



**Essoa v Foursight Capital Limited & another (Civil Appeal
E179 of 2022) [2022] KEHC 12611 (KLR) (Civ) (25 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 12611 (KLR)

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

CIVIL

CIVIL APPEAL E179 OF 2022

JK SERGON, J

JULY 25, 2022

BETWEEN

NKOY KELVIS ESSOA APPELLANT

AND

FOURSIGHT CAPITAL LIMITED 1ST RESPONDENT

DANIEL SHAMOLA SHITAGWA 2ND RESPONDENT

RULING

1. The plaintiff/applicant herein has brought the notice of motion dated March 24, 2022 supported by the grounds set out on the body thereof and the facts stated in the affidavit of Nkoy Kelvis Essoa. The applicant sought for the following orders:
 - i. spent.
 - ii. This honourable court be pleased to stay the execution of the ruling and order of the magistrate's court ruling and consequential orders of March 21, 2022 in civil case number E557 of 2022.
 - iii. spent.
 - iv. spent.
 - v. A temporary order of injunction do issue against the respondents from transferring to themselves, charging, encumbering or otherwise dealing in motor vehicle KDB 111C pending the hearing and determination of this application and suit herein.
 - vi. The honourable court be pleased to direct the respondents to return motor vehicle registration number KDB 111C to the applicant for safekeeping at the applicant's residence in Lavington



always provided that the applicant shall not part with possession or encumber the vehicle in any way pending the hearing and determination of this suit.

- vii. In alternative, the honourable court be pleased the respondents that motor vehicle registration number KDB 111C be deposited in court for safekeeping pending the hearing and determination of this suit.
- viii. DCIO/OCS/OCPD Dagoreti police station to assist in enforcing the orders herein.
2. The respondent opposed the motion by filing the replying affidavit he swore on May 11, 2022.
3. The Motion was canvassed by way of written submissions.
4. I have considered the grounds set out on the face of the motion and the facts deponed in the affidavits supporting and challenging it, and the contending written submissions and authorities cited.
5. In its supporting affidavit, the appellant stated that it is the beneficial owner of motor vehicle registration KDB 111C having purchased, paid for the same in full from the respondent for the sum of Kshs 11,000,000/= that was partly paid in cash in the sum of Kshs 8,000,000/= and partly in exchange of the respondents motor vehicle KCH 800N instead of Kshs 5,000,000/= which was inclusive of a Kshs 3,000,000/= which he cleared for motor vehicle registration No KCH 800N.
6. The appellant stated that on February 22, 2022 the lower court issued orders giving the respondent possession of the motor vehicle KDB 111C and the order was served on him when the respondent confiscated the car in the company of police officers.
7. The appellant avers that on March 7, 2022, they filed an application dated March 7, 2022 seeking a review of the orders of the court giving the respondent possession of the said vehicle but the court declined to set aside.
8. The appellant further avers that devoid of this court's protection, the he stands to lose both the vehicle and his money paid to the respondent which damages cannot sufficiently compensate harm.
9. In reply, the respondent avers that the appellant's allegation that it transferred the said motor vehicle is superfluous since a simple search of the NTSA data base shows that the vehicle is registered in the name of the appellant and another person named Evelyne Osebe Kimori.
10. The respondent further stated since the said motor vehicle is in police custody pending conclusion on tax evasion and that he be allowed to keep the suit motor vehicle at a known place and undertake to ensure that the vehicle is in good condition at all times.
11. It is clear that the applicant is seeking two (2) key orders: first, the grant of an interlocutory injunction and secondly an order of stay of execution. I will first deal with the temporary injunctive order sought.
12. The germane principles on interlocutory injunctions were stated by the Court of Appeal in East Africa in the case of *Giella v Cassman Brown & Co Ltd* (1973) EA as follows:
 - i. The applicant must first establish a prima facie case with a probability of success.
 - ii. The applicant must then demonstrate that he, she or it stands to suffer irreparable loss that cannot be adequately compensated through damages.
 - iii. Where there is doubt on the above, then the balance of convenience should tilt in favour of the applicant.



13. The first condition that the plaintiffs herein must satisfy is that there is a *prima facie* case with a probability of success. In the case of *Mrao v First American Bank of Kenya Limited & 2 others* (2003) KLR 125, “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 equitable case.” It is a case which, on the matter 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 explanation or rebuttal from the latter.”
14. Under the first principle, it is the position of the applicant that it is uncontroverted that the appellant discharged all his obligations to the respondent and obtained a good title and that the respondent has acknowledged receipt of the cash paid to them.
15. The applicant states that the respondent transferred the said motor vehicle KCH 800N to a third party and that the vehicle is even further charged creating a furthered interest in it.
16. In response, the respondent in its submissions stated that the appellant has not laid down the legal foundation in order to be granted the said injunctive reliefs.
17. Prima facie and after considering the rival submissions, I am satisfied that the appellant has established a *prima facie* case with a probability of success.
18. In respect to the second principle on irreparable damage/loss, the appellant states that he stands to lose both the vehicle and his money paid to the respondent which damages cannot sufficiently compensate harm.
19. On its part, the respondent is of the view that if this honourable court allows the appellant have possession of the suit motor vehicle, the respondent will suffer irreparable harm since it is likely that it may lose not only the possession of motor vehicle but also its ownership by virtue of it having entered the country illegally.
20. Having come to the view that the appellant has satisfied the first two (2) principles warranting an interlocutory injunction, it would be fair to state that the appellant stands to suffer a greater inconvenience if the injunction is not granted in comparison to the inconvenience that would befall the respondent. It therefore follows that the balance of convenience tilts in favour of the appellant.
21. On the second issue for determination as regards the order for stay of the judgment of the lower court, order 42 rule 6 of the *Civil Procedure Rules* provides for stay of execution pending appeal as follows:
 - (2) No order for stay of execution shall be made under subrule (1) unless—
 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
22. The appellant has not demonstrated his satisfaction of these three elements. In any event the court is of the view that since the essence of an application for stay pending appeal is aimed at preserving the subject matter of litigation to avoid a situation where a successful appellant only gets a paper judgment, and having found that the appellant is entitled to an injunction pending appeal his interests have already been catered for.



23. For those reasons, it is the finding of this court that the application dated March 24, 2022 is meritorious. The application is allowed thus giving rise to issuance of the following orders:
- i. A temporary order of injunction be and is hereby issued against the respondent from transferring to themselves, charging, encumbering or otherwise dealing in motor vehicle registration No KDB 111C pending the hearing and determination of this suit.
 - ii. An order is hereby issued directing b the respondent to return motor vehicle registration number KDB 111C to the appellant/applicant for safe keeping at the appellant/applicant's residence in Lavington pending appeal provided that the appellant/applicant shall not part with possession or encumber the motor vehicle in any way.
 - iii. The deputy registrar to have the motor vehicle released to the appellant/applicant from the court's premises where it has been lying for safe keeping.
 - iv. Costs of the application to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 25TH DAY OF JULY, 2022.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the 1st Respondent

..... for the 2nd Respondent

