



**Oney Credit Limited v Macharia & another (Civil Appeal E644 of 2022)  
[2022] KEHC 16887 (KLR) (Civ) (22 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16887 (KLR)

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

**CIVIL**

**CIVIL APPEAL E644 OF 2022**

**JK SERGON, J**

**DECEMBER 22, 2022**

**BETWEEN**

**ONEPAY CREDIT LIMITED ..... APPELLANT**

**AND**

**EDWARD MWANGI MACHARIA ..... 1<sup>ST</sup> RESPONDENT**

**STANLEY MACHARIA MWANGI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

- 1) The subject matter of this ruling is the motion dated November 16, 2022 taken out by the respondents whereof they sought for inter alia:
  - i. This application be certified urgent and dispensed with ex-parte in the first instance.
  - ii. Pending the hearing of this application the appellant/ respondent be and is hereby ordered to immediately and unconditionally release motor vehicle known as KCS 795N to the 2<sup>nd</sup> appellant.
  - iii. Pending the hearing of the appeal, the appellant/ respondent be and is hereby restrained from attaching, repossessing, advertising, offering for sale, selling, transferring, alienating or in any other manner interfering with the 2<sup>nd</sup> applicant's possession, ownership and use of motor vehicle KCS 795N.
  - iv. The court be pleased to order the appellant /respondent to immediately pay all storage charges accrued from the August 15, 2022.
  - v. The OCPD Kiambu to ensure compliance with this court's orders.



vi. The costs of this application be in the cause.

- 2) The respondents/applicants filed the supporting and supplementary affidavits both sworn by Stanley Macharia Mwangi to buttress the motion. The appellant/respondent filed the replying affidavit sworn by its general manager, Nazir Madatali to oppose the application.
- 3) I have considered the grounds stated on the face of the aforesaid motion plus the facts deponed in the rival affidavits. I have also considered the rival oral submissions of learned counsels appearing in this matter. The main order the respondents/applicants beseeched this court to grant is an order of mandatory injunction to direct the release of motor vehicle registration no. KCS 795N to them.
- 4) They argued and pointed out that this court did not determine the question regarding possession of the aforesaid motor vehicle during the pendency of this appeal in the ruling delivered on November 11, 2022. They further stated that the aforesaid motor vehicle is lying idle and continues to attract storage charges daily and without undergoing any maintenance.
- 5) In response, the appellant/applicant urged this court to dismiss application stating that the application is seeking for near similar orders as in the application dated October 17, 2022 hence it is res-subjudice. The appellant's learned advocate further pointed out that the orders being orally sought appear to be in the nature of a mandatory injunction and yet there is no prayer for such an order in the application. The appellant further averred that the order sought in prayer 2 was meant to last pending interpartes hearing of the instant motion.
- 6) In response the respondents/applicants admitted that there is pending a similar application. They urged this court to treat the pending application as withdrawn since the same has not been listed for hearing.
- 7) Having considered the material placed before this court plus the oral submissions made by learned counsels, I find that in the motion dated November 16, 2022, there is no prayer for a mandatory order of injunction pending appeal to compel the release of motor vehicle registration no. KCS 795N to the respondents/applicant.
- 8) The applicants have specifically sought for a prohibitory order of injunction in prayer 3. With respect I agree with the submissions of the appellant/respondent that in the absence of such a prayer this court cannot gratuitously issue a mandatory injunction which is not formally applied for.
- 9) The other issue which was raised by appellant/respondent which is admitted by the respondents/applicants is that the instant application is res-subjudice, in that there is a pending application dated October 17, 2022 which is similar to the current motion. The respondents/applicants have beseeched this court to treat the previous application as withdrawn. I do not think this court should accept such an invitation. The applicants should have simply have formally withdrawn the previous application.
- 10) In the end and on the basis of the above reasons, I find the motion dated November 16, 2022 to be res-subjudice and to be without merit. The same is hereby ordered struck out and dismissed with each party bearing its own costs.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS  
22<sup>ND</sup> DAY OF DECEMBER, 2022.**

.....

**J. K. SERGON**

**JUDGE**



**In the presence of:**

..... for the Appellant/Applicant

.....for the 1<sup>st</sup> Respondent

.....for the 2<sup>nd</sup> Respondent

