



REPUBLIC OF KENYA



**Tri State Capital Limited v Kimani & another (Civil Appeal E283 of 2023)
[2025] KEHC 116 (KLR) (Civ) (13 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 116 (KLR)

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

**CIVIL
CIVIL APPEAL E283 OF 2023**

**RC RUTTO, J
JANUARY 13, 2025**

BETWEEN

TRI STATE CAPITAL LIMITED APPELLANT

AND

FELIX DAVID NJENGA KIMANI 1ST RESPONDENT

CAROLINE NKATHA MICHIRA 2ND RESPONDENT

(An appeal from the ruling and order of the Chief Magistrate's Court at Nairobi (E. M. Kagoni, PM.) delivered on 1st December 2021 in CMCOMM No. E1132 of 2021)

JUDGMENT

1. In Nairobi CMCOMM No. E1132 of 2021, the appellant filed a Notice of Motion dated 17th August 2021 invoking section 1A, 1B and 3A of the [Civil Procedure Act](#), order 51, rule 1 of the [Civil Procedure Rules](#), section 4 (1) (A), 6 (1) and (4), 65, 66 (A), 67, 68 & 72 of the [Moveable Property Security Rights Act](#) and rule 14 of the Auctioneer rules. The appellant sought the following reliefs:
 1. Spent;
 2. That the defendant/respondent & interested party be directed by the court to produce and/or furnish motor vehicle registration number KBZ 992U Mercedes Benz to Kiriiyu Merchant Auctioneers for attachment within seven (7) days from the date of the order hereof;
 3. That in the event that the defendant/respondent and interested party fail to comply with the order under prayer 2 herein above, the court be pleased to issue warrants of arrest against them to be executed by the O.C.P.D Kilimani Division;
 4. That costs of this application be borne by the defendant/respondent.



2. The application was supported by the grounds on the body of the motion and the supporting affidavit of Silas Gachanga, the appellant's director. In its ruling dated 1st December 2021, the trial court held as follows:

“I have considered the application before the court, the various affidavits on record as well as parties' submissions and in my view, the issue for determination is whether the defendant/respondent be directed to produce and or furnish motor vehicle registration number KBZ 99U (sic) Mercedes Benz to Kiriyyu Merchant Auctioneers for attachment within seven days (7) from the date of the order hereof.

For the defendant/respondent & the interested party to be directed to produce and or furnish motor vehicle registration number KBZ 99U (sic) Mercedes Benz to Kiriyyu Merchant Auctioneers for attachment, then the Applicant ought to prove ownership of the said vehicle or some bonafides with regard to it.

However, this the applicant has failed to do. The Security Agreement dated 24.01.2020, and upon which the motor vehicle KBZ 99U (sic) Mercedes Benz was pledged on is undated, unsigned by the respondent, does not indicate the money which was unsigned (sic). For these reasons, the same cannot be the foundation upon which any bonafides can be hoisted. In light of this, the application must fail and is accordingly dismissed.”

3. The appellant is dissatisfied with those findings. In his memorandum of appeal dated 11th April 2023, the appellant raised three grounds disputing the findings of the learned magistrate. The appellant alleged that the learned magistrate misapprehended the law and the evidence on record resultantly failing to establish that the 1st respondent claimed ownership of the suit vehicle; the 1st respondent on his own volition, executed the security agreement dated 24th January 2020 and pledged the suit vehicle as collateral for breach of the loan repayment; the 1st respondent was in default of the agreement, thus, the appellant was entitled to realize the security.
4. The appellant furthermore faulted the learned magistrate for delivering the ruling on 1st December 2021 when by notice he had informed parties that the ruling would be delivered on 7th December 2021; the ruling was delivered in the absence of parties; no ruling notice was served upon the parties; and that the trial court made reference to the date of the security agreement but declared that the main basis for dismissal of the application was that the agreement was undated and unsigned.
5. For the above reasons, the appellant urged this court to allow the appeal, set aside the ruling of 1st December 2021, and grant costs of this appeal and interest on costs until payment in full.
6. The appeal was canvassed through written submissions. The appellant relied on its written submissions dated 4th June 2024. It summarized the facts giving rise to the suit and argued that by dint of section 80 of the *Civil Procedure Act* and order 45 (1) and (2) of the *Civil Procedure Rules*, this court has jurisdiction to discharge, vary and/or set aside orders issued by the subordinate court. It wholly adopted the contents and grounds of its memorandum of appeal adding that the illegibility of documents adduced in evidence ought not to drive a litigant away from the seat of justice.
7. The appellant submitted that the orders sought ought to be granted for the 1st respondent breached the loan agreement dated 24th January 2020. It cited several decisions in this regard and fortified its submissions by relying on section 67 of the *Moveable Property Security Rights Act*.
8. The 1st respondent relied on his written submissions dated 4th June 2024. It submitted that the appellant wrongly invoked the provisions of section 80 of the *Civil Procedure Act* and order 45 of the



