



**NCBA Bank Kenya PLC v Bowden & 2 others (Commercial Appeal E103 of 2024)
[2025] KEHC 365 (KLR) (Commercial and Tax) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 365 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E103 OF 2024**

PM MULWA, J

JANUARY 23, 2025

BETWEEN

NCBA BANK KENYA PLC APPELLANT

AND

MATILDA BOWDEN 1ST RESPONDENT

THE AGENGO GROUP LIMITED 2ND RESPONDENT

NTSA 3RD RESPONDENT

*(Being an appeal against the Ruling and Order of the Chief Magistrate's
Court at Milimani, delivered on 9th April 2024 in MCOMMSU
No. E038 of 2024 by Hon. Rawlings Liluma Musiega, SRM)*

JUDGMENT

1. This interlocutory appeal arises from the ruling and order of 19th April 2024 where the court allowed the release of Motor Vehicle KBX 356Y to the 1st Respondent and restrained the Appellant, together with the 2nd and 3rd Respondents, from interfering with the 1st Respondent's possession of the said motor vehicle.
2. Dissatisfied with the court's ruling, the Appellant lodged this appeal based on the following grounds:
 - i. That the learned magistrate erred in law in returning a finding that the sale agreement dated 14th November 2020 entered as between the 1st and 2nd Respondent was legally enforceable and binding.
 - ii. That the learned magistrate erred in law in failing to uphold the sanctity of the contract between the appellant and the 2nd respondent and further in failing to appreciate the fact that



there was no privity of contract between the appellant and the 1st respondent which would entitle the 1st respondent to obtain and enforce against the appellant such orders as granted vide the ruling delivered on 19th April, 2019.

- iii. That the learned magistrate erred in law by conferring upon the 1st respondent third party rights over a charge property which the 1st respondent was not privity to.
 - iv. That the learned magistrate erred in law by allowing the 1st respondent to enjoy the benefits of an illegal and enforceable contract between herself and the 2nd respondent.
 - v. That the learned magistrate erred in law by issuing a mandatory injunction against the appellant whereas the same was not specifically prayed for by the 1st respondent and wherein the application had not met the legally required threshold for grant of such an order.
3. Facts leading to the impugned ruling are that the 1st Respondent filed the Notice of Motion, amended on 13th February 2024, seeking an injunction to restrain the Appellant by itself or through its agents, servants, officers and or employees from advertising, disposing, auctioning, selling motor vehicle KBX 356Y in exercising its statutory power of sale. She also prayed to be allowed to deposit in court or to the Appellant the proved balance of the purchase price of the motor vehicle. The trial court granted a conditional injunction, ordering the release of the motor vehicle to the 1st Respondent provided she deposits the outstanding balance of Kshs. 669,000/-.
 4. The appeal was heard through written submissions, which I have duly considered alongside the cited authorities. The Appellant raised two primary issues for determination in this appeal.
 5. First, the Appellant contends that there was no legally binding contract between itself and the 1st Respondent. It submits that on 20th July 2020, the Appellant provided a hire purchase facility of Kshs. 1,800,000/- to the 2nd Respondent for the purchase of Motor Vehicle KBY 356Y. Upon discovering fraudulent activities by the 2nd Respondent, the Appellant exercised its rights under the hire purchase agreement, calling in the facility and repossessing the vehicle, with the intention of auctioning it to recover the outstanding amount. The Appellant maintains that it was unaware of the 1st Respondent's involvement and asserts that the 2nd Respondent had no legal right to sell the vehicle without its consent.
 6. Second, the Appellant submits that the sale agreement between the 1st and 2nd Respondents was void ab initio. The 2nd Respondent, as a hirer under the hire purchase agreement, lacked ownership rights to transfer the vehicle. The vehicle's logbook, which indicates joint ownership between the Appellant and the 2nd Respondent, remained in the custody of the Appellant.
 7. The Appellant argues that the trial court erred in upholding what it describes as an illegal transaction, thereby compromising the Appellant's security interest in the vehicle. It faults the 1st Respondent for failing to exercise due diligence before purchasing the vehicle and asserts that the 1st Respondent cannot be deemed a bona fide purchaser.
 8. Furthermore, the Appellant submits that the trial court erred in holding that the 1st Respondent's deposit was sufficient to secure the Appellant's interests. The Appellant contends that the deposit neither cures the illegality of the transaction nor overrides the terms of the Facility Letter and Hire Purchase Agreement between the Appellant and the 2nd Respondent. The Appellant argues that it retained the right to repossess and sell the vehicle under the contractual terms to recover outstanding amounts, including amounts arising from other facilities. In support of its position, the Appellant relies on the case of Barclays Bank of Kenya Ltd v Kepha Nyabera & 191 Others (2013) eKLR which affirms a financier's right to consolidate and set off accounts.



