



**Momentum Credit Limited v Wesleye & 2 others (Civil Appeal
E22 of 2022) [2023] KEHC 19205 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19205 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E22 OF 2022
JRA WANANDA, J
JUNE 29, 2023**

BETWEEN

MOMENTUM CREDIT LIMITED APPELLANT

AND

RONOH WESLEYE 1ST RESPONDENT

PAUL KANGETHE NDUNGU 2ND RESPONDENT

ANTIQUA AUCTIONS AGENCIES 3RD RESPONDENT

*(Appeal arising out of the Ruling delivered on 28/01/2022 in
Eldoret Chief Magistrate's Court Civil Suit No. E509 of 2021.)*

JUDGMENT

1. This Appeal arises out of the Ruling delivered on 28/01/2022 in Eldoret Chief Magistrate's Court Civil Suit No. E509 of 2021. The Appellant was the 2nd Defendant in the suit, the 1st Respondent was the Plaintiff, the 2nd Respondent was the 1st Defendant and the 3rd Respondent was the 3rd Defendant.
2. The background of the matter is that by the Plaint filed in the said suit on 2/07/2021 through Messrs Bulbul-Koitui & Co. Advocates, the 1st Respondent pleaded that he was the owner of the motor vehicle registration number KCZ 622Y which is in his possession but which is registered jointly in the names of the 2nd Respondent and the Appellant, around the month of August 2020 while in search of a motor vehicle to purchase the 1st Respondent was introduced to the 2nd Respondent who is a car dealer in Nairobi, the 2nd Respondent agreed to sell to him the said motor vehicle at a consideration of Kshs 1,189,000/-, as a term of the agreement the 1st Respondent was to pay to the 2nd Respondent a deposit of Kshs 800,000/- and the balance to be paid upon transfer of the motor vehicle within 5 months of the date of the initial deposit, the 1st Respondent applied for a loan and deposited an amount of



- Kshs 800,000/- into the 2nd Respondents bank account, the 1st Respondent then took possession of the motor vehicle which is currently in his possession,
3. It was further pleaded that without knowledge of the 1st Respondent, the 2nd Respondent secured a loan with the Appellant using the said motor vehicle as security, the 1st Respondent only came to know of this fact when a representative of the 3rd Respondent Auctioneers approached him having been instructed by the Appellant with the intention of attaching, proclaiming and/or repossessing the motor vehicle, upon reaching out to the 2nd Respondent, he was remorseful for failing to inform the 1st Respondent of that fact, the 2nd Respondent then requested him to be paying the instalments directly to the Appellant to clear the 2nd Respondent's said outstanding loan, the 1st Respondent has now paid the purchase consideration in respect to the motor vehicle in full, the Appellant never issued the 1st Respondent with the mandatory 3 months' notice as provided by the law, the said actions against the 1st Respondent amount to infringement of his constitutional rights to own property
 4. Together with the Plaint, the 1st Respondent also filed the Notice of Motion dated 2/072021 in which he sought the following orders:
 - i. [Spent]
 - ii. That there be interim orders of stay of execution of attachment and repossession of Motor Vehicle Registration No. KCZ 622Y including the warrants for attachment/proclamation/repossession pending the hearing and determination of this Application
 - iii. That the proclamation notice of attachment/repossession dated 25/6/2021 of the subject Motor Vehicle Registration No. KCZ 622Y issued by the 3rd Defendant/Respondent, Antique Auctions Agencies be set aside and/or lifted.
 - iv. That there be a stay of execution of attachment and repossession of Motor Vehicle Registration No. KCZ 622Y issued by the 3rd Respondent, Antique Auctions Agencies, be set aside and/or lifted pending the hearing and determination of the suit.
 - v. That costs of this Application be provided for.
 5. The Application was supported by the Affidavit sworn by the 1st Respondent and which basically reiterated the matters pleaded in the Plaint.
 6. The Application was opposed by the Appellant vide the Replying affidavit sworn by one Sheila Imali and filed in Court on 14/07/2021 through Messrs MMW Advocates. She deponed that she is the Legal Officer at the Appellant. As a preliminary matter, she deponed that the Application was brought under Order 22 Rule 6 and Order 22 Rule 22 of the Civil Procedure Rules and seeks orders for stay of execution which orders are sought in the execution of a decree, there is no decree in the matter and therefore the Court cannot be misled to grant stay of execution orders and that an injunctive order is donated by Order 40 of the Rules. She added that there is no privity of contract between the 1st Respondent and the Appellant, the 1st Respondent is a stranger to the Appellant, the 1st Respondent therefore lacks locus to seek the orders.
 7. She further deponed that on 28/09/2020, the 2nd Respondent made a loan application to the Appellant seeking a credit facility of Kshs 675,848/-, it was further agreed that in the loan application form that the 2nd Respondent would offer a motor vehicle as security for the loan, in the event of default the Appellant will exercise its right to realize the collateral and recover any unpaid portion of the loan, on 2/10/2020 the Appellant issued a confirmation letter granting the loan facilities, in the confirmation letter it was further agreed that the facilities would be secured by the said motor vehicle, there would



be joint registration of the motor vehicle, the loan would be repaid in 18 equal monthly instalments of Kshs 66,581/-, the Appellant thereafter proceeded to register at NTSA the motor vehicle in the joint names of the 2nd Respondent and the Appellant on 2/10/2020, the Appellant was issued with a log-book on 5/10/2020 demonstrating the joint ownership, the Appellant further proceeded to register the motor vehicle at the collateral registry in compliance with the Movable Property Security Rights Act, upon the securitization the Appellant proceeded to disburse the loan, the 2nd Respondent has consistently failed to honour his repayment obligations, the Appellant issued a letter dated 18/06/2021 demanding for the repayment of the arrears within 7 days, the 2nd Respondent neglected to regularize the debt causing the Appellant to exercise its statutory power of sale, the Appellant thus issued instructions to the 3rd Respondent to repossess and sell the motor vehicle,

8. She also deponed that under Section 8 of the Traffic Act the person whose name is registered in the log-book shall be deemed as the registered owner of the motor vehicle, in the Sale Agreement annexed in the 1st Respondent's Application, the 1st Respondent knew that the registered owners of the motor vehicle were the 2nd Respondent and the Appellant, the collateral was registered on 2/10/2020 prior to the alleged Sale Agreement dated 5/03/2021 entered into between the 1st Respondent and the 2nd Respondent demonstrating that the 1st Respondent was aware that no rights could pass to him in the absence of the Appellant's consent, the 1st Respondent has not demonstrated any rights that the Court can use to override the registered rights of the Appellant, for a transfer in jointly owned property to fully pass to the intended purchaser, both owners must acquiesce to the transaction, an obligation that the 1st Respondent neglected, the 1st Respondent therefore has no locus to seek to assert a right that is not recognized in law, the 1st Respondent has demonstrated negligence in terms of failure to conduct due diligence and failure to seek the Appellant's consent to the sale and transfer of ownership, the 1st Respondent cannot suffer irreparable loss as he has no legally recognized proprietary rights to the motor vehicle, the orders sought would strip the Appellant of its security.
9. The 2nd and 3rd Respondents do not appear to have filed any response to the Application.
10. Upon hearing the parties and the pleadings filed as aforesaid, including a Supplementary Affidavit filed by the 1st Respondent and also the written Submissions filed respectively by the parties, the trial Court delivered its Ruling on 28/01/2022. By the said Ruling, the Court allowed the Application on the following terms as captured in the order extracted:
 - i. That the proclamation notice of attachment dated 25/6/2021 for the subject motor Vehicle Registration No. KCZ 622Y issued by the 3rd Defendant/Respondent herein, Antique Auctions Agencies be and is hereby set aside and/or lifted.
 - ii. That there be a stay of execution of attachment and repossession of motor vehicle Registration No. KCZ 622Y pending hearing and determination of this Application.
 - iii. That the Defendant fits the suit motor vehicle with a tracker at a shared cost of both parties within 14 days of this Ruling pending the hearing and determination of the main suit.
 - iv. That the vehicle is availed to Court anytime when required.
 - v. That in the event that the Applicant is not able to avail the vehicle in a timely manner as and when needed, the defense shall have the liberty to detain the vehicle until the matter/suit is conclusively heard and determined.
 - vi. That the parties to set down the suit expeditiously for hearing on priority basis.
 - vii. That the costs shall be in the Cause.