- Civil Procedure Rules as the court lacked jurisdiction to review the decision of a lower court. He urged that the loan facility was secured by collateral of motor vehicle registration number KBZ 773C and not KBZ 992U. That the suit vehicle was registered in the name of the 2nd respondent who was never a party to any of the agreements. He stated that the appellant never pleaded for injunctive relief over the suit vehicle. He argued that since the agreement relied on was neither executed nor registered any chattel, the same was unenforceable. In its view, the prayers sought were intended to recover a debt summarily without proof of debt.
9. He submitted that, based on the prayers sought in the appellant's plaint, the matter ought to go for full trial before such orders were granted. He lauded the findings of the learned magistrate and urged that the suit be dismissed with costs.
 10. The 2nd respondent filed her written submissions dated 6th June 2024. She argued that no valid security agreement existed and if at all it did it was unenforceable as the suit vehicle was not owned by the 1st respondent. She submitted that she became the registered owner of the suit vehicle after its importation. Later on, she discovered that the suit vehicle had been registered in the name of the 1st respondent. She thus petitioned the NTSA to caveat the title and effectuate re-registration in June 2020. She further pointed out that the 1st respondent is her estranged husband and they have since divorced.
 11. Based on the above, she submitted that it was not true that the suit vehicle was transferred to her name to defeat the security agreement. In this regard, the 2nd respondent argued that the 1st respondent had no good or valid title to charge the suit vehicle in favor of the appellant by dint of section 6 (1) of the Moveable Property Security Rights Act. Several decisions were cited in support of that proposition. She contended that the trial court was right to find that the document marked SGM-5, the basis of the application, was unsigned, undated and made no reference to the suit vehicle or any funds advanced.
 12. On whether the trial magistrate was biased, it was the 2nd respondent's submission that no evidence had been adduced to demonstrate lack of impartiality by the trial magistrate. She further submitted that, the orders sought were incapable of enforcement as the contract entered into was between the appellant and the 1st respondent. For those reasons, she urged that the appellant was not entitled to the reliefs sought. She posited that in any case, the validity of the security agreement, the issue of indebtedness and the aspect of ownership of the suit vehicle was disputed.. She further stated that the appellant failed to prosecute the appeal within 6 months from 30th March 2023 as ordered by the trial court. Consequently, her right to dispose of the suit vehicle crystallized and the same had been sold to a third party.
 13. In rejoinder, the appellant argued that no evidence had been tendered to demonstrate that the suit vehicle had been disposed of to a third party. While acknowledging the orders of 30th March 2023, the appellant explained that it faced difficulties in obtaining a copy of the ruling as the trial magistrate had been transferred. That difficulty had been explained before this court and a party ought not to be penalized for a mistake not engineered by it. It pointed out that the debt was not disputed and the only issue was whether the agreement was dated. Finally, that a search on the NTSA portal, at the time of execution of the agreement, revealed that the vehicle was registered in the 1st respondent's name. It was on this basis that the agreement was registered and the appellant's interests recorded.
 14. Before going into the merits or demerits of the appeal, I must address one preliminary issue. In its opening address, the appellant argued that by virtue of section 80 of the Civil Procedure Act and order 45 of the Civil Procedure Rules, this court was vested with jurisdiction to vary, discharge or set aside the findings of the learned magistrate. This is a wrong application of that provision. While those provisions offer avenue for relief available to an aggrieved party, they only apply to the court that made the order.



Accordingly, as a superior court, I am not robed with jurisdiction to review a decision of a lower court. this Court's jurisdiction against an impugned decision of a subordinate court is the exercise of an appeal as properly invoked by the appellant. It is important to distinguish those two principles which are separate and distinct from each other.