9. On the other hand, the 1st Respondent submits that it entered into a sale agreement with the 2nd Respondent for the purchase of a motor vehicle valued at Kshs. 3.1 million. The agreement was executed on 14th November 2020, and full payment was made via bank transfer on 16th November 2020. Following the payment, possession of the vehicle was handed over to the 1st Respondent.
10. Citing Article 40 of *the Constitution*, the 1st Respondent asserts lawful acquisition of the motor vehicle. The court is urged to protect the 1st Respondent's rights under the principle that no person should be arbitrarily deprived of their property. Reliance was placed in the case of *Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others* [2019] eKLR where the court of appeal states that:

“The courts have indeed been consistent that a bona fide purchaser will not be bound by any interests of which he or she does not have actual, constructive or imputed notice, as long as he or she did reasonable due diligence before purchasing. Bona fide purchaser, the courts have maintained, is assured of protection, notwithstanding that previous dealings might be shown to have been mired in fraud.”
11. The 1st Respondent contends that they were a bona fide purchaser for value without notice of any competing claims or defects in the 2nd Respondent's title.
12. The evidence of ownership and registration confirms the 2nd Respondent's valid title to the vehicle. The 1st Respondent acted in good faith and had no knowledge of any alleged debts or disputes involving the 2nd Respondent.
13. As a measure of good faith, the 1st Respondent deposited Kshs. 669,821.55 in court as security, equivalent to the outstanding debt claimed by the Appellant. The court has stipulated that should the Appellant prove their case, the amount owed will be deducted from the deposited security.

Analysis and determination

14. In considering this appeal, I will be guided by the seminal case of *Selle v Associated Motor Boat Co.* (1968) E.A. 123 alongside numerous decisions thereafter where the Court of Appeal set the mandate of a first appellate court. The primary responsibility of such a court is to reconsider the evidence, reevaluate the facts, and draw its own conclusions while bearing in mind that it did not have the advantage of hearing and observing the witnesses firsthand.
15. It is trite law that an appellate court can only interfere with findings of fact made by the lower court if such findings were based on no evidence or a misrepresentation of the evidence or if the trial court in reaching its decision applied the wrong legal principles (See *Sumaria & Another v Allied Industrial Limited* [2007] 2 KLR 1; *Jabane v Olenja* [1986] KLR 661; *Simon Muchemi & Another v Gordon Osore* [2013] eKLR).
16. Bearing these principles in mind, and after evaluating the grounds of appeal, the evidence on record and arguments presented by the parties, the cited authorities, and the applicable law, I do find the primary issue for consideration is whether the trial magistrate erred in allowing the 1st Respondent's application.
17. In his ruling, the trial magistrate identified the core issue as the propriety of granting a mandatory injunction. He carefully considered the principles governing the grant of such injunctions, particularly



at an interlocutory stage. Notably, he cited the Court of Appeal decision in *Lucy Wangui Gachara v Minudi Okemba Lore* [2015] eKLR, where it was held:

“Although the court has jurisdiction to grant a mandatory injunction at the interlocutory stage, such an injunction should not be granted absent special circumstances or in the clearest of cases...The grant of a mandatory injunction amounts to determination of issues in dispute in a summary manner. Among the special circumstances that justify the grant of a mandatory injunction are cases involving simple acts easily reversible, situations where the defendant has accelerated developments to defeat the plaintiff’s claim, or instances where the defendant is intent on gaining an unfair advantage.”

18. The trial magistrate found that the 1st Respondent had entered into a sale agreement for the suit vehicle with the 2nd Respondent, not the Appellant. The repossession of the motor vehicle by the Appellant was based solely on an alleged debt of Kshs 227,000/-.
19. The court noted that the 1st Respondent had deposited Kshs. 669,821.55 as security on 22nd February 2024, which exceeded the claimed debt. It was further observed that if the Appellant eventually proved its case against the 2nd Respondent, the debt could be deducted from the deposited amount. Based on these considerations, the trial magistrate identified the existence of special circumstances and granted a mandatory injunction.
20. The application filed by the 1st Respondent in the trial court sought a prohibitory injunction to restrain the sale of Motor Vehicle KBY 356Y. Evidence on record established that the 1st Respondent had purchased the vehicle from the 2nd Respondent in 2020 and retained possession until 2023 when the Appellant repossessed it, citing the outstanding purchase price.
21. The principles for granting an injunction are well articulated in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* ([CA No. 77 of 2012](#)), where an applicant must demonstrate:
 - a. A prima facie case,
 - b. Irreparable injury if the injunction is not granted, and
 - c. That the balance of convenience favors the applicant.
22. The trial magistrate also carefully addressed the issue of damages, balancing the potential harm to all parties. He reasoned that granting the mandatory injunction would not preclude the Appellant from pursuing its claim against the 2nd Respondent or seeking appropriate redress for the alleged debt.
23. Further, the deposit of Kshs 669,821.55 by the 1st Respondent as security adequately protected the Appellant’s financial interest. The magistrate noted that this deposit not only exceeded the disputed debt amount of Kshs 227,000/- but also provided sufficient assurance that the Appellant would not suffer irreparable loss should its claim ultimately succeed.
24. The trial court’s approach ensured that the Appellant’s interests were safeguarded while also preventing the 1st Respondent from being unfairly deprived of her possession and use of the motor vehicle, which she had lawfully purchased and retained for three years before the repossession. In *Bharat Petroleum Corp Ltd v Haro Chand Sachdeva*, Air 2003, Gupta, J. of the Delhi High Court observed as follows:

“While Courts power to grant temporary mandatory injunction on interlocutory application cannot be disputed, but such temporary mandatory injunctions have to be issued only in rare cases where there are compelling circumstances and where the injury complained of is



immediate and pressing and is likely to cause extreme hardship. If a mandatory injunction has to be granted at all on interlocutory application, it is granted only to restore status quo and not to establish a new state of things.”

25. Based on the analysis above, the trial magistrate's decision to grant a mandatory injunction was both sound and well-reasoned. His ruling was firmly grounded in legal principles, carefully weighed evidence and an evaluation of the balance of interests between the parties.
26. The magistrate adhered to the guiding principles for granting interlocutory injunctions, particularly mandatory injunctions, as established in precedent. His recognition of special circumstances in this case such as the 1st Respondent's significant deposit and the disproportionate harm caused by the Appellant's repossession justified the exceptional remedy at the interlocutory stage.
27. The ruling struck a fair balance by protecting the 1st Respondent's immediate interests while preserving the Appellant's ability to recover the alleged debt through the security deposited in court or other legal avenues. Therefore, the decision was consistent with established legal principles and equitable considerations.
28. In light of the foregoing analysis, I find no merit in the appeal. The trial magistrate exercised his discretion judiciously. The Appellant has failed to demonstrate any error in law or fact that would justify interference with the trial court's decision. Consequently, the appeal is dismissed with costs awarded to the 1st Respondent.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF JANUARY 2025.

P.M. MULWA

JUDGE

In the presence of:

Mr. Ngugi for Appellant

Mr. Mugane for 1st Respondent

Court Assistant: Carlos

