Al-Alyaan Motors Limited & another v Ngala (Civil Appeal E191 of 2021) [2023] KEHC 19745 (KLR) (30 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19745 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E191 OF 2021

OA SEWE, J

JUNE 30, 2023

BETWEEN

AL-ALYAAN MOTORS LIMITED ..... 1ST APPELLANT

IMRAN YOUSAF ..... 2ND APPELLANT

AND

BIDII STEPHEN NGALA ..... RESPONDENT

(Being an Appeal from the Ruling and Orders of Hon. E. Muchoki, delivered on the 12th October, 2021 in Mombasa CMCC No. 1181 of 2021)

JUDGMENT

1. This is an appeal from the ruling and orders of Hon. E. Muchoki, RM, delivered in Mombasa Chief Magistrate's Civil Case No. E1181 of 2021: Bidii Stephene Ngala v Al-Alyaan Motors Ltd and Another. The dispute was in connection with a motor vehicle sale agreement dated 1st June 2020 in respect of which the respondent had paid over about 75% of the purchase price, leaving a balance of Kshs. 750,000/= only. The respondent was therefore aggrieved when the appellant, for no apparent reason, repossessed the subject motor vehicle without prior notice of such intention.

2. Accordingly, the respondent filed the lower court suit seeking the following reliefs on the ground of breach of contract:

   (a) An order compelling the appellants to release the Motor Vehicle Registration No. KCX 709R Toyota Noah;

   (b) An order declaring the sale agreement dated 1st June 2020 void;

   (c) General damages;

   (d) Punitive, aggravated and/or exemplary damages;

(e) Costs of the suit;

(f) Interest on [a] above at court rate;

(g) Any other relief that the Court may deem fit to grant.

3. Along with the Plaint, the respondent filed a Notice of Motion under a Certificate of Urgency dated 16th July 2021. He prayed for the following orders in the interim:

(a) That the Court be pleased to certify the matter as urgent;

(b) That a temporary order be issued and directed to the 1st and 2nd appellants to release Motor Vehicle Registration No. KCX 709R Toyota Noah (Chassis/Frame ZRR70-0513952) to the respondent pending the hearing and determination of the application;

(c) That a temporary injunction be issued to prevent the 1st and 2nd appellants, their agents, servants, employees, or any other persons acting on its behalf from distressing/repossessing and or retaining the Motor Vehicle Registration No. KCX 709R Toyota Noah (Chassis/Frame ZRR70-0513952) pending the hearing and determination of the suit;

(d) An order be issued that the OCS Nyali Police Station shall ensure compliance with the Court's order;

(e) An order be issued that the sale agreement entered into between the appellants and the respondent on 1st June 2020 is null and void.

(f) An order that the costs of the application be in the cause.

4. The application was canvassed by way of written submissions and was determined by Hon. Muchoki, RM, vide his ruling dated 12th October 2021. In his concluding remarks, the learned magistrate held:

> " The plaintiff and the defendant entered into a sale agreement which is commercial in nature. Any loss to either party can be remedied by an award of damages which can be clearly and easily ascertained.
>
> According to the accounts of both parties the plaintiff has paid a substantial amount towards the purchase price. The parties cannot agree on the terms of the sale agreement.
>
> The plaintiff having paid a substantial amount of the purchase price and the court having taken judicial notice of the Covid-19 pandemic ravaging the economy and the motor vehicle was intended for business the balance of convenience thus tilts in favour of the plaintiff.
>
> Accordingly, the court will proceed to find that the notice of motion dated 16th July 2021 has merit and the same is hereby allowed as prayed..."

5. Granted the nature of the orders of the Court, the formal order as extracted was to the following effect:

(a) That a temporary order be and is hereby issued and directed to the 1st and 2nd Respondents/ Defendants to release Motor Vehicle Registration Number KCX 709R Toyota Noah [Chassis/ Frame ZRR70-0513952] to the Applicant/Plaintiff.

(b) That a temporary injunction is hereby issued to prevent the 1st and 2nd Respondent/ Defendants, its agents, servants, employees, or any other persons acting on its behalf from distressing/repossessing and or retain the Motor Vehicle KCX 709R Toyota Noah [Chassis/ Frame ZRR70-0513952].