15. Looking at the orders sought and the issues set out before me, the question for determination is whether the trial magistrate arrived at an erroneous decision in dismissing the application? Put differently, were the orders sought capable of being granted?
16. The appellant is seeking to appeal against an interlocutory order challenging the trial court's exercise of discretionary powers. The law on the exercise of discretionary power is settled. In the case of *Mbogo v Shah* [1968] EA page 93 in which De Lestang VP (as he then was) observed at page 94:

"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."
17. The gist of the dispute as set out in the application is that on 25th June 2019, the 1st respondent applied for a short-term loan in the sum of Kshs. 500,000.00 from the appellant. By a security agreement dated 25th June 2019, between the appellant and the 1st respondent, and a subsequent one between the appellant and Sera Obano as guarantor, the loan was advanced. As security, the 1st respondent pledged motor vehicle registration number KBZ 773C Mitsubishi Shogun Sport owned by Sera Obano.
18. The 1st respondent repaid the sums due and requested for a second loan from the appellant in the sum of Kshs. 309,000.00. This request was granted and an agreement dated 30th September 2019 drawn to this effect. The same motor vehicle remained as collateral.
19. It was the appellant's case that the 1st respondent failed to honor this subsequent facility. Consequently, vide a letter dated 20th December 2019, the appellant demanded for a settlement of the full sum totaling Kshs. 571,962.00. Instead, the 1st respondent renegotiated further seeking a sum of Kshs. 800,000.00 from the appellant. This gave rise to the agreement dated 24th January 2020 in which the suit vehicle, that is motor vehicle registration number KBZ 992U Mercedes Benz was offered as security.
20. On conducting a search at the motor vehicle registry on 5th February 2020, it was revealed to the appellant that the vehicle had been registered in the joint names of the 1st respondent and Baraka Credit Limited having been previously registered in the name of the 2nd respondent. It was on the strength of this revelation that the appellant sought to register its interests as creditor against the suit vehicle in line with the requirements set out in the Moveable Property Security Rights Act.
21. Unfortunately, the 1st respondent failed to honor his obligations. consequently, the appellant instructed auctioneers to attach and repossess motor vehicles registration numbers KBZ 773C and KBZ 992U. While the former vehicle was successful sold in an auction for a sum of Kshs. 830,000.00, the suit vehicle could not be sold. According to the appellant, this was because the 1st respondent fraudulently transferred the vehicle to the name of his wife, the 2nd respondent, in an attempt to default the appellant. It was for that reason that the appellant instituted the instant application the subject of this appeal.
22. In response, the 1st respondent swore an affidavit dated 26th September 2021. He deposed that the 2nd respondent ought not to have been involved in the proceedings. He acknowledged that he applied for a



- loan facility with the appellant secured by a chattel in the form of a motor vehicle registration number KBZ 773C Mitsubishi Shogun. He admits being unable to meet his loan obligations regarding the loan dated 30th September 2019 and denies entering into any other subsequent agreement. He states that, no interest was registered against the suit vehicle. He also admitted that as per the log book copy, similar to the one adduced by the appellant, the vehicle was registered in his name and Baraka Credit Limited jointly as prima facie evidence of ownership. The 1st respondent opined that the appellant had no legal right over the suit motor vehicle and ought to have recovered any alleged monies owed through a normal suit as opposed to seeking a surrender of the vehicle in the interim.
23. On her part, the 2nd respondent swore an affidavit dated 21st September 2021. It was her position that she was previously married to the 1st respondent having solemnized their union on 28th October 2011. She claimed ownership of the suit vehicle by relying on the importation document demonstrating that the vehicle was shipped from the United Kingdom in July 2014. Sometime in January 2020, she realized that her log book was missing. She thus instructed her lawyers to request for a replacement on 28th January 2020 to NTSA. It was here that she discovered that the logbook had been transferred to the names of the 1st respondent and Baraka Credit Limited on the strength of a loan facility taken out by the 1st respondent. This was communicated to her by NTSA in its letter dated 31st January 2020.
 24. By letter dated 4th February 2020, the 2nd respondent requested for investigations into the matter as she had never authorized the transfer of the vehicle. Having informed the 1st respondent that she intended to seek criminal justice against him, the 1st respondent transferred the vehicle back to her name. A log book was registered in her name on 1st April 2020. On 15th June 2020, a letter from NTSA confirmed that the vehicle had been transferred back to the name of the 2nd respondent.
 25. She further stated that she was not privy to any dealings entered between the appellant and the 1st respondent. As such, she did not authorize her vehicle to be used as collateral and the 1st respondent had no good title to transfer to the appellant.
 26. Finally, the 2nd respondent challenged the security agreement dated 24th January 2020 as it failed to provide details of the alleged borrower, it did not define the guarantor, was undated and unexecuted, did not provide the money advanced and failed to define the collateral issued by the unnamed borrower.
 27. In brief rejoinder, the appellant filed its further affidavit sworn on 14th October 2021 wherein it adopted its application, affidavit and annexures thereto further producing another security agreement dated 24th January 2020 showing the loan amount and the parties' signatures.
 28. It is not in dispute that the appellant and the 1st respondent entered into several loan facility transactions between themselves. However, the loan agreement allegedly issued vide an agreement dated 20th January 2020 is contested. In the first instant, the appellant produced and relied on a security agreement which prima facie did not disclose a date details of the alleged borrower, nor define the guarantor and was unexecuted, but the parties and the trial court made observations as to allude that the same was dated 24th January 2020.
 29. It was the appellant's case that vide a security agreement, the 1st respondent pledged motor vehicle registration number KBZ 992U Mercedes Benz as security in the event of default of paying the loan. Both the appellant and the 1st respondent claimed interest over the suit vehicle to the extent that it belonged to the 1st respondent and was used to secure the loan advanced by the appellant. This was vehemently opposed by the 2nd respondent who stated that the suit vehicle was always hers and the 1st respondent fraudulently transferred the vehicle to his favor. That he had no good title to pass and could therefore not offer the vehicle as collateral. Both respondents produced copies of logbooks to claim