11. Aggrieved by the said decision, the Appellant filed this Appeal vide the Memorandum of Appeal filed on 25/02/2022. He preferred 5 grounds as follows:
 - i. The learned Magistrate erred in fact and in law by granting the 1st Respondent a stay of execution of attachment and repossession of motor vehicle registration number KCZ 622Y pending the determination of the suit yet there was no decree in the suit capable of being stayed.
 - ii. The learned Magistrate erred in fact and in law in granting the 1st Respondent a stay of execution of attachment and repossession of motor vehicle registration number KCZ 622Y pending the determination of the suit yet the 1st Respondent is not the registered owner of the motor vehicle.
 - iii. The learned Magistrate erred in law and fact and misdirected herself by failing to consider that the Appellant's and the 2nd Respondent's joint interest in the motor vehicle arose prior to the 1st Respondent's purported ownership.
 - iv. The learned Magistrate erred in law and fact by failing to recognize the 1st Respondent's wilful negligence in the purported purchase of the motor vehicle registration number KCZ 622Y.
 - v. The learned Magistrate erred fact and in law by wholly misdirecting the application and facts and irregularly granting the Respondent a stay of execution pending the determination of the main suit.

Hearing of the Appeal

12. Pursuant to the directions given, the parties filed Submissions. The Appellant filed its submissions on 13/1/2023 while the 1st Respondent filed his on 16/1/2023. The law firm of Messrs Kibet-Lemeto & Co. Advocates also filed a Notice on behalf of the 2nd Respondent indicating that the 2nd Respondent adopts the Submissions of the 1st Respondent.

Appellant's Submissions

13. Counsel for the Appellant submitted that the 1st Respondent's Application was brought pursuant to Order 22 Rules 6 & 22 of the *Civil Procedure Rules*, both of which presuppose the existence of a decree sought to be executed by attachment and Order 12 Rules 7 which presupposes the existence of a Judgment, by virtue of the fact that there is no Judgment or decree in place and that the Appellant sought to proclaim the motor vehicle by virtue of its legal, contractual and statutory power of sale, seeking for an order of stay of execution and setting aside of Judgment is contra-statute, and therefore, the trial Court erred in granting an order for stay. He cited the case of Cyril J. *Haroo & Another v Uchumi Services Limited & 3 Others* [2014] eKLR. He submitted further that an injunctive order would have been more appropriate, however the same is only donated by Order 40 of the *Civil Procedure Rules 2020*.
14. Counsel submitted that the trial Magistrate agreed that there was indeed conflict of ownership of the motor vehicle between the Appellant and the 1st Respondent, the Appellant having granted a loan to the 2nd Respondent and subsequently registering its interests in the motor vehicle, it is deemed the legal owner, the 1st Respondent having purchased the motor vehicle from the 2nd Respondent in full knowledge of the Appellant's registered interests, he cannot be deemed to be a bona fide purchaser for value without notice
15. He further submitted that there was no privity of contract between the Appellant and the 1st Respondent with regard to both the loan agreement that was entered into by the Appellant and the



- 2nd Respondent as well as with regard to the Sale agreement entered into between the 1st and the 2nd Respondents, the 1st Respondent cannot seek to frustrate the enforcement of the terms of the loan agreement to which he was not a party, the Appellant cannot be burdened by obligations arising from the Sale agreement to which it was also not a party, the essence of the rule is that only the parties that actually negotiated a contract, who are privy to it, are entitled to enforce its terms. He cited the case of *Agricultural Finance Corporation V Lengetia Ltd* [1985] eKLR and added that the 1st Respondent is a stranger to the loan agreement and he cannot assert rights or inhibit rights as a stranger to a contract whose terms he was not privy, in the same vein the Appellant is a stranger to the Sale agreement and as such it cannot bear obligations as a stranger to it.
16. Counsel added that the 1st Respondent knew at all times that the registered owner of the motor vehicle were the Appellant and the 2nd Respondent as demonstrated from the sale agreement, the collateral was registered on 2/10/2020 prior to the Sale agreement dated 5/03/2021 entered into between the 1st and 2nd Respondents, this demonstrates that the 1st Respondent was aware that no rights could pass to him in the absence of the Appellant's consent, under Section 8 of the *Traffic Act* the person whose name is registered on the log-book shall be deemed as the registered owner of the motor vehicle and that it only parties registered in a log-book that have proprietary rights over a motor vehicle. He cited the case of *Law Society of Kenya V. Commissioner of Lands & Others; Nakuru High Court Civil Case No. 464 of 2000* and several other cases to buttress his arguments on the issue and added that the 1st Respondent abdicated his responsibility to obtain the Appellant's consent and approval before purchasing the motor vehicle, he who comes to equity must do so with clean hands, the 1st Respondent is murkily tainted.
17. He submitted further that unlike the 1st Respondent who has no proof of ownership or beneficial interest over the motor vehicle, the Appellant produced enough evidence to show that it entered into a log-book loan agreement with the 2nd Respondent who used the motor vehicle as security, the Appellant showed that the same was registered in the joint names of itself and the 2nd Respondent, in compliance with the *Traffic Act* and the *Movable Property Securities Rights Act 2017* whose Section 15 he quoted as proving that "a security right in any movable asset is effective against third parties if a notice with respect to the security right is registered with the Registrar", the "*nemo dat quod non-habet*" principle envisages that no one can transfer a better title than he himself has, the principle is codified by Section 23 of the *Sale of Goods Act*, Cap. 31. He then cited the case of *Heribert Maier vs Eva-Marie Kersten* [2004] eKLR and added that being joint owners of the motor vehicle, no purported sale can be upheld if the same is conducted without consent of the joint owner, the 1st Respondent's interests are subject to the Appellant's interests as charge which rank in priority, default in the loan having been admitted the Appellant should be allowed to exercise its statutory power of sale. Counsel then cited the case of *Mabeshkumar Popatlal Shab V Highgrove Holdings Limited & Another* [2020] eKLR and added that its registered proprietary rights override the 1st Respondent's unregistered rights in the motor vehicle.

1st Respondent's Submissions

18. Counsel for the 1st Respondent submitted that the trial Magistrate did not err in law or fact in granting the stay of execution of attachment and repossession of the motor vehicle pending the hearing and determination of the main suit as the 1st Respondent proved that he has a *prima facie* case with a high probability of success. He also submitted that the 1st Respondent also proved that he likely to suffer irreparable harm if the orders sought are not granted and as such, the balance of convenience tilted in favour of the 1st Respondent.



19. Counsel further submitted that the 1st Respondent is the legal owner of the motor vehicle which is currently registered in the names of the Appellant and the 2nd Respondent fraudulently, the 1st Respondent took physical possession of the motor vehicle after receiving communication and evidence from the 2nd Respondent that the same was now successfully registered in his name, however, without knowledge, authority and or consent of the 1st Respondent, the 2nd Respondent illegally and unlawfully charged the motor vehicle using it as security for his personal use with the Appellant, the motor vehicle was registered jointly in the name of the Appellant and the 2nd Respondent on 24/9/2020, two weeks after the 1st Respondent had paid the deposit of the purchase price to the 2nd Respondent, the 1st Respondent only knew of this when a representative of the 3rd Respondent tracked the 1st Respondent and approached him around 26/1/2021 with the intention of attaching, proclaiming and/or repossessing the motor vehicle.
20. Counsel added that the 1st Respondent approached the 2nd Respondent who confirmed that he had without the consent of the 1st Respondent charged the motor vehicle to the Appellant, the 2nd Respondent requested the 1st Respondent to pay the balance of the purchase price directly to the Appellant as the 2nd Defendant finds other means to clear the loan with the Appellant so that the original logbook is discharged by the Appellant and transferred into the 1st Respondent's name which he did pay in full, the 2nd Respondent has in fact accepted and confirmed that indeed he sold the motor vehicle to the 1st Respondent, the Learned Magistrate did not err by granting the stay of execution of attachment or repossession, the 1st Respondent has a constitutional right to be heard pursuant to Article 50 and right to own property. He cited a Court decision that he described as Tahmeed Coach Limited case and added that the 1st Respondent has a legal interest over the motor vehicle being a bona fide purchaser for value, as such the trial Magistrate did not err. He cited the case of *M. Oriental Bank Limited v Samuel Nyingi Matimu & Another* [2021] eKLR.
21. He submitted that in its Replying Affidavit, the Appellant annexed a copy of a charge document showing that the 2nd Respondent illegally, fraudulently and unlawfully executed the same on 28/9/2020 after receiving the initial deposit from the 1st Respondent, thus the 1st Respondent's ownership arose prior to the Appellant's and 2nd Respondent's joint interest. Counsel submitted further that he is in agreement with the trial Magistrate that the main issues arising is the ownership of the motor vehicle and privity of contract, issues that need to go to full trial, where the ownership of the motor vehicle is in dispute it would only be fair, just and prudent that the matter proceeds to full trial. Counsel then cited the case of *Mukiri v Mutie & 2 Others* Civil Appeal No. E026 of 2022.

Analysis and Determination

22. I have considered the pleadings and evidence on record as well as the submissions of the parties. I have also given due consideration to the authorities cited and the applicable law. I find the issues that arise for determination to be as follows:
 - a. Whether the Application was fatally defective insofar as it sought orders for stay of execution or setting aside of attachment, proclamation and/or repossession, instead of orders of injunction
 - b. whether the trial Court was justified in granting interlocutory injunctive orders.
23. I now proceed to analyze and answer the said issues.



a. Whether the Application was fatally defective insofar as it sought orders for stay of execution or setting aside of attachment, proclamation and/or repossession instead of orders of injunction

24. On a point of law, Counsel for the Appellant submitted that the 1st Respondent’s Application was brought pursuant to Order 22 Rules 6 & 22 of the *Civil Procedure Rules*, both of which presuppose the existence of a decree sought to be executed by attachment and Order 12 Rules 7 which presupposes the existence of a Judgment. He submitted that what the Appellant sought to do was to proclaim the motor vehicle by virtue of its legal, contractual and statutory power of sale, and not on the basis of a Judgment or decree. He argued that since there is no Judgment or decree in issue, the prayers for an order of stay of execution and setting aside should not have been entertained by the trial Court.

25. It is true and quite puzzling that the subject Application, despite being evidently for an interlocutory injunction, was not brought under Order 40 of the *Civil Procedure Rules* which is the provision that supports grant of injunctions. Instead, the Application was strangely brought under Order 22 Rules 6 & 22 and Order 12 Rules 7 of the *Civil Procedure Rules*, which deal with stay of execution of a Court Judgment/Decree and setting aside of a Court Judgment. There is therefore no doubt that the Application was brought under the wrong provisions of law and therefore defective.

26. I note that although the Appellant raised this issue before the trial Court, the Court did not however determine or even refer to it in its decision. Be that as it may, the question is whether the said defect affected the root of the Application and whether it therefore rendered the Application fatally defective. My view is that it did not. My reason is that clearly all parties and the Court were alive to the fact that what the Application sought were injunctive orders and not stay or setting aside of a Court Judgment or Decree. The Appellant’s Replying Affidavit and Submissions demonstrate that the Appellant defended against the Application on the undisputed fact that what was before the Court was an application for an injunction. It cannot therefore be argued with justification, that the citing of the wrong provisions of the Civil Procedure Rules in any way prejudiced the Appellant.

27. On this issue, Article 159(2)(d) of the *Constitution* provides as follows:

“ (2) In exercising Judicial authority, the courts and tribunals shall be guided by the following principles:
.....
d) Justice shall be administered without undue regard to procedural technicalities and,
.....”

28. Further, under Section 3A *Civil Procedure Act*, the Court has inherent powers to give orders which are necessary to meet the ends of justice. The Section provides as follows:

“ Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

29. This is further buttressed by Section 1A & 1B of the *Civil Procedure Act* which provide that the overriding objective of the Act is to facilitate the just and expeditious resolution of disputes.

30. It is therefore clear that the said provisions of law require the Court to always strive to determine matters on merits rather than on procedural technicalities. In view thereof, I decline to rule against the



1st Respondent on this challenge. I will therefore consider substantive justice as opposed to procedural technicalities.

b. whether the trial Court was justified in granting interlocutory injunctive orders

31. First and foremost, I appreciate that this is an Appeal arising from orders made on an interlocutory Application for an interim injunction. I am also alive to the fact that the suit before the Magistrate's Court is still pending hearing and determination on merits. I am therefore required to refrain from making any conclusive views on the matters in dispute to avoid pre-judging the pending suit (See David Kamau Gakuru -v- Natural Industrial Credit Bank Ltd., [C.A. No. 84 of 2001] (UR)).
32. The issue is whether the trial Court erred in a granting the interlocutory injunctive orders sought under prayers (iii) and (iv) of the Notice Motion dated 2/07/2021 filed by the 1st Respondent herein.
33. Generally speaking, the grant of a temporary injunction is guided by the principles laid down in Giella vs. Cassman Brown & Co. Ltd [1973] EA 358, in which it was held that:
- “The conditions for the grant of an interlocutory injunction are well settled in East Africa. First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”
34. As to what amounts to a *prima facie* case, the Court of Appeal, in Mrao Ltd vs. First American Bank of Kenya Ltd & 2 others [2003] KLR 123 held as follows:
- “A *prima facie* case in a civil application includes but 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.”
35. The trial Magistrate in allowing prayers (iii) and (iv) of the 1st Respondent's Application observed that the issues raised therein can only be best adjudicated upon after conducting a full hearing of the suit and interrogation of the issues therein through cross-examination.
36. The Appellant submits that the motor vehicle was registered in the joint names of the 2nd Respondent and the Appellant on 2/10/2020 and that the Appellant was issued with a log-book on 5/10/2020 demonstrating the joint ownership. Further, the Appellant submits that the collateral was registered on 2/10/2020 prior to the alleged Sale Agreement dated 5/03/2021. On his part, the 1st Respondent argues that the Appellant annexed a copy of a charge document showing that the 2nd Respondent executed the charge on 28/9/2020 after receiving the initial deposit from the 1st Respondent, thus the 1st Respondent's ownership arose prior to the Appellant's and 2nd Respondent's joint interest. From the bank slips produced by the 1st Respondent, indeed it appears that although the Sale Agreement is dated 5/03/2021, the 1st Respondent paid the first deposit of Kshs 800,000/- to the 2nd Respondent almost a year earlier on 10/09/2020.
37. From the foregoing, it is clear that various issues emerge for determination in the pending suit: These include, inter alia, whether the 1st Respondent registered its interests over the subject vehicle prior to sale thereof by the 2nd Respondent to the 1st Respondent, whether the Appellant's rights as a holder of a registered security or collateral over the motor vehicle ranked higher in priority over the 1st



Respondent's rights as a purchaser, whether at the time that he sold the vehicle to the 1st Respondent, the 2nd Respondent possessed valid title over the motor vehicle which he could then pass to the 1st Respondent, whether the 1st Respondent was a bona fide purchaser for value without notice and whether therefore the Appellant could lawfully exercise a power of statutory sale of the motor vehicle by repossessing and disposing of the same.

38. In view of the existence of the foregoing live issues, which are yet to be determined, my view is that a *prima facie* case was demonstrated before the trial Court. The said issues, in my view, cannot be conclusively determined at an interim stage and would require the calling of substantive evidence before determination.
39. On whether the 1st Respondent will suffer irreparable injury which will not be compensated by damages, I am guided by the holding of Ringera J in *Martha Khayanga Simiyu vs. Housing Finance Co. of Kenya & 2 Others* Nairobi HCCC No. 937 of 2001 [2001] 2 EA 540 where he held as follows;

“..... the law is not that an interlocutory injunction can never issue where damages would be an adequate remedy and the Respondent is in a position to pay them.
40. It is not therefore automatic that an Applicant must be denied a grant of injunction simply because his loss is quantifiable and can be compensated by damages. Each case must be determined on its own facts and on its peculiar circumstances.
41. In the instant case, although one may therefore argue that the motor vehicle in dispute being a commodity, the losses that may arise as a result of its repossession can be easily quantified and compensated, I do not think it is as easy as that. For starters, it is not automatic that the 1st Respondent purchased the vehicle only for purposes of trade or business in which losses can be quantified. It may well be that the 1st Respondent may be using it also for domestic, family, social and/or work-related chores. Activities of such nature may not be easily quantified in a monetary manner but the inconveniences and disruption that may be caused to the 1st Respondent in connection thereto, should the motor vehicle be taken away from him, shall no doubt be immense and incapable of monetary compensation.
42. I therefore find that allowing the Appellant to repossess the vehicle from the 1st Respondent before the suit is determined would occasion the 1st Respondent irreparable harm and injury.
43. Regarding the balance of convenience, it is not in dispute that the motor vehicle is presently registered in the joint names of the Appellant and the 2nd Respondent. However, it is also not in dispute that the 1st Respondent took physical possession of the motor vehicle sometime in September 2020. This was as soon as he paid the first deposit of Kshs 800,000/- to the 2nd Respondent as part-payment of the purchase price. It is also not in dispute that since then, the vehicle has been in the possession of the 1st Respondent. On the basis of these facts, I do not find any compelling basis to disrupt the current prevailing state of affairs. I am of the view that it would be more logical to allow the status quo to remain as it is pending the hearing and determination of the suit. In the circumstances, it is my considered view that the balance of convenience lay in granting the injunction.
44. In conclusion, I find that the trial Magistrate was careful not to make substantive pronouncements on the substantive issues but rather sought to preserve the subject matter of the suit pending the full hearing and determination of the dispute. As aforesaid, the trial Magistrate, made inter alia, the following orders:

i.



- ii.
 - iii. That the Defendant fits the suit motor vehicle with a tracker at a shared cost of both parties within 14 days of this Ruling pending the hearing and determination of the main suit.
 - iv. That the vehicle is availed to Court anytime when required.
 - v. That in the event that the Applicant is not able to avail the vehicle in a timely manner as and when needed, the defense shall have the liberty to detain the vehicle until the matter/suit is conclusively heard and determined.
 - vi. That the parties to set down the suit expeditiously for hearing on priority basis.”
45. In my view, the above quoted directions and/or orders sufficiently ensure that the subject matter of the suit is well preserved and protected and that each party’s interests are catered for pending the hearing and determination of the suit.
46. With the foregoing in mind and considering that the matter before the trial Court was still at the interlocutory stage, I am unable to find any improper exercise of discretion by the trial Magistrate. From the Ruling it is evident that the Learned trial Magistrate applied her mind to the *prima facie* evidence on record before making the decision. I therefore find that the grant of the orders was justified in the circumstances.

Final Orders

47. The upshot of my findings above is therefore as follows:
- i. The Appeal is found to be unmeritorious and it is hereby dismissed with costs
 - ii. Since costs follow the event, the 1st Respondent is awarded costs of this Appeal.
 - iii. The lower Court file is to be returned to the trial Court forthwith for hearing and disposal of the main suit.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 29TH DAY OF JUNE, 2023.

.....

WANANDA J.R. ANURO

JUDGE