(c) That an Order be and hereby issued that the OCS Nyali Police Station shall ensure compliance with this Honourable Court Order.

(d) That an Order is hereby issued that the sale agreement entered between the Applicant and Respondent on the 1st June, 2020 is null and void

(e) That the cost of this application be in the cause

6. Being aggrieved by that outcome, the appellants filed this appeal on 25th October 2021 on the following grounds:

(a) That the learned trial magistrate erred in law and in fact in allowing the respondent's application dated 16th July 2021 as prayed.

(b) That the learned magistrate erred in fact and in law by ordering the release of Motor Vehicle Registration No. KCX 709R Toyota unconditionally to the respondent pending the hearing and determination of the application, which orders were spent.

(c) That the learned magistrate erred in law by ordering the release of the Motor Vehicle to the respondent as the said orders have determined the issues to be canvassed in the main suit at an interlocutory stage.

(d) That the learned magistrate erred in law and in fact by ordering the sale agreement between the 1st appellant and the respondent null and void.

(e) That the learned magistrate erred in law and in fact by re-writing the terms of the sale agreement between the 1st appellant and the respondent and declaring the said sale agreement as null and void which is the basis of ownership of the respondent.

(f) that the learned magistrate erred in fact and law by not considering the appellant's response and opposition to the release of the said motor vehicle as the respondent has admitted and is indeed indebted to the 1st appellant.

(g) That the learned magistrate erred in law by failing to consider the authorities and submissions relied on by the appellants in his ruling which is the subject matter of the appeal.

(h) That the learned magistrate erred in law and fact by holding that the respondent was unable to pay the instalments due to Covid-19 yet the document before the court showed that the respondent was in breach of the sale agreement and acknowledged he was in arrears.

(i) That the learned magistrate erred in law and fact in failing to appreciate that the motor vehicle in dispute belongs to the 1st appellant and that the respondent has failed to honour his part of the contract and is in default and cannot fail to pay instalments and keep the motor vehicle as well.

(j) That the learned magistrate erred in law and in fact by allowing the respondent's Supporting Affidavit dated 16th July 2021 and Supplementary Affidavit dated 23rd August 2021 which were sworn at Nairobi by the respondent himself yet at the time of swearing the Affidavits he was based and domiciled in Germany hence the Affidavits were and are fatally defective and incurable in law.

(k) That the learned magistrate erred in law and in fact by stating that the Supporting Affidavit and Supplementary Affidavit were sworn in the era of technology and the respondent does not need to appear before a Commissioner for Oaths for attestation.

(l) That the learned magistrate misconstrued what amounts to a prima facie case with probability of success.

(m) That the learned magistrate erred in law by allowing the respondent's application dated 16th July 2021 by ruling that he had met the principles and threshold established in Giella v Cassman Brown & Co. Ltd [1973] EA 358.

(n) That the learned magistrate misdirected himself in the issues that were for determination before him and hence made a wrong determination in the circumstances.

(o) That the trial court was openly biased against the appellants herein in its ruling and is incapable of offering/rendering a just and impartial determination of issues in this matter.

7. In the premises, the appellants prayed that their appeal be allowed and the whole of the decision of Hon. Muchoki, RM, delivered on 12th October 2021 and its consequential orders be set aside; and that the respondent's application dated 16th July 2021 be dismissed with costs. They also prayed that they be awarded costs of the appeal.

8. The appeal was canvassed by way of written submissions, pursuant to the directions given herein on 9th June 2022. The appellants' written submissions were filed on 18th November 2022 by Mr. Gitonga, Advocate. He argued his 15 grounds of appeal under 6 broad heads, namely:

(a) Whether the learned magistrate erred in law and in fact in granting an order for the release of Motor Vehicle Registration No. KCX 709R Toyota Noah to the respondent unconditionally; which orders were spent.

(b) Whether the learned magistrate failed to properly analyse the facts and by so doing misdirected himself into ruling against the weight of the evidence;

(c) Whether the trial magistrate erred in law and in fact in granting orders that were final and substantive in nature, by declaring the sale agreement between the 1st appellant and the respondent as null and void, without hearing and determining the same on merits at the interlocutory stage.

(d) Whether the respondent's Supporting Affidavit dated 16th July 2021 and Supplementary Affidavit dated 23rd August 2021 were fatally defective and ought to have been struck out or expunged.

(e) Whether the respondent met the threshold required for granting an injunction.

(f) Who bears the costs?

9. Counsel pointed out that, by their very nature, the first two orders prayed for in the respondent's application dated 16th July 2021 were interim orders; and were therefore spent by the time the learned magistrate delivered his ruling on 12th October 2021. He submitted that by granting the orders as prayed for in the impugned application the lower court in effect granted orders, some of which were ineffectual, and provided a window for mischief by the respondent.

10. Mr. Gitonga further submitted that, by allowing the application dated 16th July 2021, the learned magistrate, in effect, determined at an interlocutory stage issues that were yet to be canvassed by the parties in the main suit. He therefore posited that the magistrate erred by declaring that the subject sale agreement was null and void without hearing the parties on the merits. He further argued that having declared the sale agreement null and void, there was no basis for the order that the motor vehicle be

released to the respondent. Counsel asserted therefore that the lower court was plainly wrong when it issued substantive orders at an interlocutory stage. He relied on *John Mwangi Muhia & 2 Others v Director of Public Prosecutions & 5 Others [2019] e*KLR and Agip (K) Ltd v Vora [2000] 2 EA 285 for the proposition that the judicial process requires that all parties be given an opportunity to present their cases before a decision is given.

11. Counsel also took issue with the respondent's breach of contract and urged the Court to uphold the maxim that he who comes to equity must come with clean hands. He submitted that, by the time he filed the lower court suit, the respondent was in arrears and had refused to pay the instalments due for a period of 15 months. He added that the respondent had also tampered with the car-tracker to prevent the appellants from repossessing the said motor vehicle. Mr. Gitonga accordingly submitted that, had the learned magistrate considered the evidence before him, he would not have made the orders he made at that interlocutory stage; which orders amounted, in his opinion, to a re-writing of the contract between the parties by the lower court. He made reference to *Danson Muriuki Kihara v Johnson Kabungo [2017]* eKLR in support of this assertion.

12. On whether the respondent's Supporting and Supplementary Affidavits ought to have been struck out by the lower court for being fatally defective, Mr. Gitonga latched on the fact that, in the jurat, the affidavits were indicated to have been taken in Nairobi yet the deponent was then resident in Germany. He relied on Section 5 of the *Oaths and Statutory Declarations Act*, Chapter 15 of the Laws of Kenya. Counsel pointed out that at paragraphs 12 and 17 of the Supplementary Affidavit sworn on 23rd August 2021, the respondent acknowledged that he was out of the country at the time and that he had granted his advocate the authority to sign the affidavit on his behalf.

13. Thus, Mr. Gitonga contended that the two affidavits, having not been commissioned in accordance with Sections 4 and 5 of the *Oaths and Statutory Declarations Act*, ought to have been struck out by the lower court. He added that the court erred by ruling that in this era of technology, it was possible for the affidavit to be taken in Germany and transmitted to Kenya real time. Thus, Mr. Gitonga urged the Court to go by the decisions of *David Wamatsi Omusotsi v Returning Officer, Mumias East Constituency & 2 Others [2017]* eKLR and *Rajput v Barclays Bank of Kenya Ltd & 3 Others [2004]* KLR, among others, as the basis for finding that it would be an abuse of the court process to allow the two affidavits to remain on record.

14. On whether the respondent met the threshold required for granting a temporary injunction, counsel relied on Giella v Cassman Brown (supra); Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another [2015] eKLR and Mrao Ltd v First American Bank of Kenya & 2 Others [2003] KLR 125 as to the prerequisites. In his view, the respondent failed to establish a prima facie case and was therefore not entitled to the order of temporary injunction; having owned up to his breach of contract. He likewise posited that, in the event the sale agreement was declared null and void, it would not be impossible to quantify the respondent's loss; and therefore that no irreparable harm could befall him. He added that, in the circumstances, the balance of convenience needed no consideration. Thus, Mr. Gitonga prayed that the Amended Appeal dated 5th November 2021 be allowed and the orders prayed for therein granted.