- ownership of the vehicle; a cursory look of the copies shows that the 2nd respondent copy had a date of issue while that produced by the appellant and the 1st respondent was illegible as to the issuance date.
30. The scanty evidence at that interlocutory stage of the proceedings gave rise to a situation that would require the need for examination of the authors of the documents relied upon. Seeing for instance, the appellant adduced two security documents in its application and further affidavit and purported to suggest that they were one and the same when on face value, some of the information traced in one document was not legible or may have been absent ab initio.
31. Another glaring issue is on the ownership of the suit vehicle at the point of making the agreement and whether there were fraudulent transactions conducted by any of the parties. The documentation provided do not aid the court in making a logical conclusion at this interlocutory stage. Therefore, on the face of it, it is not clear who was the lawful owner of the vehicle so as to have the appellant benefit from the orders it sought.
32. In my view, issuing the orders at this interim stage would firstly mean that the 1st respondent is condemned as indebted to the appellant without listening to its defence. He may well have been indebted as per his letter dated 17th September 2020 but such a conclusive finding cannot be made at this stage of the proceedings given the fact that he has denied entering into the security agreement dated 24th January 2020. Secondly, it is not clear if a contract of this nature was entered into since its authenticity and credibility is disputed. Thirdly, it would also make the conclusion that the suit motor vehicle is owned by the 1st respondent when the 2nd respondent has raised claim over the same motor vehicle.
33. The orders sought by the appellant are in my view perpetual in nature. The principles upon which a court ought to issue an order of injunction are well settled. The court in the case of *Giella vs. Cassman Brown & Company Ltd* (1973) EA 358 stated them as follows:
- “First, the applicant must show that he has 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 damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”
34. In *Mrao vs. First American Bank of Kenya Limited* [2003] eKLR Bosire, JA. (as he then was) stated as follows:
- “A prima facie case is... one 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 appellant has failed to demonstrate that a prima facie case has been established as to warrant the issuance of the orders sought. Furthermore, he seeks permanent orders that would essentially conclude the suit in general without the benefit of hearing the parties and authenticating the evidence on record. In the case of *Kenya Power & Lightning Co. Limited vs. Sheriff Molana Habib* [2018] eKLR, the court observed with regards to a permanent injunction that:
- “A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually



restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.”

36. The orders sought in the trial court at an interlocutory stage would have the effect of fully determining several issues without examining them against the rules of evidence. Therefore, in my view, granting those orders would be premature and a violation of the audi alteram partem rule and the right to be heard as couched in Article 50 (2) of the Constitution.
37. I therefore find that the conclusions reached by the learned magistrate were proper and sound. The upshot of the foregoing is that the present appeal is devoid of merit and it is hereby dismissed with costs to the respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED THIS 13TH DAY OF JANUARY 2025

RHODA RUTTO

JUDGE

For Appellant:

For Respondent:

Court Assistant:

