Eklr, amongst others were relied on in support of those submissions.
 8. I have carefully considered the application, the response and the written submissions. The question for determination is whether the respondents should be restrained from selling the attached motor vehicle belonging to the appellants.
 9. The court's jurisdiction in granting the orders sought stems from order 42 rule 6 (6) of the [Civil Procedure Rules](#) which provides thus: -
 - (6) Notwithstanding anything contained in sub rule (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 subordinate court or tribunal has been complied with.
 10. The appellant has moved the court seeking to restrain the respondents from attaching and selling the said motor vehicle pending the appeal. It was her contention that the intended sale was irregular as it sought to recover an amount that was higher than it was supposed to be. That the interest charged was against the in duplum rule.
 11. On its part, the respondents submitted that the parties willingly entered into the contract and were therefore bound by the terms of the contract. They contended that the appellant was supposed to make the payments within two months after the date the loan was advanced but she delayed by three months thus the reason for attaching the said vehicle which was provided as security.
 12. In *Patricia Njeri & 3 others vs National Museum of Kenya* (2004) eKLR, spelt out the principles to be followed in considering an application for an interim injunction pending appeal. He stated that the power of the court to grant any order of temporary injunction was discretionary and the principles to grant the discretion were as follows: -
 - a. The discretion will be exercised against an applicant whose appeal is frivolous.



- b. The discretion should be refused where it would inflict greater hardship than it would avoid.
 - c. The applicant must show that to refuse the injunction would render his appeal nugatory.
 - d. The court should be guided by the principles in *Giella Vs Cassman Brown & Company Ltd* (1973) EA 358.
13. I have perused the memorandum of appeal against the ruling made on 24/3/2022 by which the trial court declined to stop the sale and attachment of the said vehicle. The appellant faulted the learned magistrate for holding that the she had defaulted in making payments.
14. Drawing guidance from the afore-stated principles, the appellant is tasked with showing that she has a *prima facie* case, that the appeal is not frivolous and that the appeal would be rendered nugatory if the order sought is not granted.
15. Having perused the appeal my finding is that it can be argued out in court and therefore it is not frivolous. In particular, if the appellant had already paid Kshs 391,000/- and the respondents were demanding Kshs 690,472.41, that would be obviously illegal. This court has stated time and again that the intention of the Legislature in enacting the in-duplum rule was not only directed at the banks, but all lenders. Although the rule was enacted under section 44A of the *Banking Act*, the principle applies across the board. The principle acts to check those who would like to advances into cash cows while salivating on the securities offered by the unsuspecting public.
16. All the respondent was required to do was to produce the statement of account and show the amount due. The appellant only admitted owing Kshs 68,158/-. If the order sought is not granted and the said vehicle sold, the appeal would be rendered nugatory. I find the issues raised on whether or not the interest charged was high is to be determined at the appeal.
17. In this regard, I exercise my discretion and allow the application to the extent that the respondents are restrained from selling the motor vehicle until the appeal is heard and finalized. However, this is on condition that the appellant pays to the 1st respondent the admitted sum of Kshs 68, 158/- within 21 days of the date of this ruling. Costs shall be in the appeal.
- 18 It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH, 2023.

A. MABEYA, FCIArb

JUDGE