15. Ms. Nganga for the respondent relied on her written submissions filed on 15th November 2022. She referred to Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123 as to the role of the first appellate court such as this, and Giella v Cassman Brown & Co. Ltd (supra) for the applicable principles governing the grant of a temporary injunction. She pointed out that the sale agreement between the parties was not a chattel mortgage; and therefore did not provide for repossession. Thus, counsel defended the ruling and orders issued by the lower court and added, on the authority of

National Bank of Kenya v Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR that the parties are bound by the terms of their agreement. She therefore prayed for the dismissal of the appeal.

16. On an appeal such as this, it is the duty of this Court to re-evaluate the evidence placed before the lower court for the purpose of making its own conclusions thereon. (see Selle & Another v Associated Motor Boat Co. Ltd & Others, supra). Moreover, it is pertinent to bear in mind that the impugned decision was made in the exercise of discretion on the part of the lower court; and therefore, as an appellate court, this Court must bear in mind the principles brought out in United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd [1985] E.A 898, that:

> " The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

17. The same position was taken by the Court of Appeal in *Philip Keipto Chemwolo & another v Augustine Kubende [1986]* eKLR thus:

> " ...this Court will not lightly interfere with the discretion of the trial judge unless it is satisfied that he misdirected himself in some matter, and as a result arrived at a wrong decision, or unless it is manifest on the case as a whole that the judge was clearly wrong in the exercise of his discretion, and that as a result there has been a miscarriage of justice."

18. Accordingly, I have given careful consideration to the submissions made herein by learned counsel in the light of the proceedings of the lower court. The background facts are not in dispute, namely that the respondent entered into a sale agreement with the 1st appellant for the sale of Motor Vehicle Registration No. KCX 709R Toyota Noah. The agreed purchase price was Kshs. 1,650,000/=; and it is common ground that the respondent had paid a substantial portion thereof by June 2020 when the appellants repossessed the motor vehicle. The respondent sought the intervention of the lower court and obtained, inter alia, an order for the release of the motor vehicle to him and a temporary injunction restraining the respondents from repossessing the motor vehicle pending the hearing and determination of the suit.

19. In the premises, the issues arising for determination in this appeal are as follows:

    (c) Whether the trial court erred in failing to expunge the Supporting Affidavit and Supplementary Affidavit dated 16th July, 2021 and 23rd August, 2021 respectively by the Respondent.

    (b) Whether the trial court erred when it declared the sale agreement null and void

        (a) Whether the trial court erred when it granted a temporary injunction.

A. On whether the trial court erred when it did not expunge the respondent's Supporting Affidavit and Supplementary Affidavit dated 16th July, 2021 and 23rd August, 2021 respectively:

20. It was the appellant's case that the trial court erred by failing to expunge the respondent's Supporting Affidavit sworn on 16 July, 2021 filed in support of the Motion and a Supplementary Affidavit thereto

sworn on 23rd August, 2021. The appellants' reasons for so submitting was that the respondent was in Germany whilst the Affidavits were sworn in Nairobi; and therefore that the affidavits were taken in disregard of Sections 4 and 5 of the *Oaths and Statutory Declarations Act*. On this account, the appellants submitted that the Affidavits were fatally defective and ought to have been struck out.

21. Section 5 of the *Oaths and Statutory Declarations Act* provides:

> Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.

22. Copies of the impugned affidavits are at pages 22 and 94 of the Record of Appeal. They purport to have been sworn at Nairobi by the Respondent in the presence of Henry Kurauka, Commissioner for Oaths, on 16th July, 2021 and Simiyu Hilda Nekesa on 23rd August, 2021 respectively; yet the respondent was then resident in Germany. At paragraph 12 of the Supplementary Affidavit, the respondent averred that he was not in the country; and at paragraphs 16 and 17 thereof, he averred that:

> 16. In response to paragraph 24, I left the Country on the 8th January 2020 and at the time of my departure, I was not aware that the motor vehicle was inserted with a car tracker...
>
> 17. In response, I attest that I have given my Advocates on record access to my e-signature to attest to my affidavit having been advised accordingly."

23. It is also manifest from the two affidavits that the deponent's signature appears to be in the electronic format. Thus, in determining this issue, the trial court took the view that the since courts have embraced technology, e-signatures are permissible; and therefore the question of whether the respondent was in Kenya or not to swear the Affidavit should not arise.

24. While it is true that the courts in Kenya have embraced technology in their operations, and that as a result a lot of changes have been introduced in terms of court operations, it must be emphasized that the deployment of technology must conform to the provisions of the law. As it stands, Section 5 of the *Oaths and Statutory Declarations Act* requires that an affidavit be sworn at the same place it is commissioned. Hence, in David Wamatsi Omusotsi v Returning Officer Mumias East Constituency & 2 Others (supra) the court struck out such an affidavit and explained that:

> " It is the commissioning of an affidavit that distinguishes it from other documents. It would be an abuse of the process of the court to allow these kind of documents to remain in record to form the basis of the case for the petitioner..."

25. I therefore agree with the position taken in *Regina Munyiva Ndunge v Kenya Commercial Bank Limited (2005)* eKLR, in which the Court expressed itself thus:

> " The second issue raised by the Applicant is that the application should be treated as unopposed because the replying affidavit is defective since it is not properly commissioned. Section 5 of the *Oaths and Statutory Declarations Act* provides that:
>
> 'Every Commissioner for Oaths before whom any oath or affidavit is taken or made ... shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.'
>
> ' ... The affidavit is shown as having been sworn at Machakos in the presence of Leah Mbuthia, Commissioner for Oaths, on 13th October 2003 but whose stamp reads Nairobi. If the affidavit was sworn at Machakos, it should have been before a Commissioner for

> Oaths in Machakos and the stamp should show likewise. The only conclusion one can reach on looking at this affidavit is that the place the affidavit was sworn and where it was commissioned are two different places. That is irregular and unacceptable and that affidavit is, therefore, fatally defective as it was not sworn in the presence of a Commissioner for Oaths. It is likely that the stamp was just affixed. This court should have no alternative but strike off the replying affidavit as it is not properly commissioned and that the application would stand unopposed."

26. By parity of reasoning, if the deponent was in Germany as at the time the two affidavits were sworn, then he ought to have taken oath before a Notary Public or an equivalent thereof in Germany. It was misleading and an outright lie for the respondent to purport that the affidavits were taken in Nairobi when that was not the case. In the premises, the affidavits were for striking out and ought to have been struck out by the learned magistrate for non-compliance with Section 5 of the *Oaths and Statutory Provisions Act*.

B. On whether the trial court erred when it declared the sale agreement null and void:

27. One of the prayers sought by the respondent in the Notice of Motion dated 16th July, 2021 was an order that the sale agreement between the respondent and the appellants is null and void. Needless to say that although sought at an interlocutory stage, that was a prayer that belonged to the main suit and could only be granted after hearing the parties on the merit, for the sale agreement was the backbone of the claim. This is manifest at paragraphs 4-9 and 13-20 of the Plaint dated 28th July 2021. Indeed, particulars of breach of the agreement were meticulously set out by the respondent at paragraph 17 of the Plaint. And if there indeed was another agreement introduced by the appellants without the knowledge and/or consent of the respondent, that was a matter that could only be resolved by the lower court after hearing the parties.

28. Thus, in National Bank of Kenya v Duncan Owuor Shakali & Another, CA NO. 9 of 1997, Hon. Omolo, JA stated:

> " The question of finally deciding whether or not there is a contract between the parties and if there is what terms ought to be implied in the contract is not to be determined on affidavits. All a Judge has to decide at the stage of an interlocutory injunction is whether there is a prima facie case with a probability of success. A prima facie case with a probability of success does not, in my view, mean a case, which must eventually succeed."

29. Similarly, in *Nguruman Limited v Jan Bonde Nielsen & 2 Others Civil Appeal No. 77 of 2012* the Court of Appeal held:

> " 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." (also see Edwin Kamau Muniu vs Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002)

30. Lastly, in Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others [2015] eKLR, the Court of Appeal reiterated that:

> Having carefully considered the ruling of the learned Judge, we are satisfied that the learned Judge erred by making several definitive and final conclusions without the advantage of hearing and seeing witnesses who have been subjected to cross-examination, the time tested device of testing the truth or falsity of evidence. Among those final conclusions by the learned Judge was that Mr. Maloba had acted for and on behalf of Maloba Station and could therefore legally bind the latter even though it was a separate and distinct legal personality; that there was no difference between Maloba Station and Mr. Maloba; that the directors of Maloba Station were aware of Maloba's dealings with Total; that the Kshs 1,099,980 paid to Mr. Maloba by Total was advance rent rather than a personal loan; and that Mr. Maloba had acted fraudulently in the dealings culminating in this dispute." (see also Agip (K) Ltd v. Vora [2000] 2 EA 285)

31. In the premises, there is considerable merit in the appellants' argument that the issuance of Prayer 5 of the Notice of Motion dated 16th July 2021 was not only premature but also pre-emptive. It is, therefore, my finding that the trial court misdirected itself when it allowed the entire Notice of Motion despite making a conclusion that there was no concord on the sale agreement.

C. On whether the trial court erred when it granted a temporary injunction:

32. It is clear from the ruling of the trial court that it considered the application for an injunction pursuant to the principles set in the case of Giella v Cassman Brown, being whether the applicant had established a prima facie case with a probability of success, will suffer irreparable loss incapable of compensation and where the balance of convenience tilts in their favour.

33. An order of injunction is a discretionary order, and therefore this court, being an appellate court, must exercise restraint and not disturb such an order unless it be shown that the lower court acted on the wrong principles of law, facts; or that the impugned order is plainly wrong. In Mbogo v Shah (1968) EA 93, at page 94 De Lestang, JA, held thus:

> " I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong..."

34. In his ruling, the learned magistrate observed that although the parties were not in agreement as to the terms of the contract, a substantial part of the purchase price had been paid for the motor vehicle by the respondent. In the circumstances, the learned magistrate had the power and duty to consider the circumstances presented before him with a view of granting such orders as were efficacious. On the face of it, the appellants have not demonstrated that, in granting the order for a temporary injunction, the magistrate committed an error of principle in the manner explicated in United India Insurance Co. Ltd (supra) and Mbogo (supra) or that the lower court misdirected itself and thereby made a wrong

decision to warrant the interference of this court. Indeed, in Charter House Investments Ltd v Simon K. Sang and Others Civil Appeal No. 315 of 2004 it was pointed out that:

> " Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the convenience of the parties and possible injuries to them and to third parties.

35. The record of the lower court also shows that, when the application came up for hearing on 16th August 2021 an interim order was granted by way of a status quo order to preserve the subject matter of the dispute pending the filing of written submissions and the ruling of the lower court. It would have been pointless for the lower court to issue an order restraining repossession when the subject motor vehicle was not in the possession or control of the respondent. I therefore find nothing untoward in Prayer 2 being granted by the lower court. Indeed, Section 63(e) of the *Civil Procedure Act* is explicit that, in order to prevent the ends of justice from being defeated, the court may make such interlocutory orders as may appear to be just and convenient.

36. Nevertheless, having found that the respondent's affidavits upon which the application for injunction was hinged were fatally defective, it would follow that there was no basis for the orders issued vide the ruling dated 12th October 2021. Accordingly, I find merit in the appeal and grant orders as follows:

    (a) That the appeal be and is hereby allowed.

    (b) The ruling and orders granted by Hon. E. Muchoki, RM, on 12th October 2021 be and are hereby set aside and replaced with an order striking out the application dated 16th July 2021.

    (c) The status quo now subsisting in respect of Motor Vehicle Registration No. KCX 709R, Toyota Noah, as at 30th June 2023, be maintained pending the hearing and determination of the lower court suit.

    (d) The lower court suit to be heard on priority basis.

    (e) Each party to bear own costs of the appeal.

    It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 30TH DAY OF JUNE 2023

OLGA SEWE

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR