



**Mwangi v Momentum Credit Limited (Commercial Case E068 of 2024)
[2025] KEHC 1151 (KLR) (Commercial and Tax) (21 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1151 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E068 OF 2024
MN MWANGI, J
FEBRUARY 21, 2025**

BETWEEN

THOMAS MACHARIA MWANGI PLAINTIFF

AND

MOMENTUM CREDIT LIMITED DEFENDANT

RULING

1. The plaintiff filed a Notice of Motion application dated 16th February 2024 pursuant to the provisions of Section 7 of the *Arbitration Act*, No. 4 of 1995, Sections 1A, 1B & 3A of the *Civil Procedure Act*, Order 40 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. The plaintiff seeks orders for a temporary injunction restraining the defendant from selling, auctioning, or interfering with motor vehicle Reg. No. KBN 466M until the arbitral proceedings are concluded, and a mandatory injunction compelling the respondent to release the said motor vehicle to the plaintiff, subject to any conditions the Court deems necessary.
2. The application is based on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Thomas Macharia Mwangi, the plaintiff herein. He averred that he entered into a loan Agreement with the defendant on 18th January 2021 for Kshs.340,000/=, secured by motor vehicle Reg. No. KBN 466M. He later took an Ezua loan, which was advanced as a mobile unstructured supplementary service data (USSD loan) which was later converted into a normal logbook loan. That on 10th November 2023, he received an additional loan secured by the same vehicle.
3. He further averred that on 30th January 2024, the defendant instructed Antique Auction Agencies to repossess the vehicle, which was under repair, and the defendant paid Kshs.66,000/= to the garage for its release. Consequently, he questioned the defendant on why he was being charged twice for



repossession and unperformed mechanic work, and the defendant responded by stating that two proclamation notices had been issued.

4. Mr. Macharia disputed the aforesaid charges on grounds that the repairs were unsatisfactory and on 7th February 2024, he received a 7-day disposition notice for the vehicle's sale. He stated that he made a partial payment of Kshs.90,000/=, leaving a balance of Kshs.34,000/=, which he was willing to deposit in Court. He stated that upon inspecting the vehicle at the defendant's yard, he found that it had been vandalized. He stated that he attempted to resolve this dispute amicably and invoked the arbitration clause in the loan Agreement. He however argued that the defendant's actions could affect the arbitration's subject matter. He stated that he relies on the suit motor vehicle for daily transport and urged this Court to restrain its sale and compel its release to him, so as to ensure that arbitration proceeds without interference.
5. The instant application was canvassed by way of written submissions. On perusal of the Court record, this Court notes that despite service of the instant application upon the defendant, it did not file any pleadings and/or submissions in opposition to the application. The plaintiff's submissions were filed on 25th September 2024 by the law firm of MMD Advocates LLP. Notwithstanding the fact that the defendant did not file a response, I have to satisfy myself that the plaintiff is entitled to the orders being sought.
6. Mr. Davidson Makau, learned Counsel for the plaintiff submitted that under Section 7 of the *Arbitration Act*, 1995, this Court has the power to grant interim measures of protection before arbitration begins. Citing the case of *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* [2010] eKLR, he contended that the plaintiff has justified the need for interim measures. He argued that the loan Agreement at Clause 18 contains an arbitration clause, and that the defendant's 7th February 2024 disposition notice would threaten the arbitration's subject matter if the vehicle is sold. He asserted that if the orders sought herein are not granted, the arbitration proceedings would be rendered nugatory.
7. Counsel relied on the Court of Appeal case of *Joseph Kaloki t/a Royal Family Assembly v Nancy Atieno Ouma* [2020] eKLR, and submitted that special circumstances exist to justify granting a mandatory injunction in favour of the plaintiff. He expounded that the said special circumstances include the plaintiff's legal and equitable ownership of the vehicle and prior possession of the vehicle before repossession, and the risk of the suit motor vehicle being further vandalized. He submitted that no prejudice will be occasioned to the defendant as the loan is being serviced, and stated that the defendant has the ability to repossess the vehicle later if the plaintiff defaults. He added that arbitration proceedings will be unaffected by the injunction, which will not discharge the existing encumbrance.

Analysis And Determination.

8. I have considered the instant application, the grounds on the face of it and the affidavit filed in support thereof, together with written submissions by Counsel for the plaintiff. The issues that arise for determination are –
 - i. Whether an order of temporary injunction should issue; and
 - ii. Whether an order of mandatory injunction should issue.

Whether an order of temporary injunction should issue.

9. This Court has been moved under the provisions of Section 7(1) of the *Arbitration Act*, No. 4 of 1995, to issue interim measures of protection in the form of a temporary injunction pending the



commencement, hearing and determination of arbitral proceedings. Section 7(1) of the [Arbitration Act](#), No. 4 of 1995 provides the following -

It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.

10. From the above provisions, this Court finds that it is clothed with the requisite jurisdiction to issue interim orders to preserve the subject matter of the arbitration proceedings and/or maintain status quo, so as to ensure that there is a dispute for hearing and determination before the Arbitrator. The guiding principles when dealing with applications of this nature were laid down by the Court of Appeal in the case of *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* (supra), where Nyamu., JA held as follows -

“Under our system of the law on arbitration the essentials which the court must take into account before issuing the interim measures of protection are: -

1. The existence of an arbitration agreement.
2. Whether the subject matter of arbitration is under threat.
3. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application.
4. For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal’s decision-making power as intended by the parties.”

11. In this case, the interim measure of protection sought by the plaintiff is in the form of a temporary injunction. It is trite law that an injunction is a discretionary remedy, granted on the basis of evidence and sound legal principles. The Court in the case of *Giella v Cassman Brown & Company Limited* [1973] E A 358, laid down the principles to be considered when dealing with an application for an interlocutory injunction as hereunder -

Firstly, 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.”

12. In addition to the conditions laid down by the Court of Appeal in in the case of *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* (supra), this Court shall also consider whether the plaintiff has met the conditions laid down by the Court in the case of *Giella v Cassman Brown & Company Limited* (supra), to warrant being granted an order of temporary injunction against the defendant.
13. The plaintiff claims to have entered into a loan agreement with the defendant on 18th January 2021, for Kshs.340,000/=, secured by motor vehicle Reg. No. KBN 466M. He later took an Ezua loan, which was converted into a logbook loan, and on 10th November 2023, he received an additional loan using the same motor vehicle as security. On 30th January 2024, the defendant instructed Antique Auction Agencies to repossess the vehicle, which was under repair, the defendant paid Kshs.66,000/= to the garage to secure its release. The plaintiff stated that he questioned why he had been charged twice



for repossession and unperformed repairs, to which the defendant responded that two proclamation notices had been issued.

14. The plaintiff contended that he disputed the aforesaid charges, citing unsatisfactory repairs. On 7th February 2024, he however received a 7-day disposition notice for the vehicle's sale. He stated that he then made a partial payment of Kshs.90,000/=, leaving a balance of Kshs.34,000/=. He stated that upon inspecting the vehicle at the defendant's yard, he discovered it had been vandalized, and after failing to resolve the dispute amicably, he invoked the arbitration clause in the loan Agreement.
15. A prima facie case was defined by the Court of Appeal in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR, as hereunder-

So, what is a "prima facie case" I would say that in civil cases 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. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.

16. On perusal of the loan Agreement dated 18th January 2021, it is apparent that it includes an arbitration clause at Clause 18. The plaintiff argued that the motor vehicle, which is the subject matter of the arbitration proceedings is at the risk of being sold to a third party or further vandalized if it remains in the defendant's possession. Further, he argued that if the orders sought herein are not granted and the suit motor vehicle is sold to a third party, he will not be able to contest repossession and garage charges or claim compensation for vandalism of the suit motor vehicle, thus the arbitration proceedings will be rendered nugatory.
17. It is not disputed that the defendant repossessed the suit motor vehicle through Antique Auction Agencies due to loan arrears while it was undergoing repairs, and the defendant paid garage fees for its release. From the annexures to the plaintiff's affidavit in support of the instant application, it is evident that the defendant issued the plaintiff with a 7-day disposition notice for the vehicle's sale and approximately five (5) days later, the plaintiff paid Kshs.90,000/=, which the defendant acknowledged receipt of, via email. On perusal of the disposition notice, I note that it required the plaintiff to make a total payment of Kshs.508,032.64 so as to secure release of the suit motor vehicle. It is however worthy of note that later, the defendant informed the plaintiff's Advocate that Kshs.127,410.00 was needed to prevent the sale of the suit motor vehicle, which sum comprised garage fees, repossession fees, and loan arrears.
18. In view of the foregoing averments and analysis, it is my finding that the subject matter of the arbitration proceedings is the suit motor vehicle in issue, and the loan Agreement. This is because some of the issues that would have to be determined by the Arbitrator in arbitration proceedings would be whether repossession of the suit motor vehicle was justified and/or provided for, in the loan Agreement, whether the plaintiff ought to have been charged twice for the repossession despite the fact that the suit motor vehicle was only repossessed once, whether the defendant is entitled to a refund of the money it paid to the garage in view of the assertions by the plaintiff that the repairs were unsatisfactorily done and that the defendant paid for work not done, whether the said vehicle was vandalized while in possession of the defendant and if so, whether the plaintiff is entitled to compensation for the said vandalism.



19. At this juncture, it is worth noting that the defendant has not challenged, rebutted and/or controverted the applicant's averments contained in his affidavit in support of the instant application by way of a replying affidavit or otherwise. For this reason, I consider all the averments by the plaintiff to be true.
20. From the photograph annexed to the affidavit in support of the instant application, which was taken at the defendant's yard, it is evident that some vehicle parts are missing. That may be as a result of vandalism when the vehicle was in the defendant's possession as alleged by the plaintiff. This Court is of the considered view that if this is proven to be true, then the plaintiff's claim against the defendant for compensation for the said vandalism will automatically succeed. Further, other than the averment made by the plaintiff that the suit motor vehicle was repossessed once on 30th January 2024, there is no evidence of a second repossession of the said vehicle. That in my finding, is an issue for consideration at the arbitral proceedings so as to determine whether indeed there was any justification for the defendant to charge the plaintiff repossession charges twice.
21. In protecting the subject matter of the proceedings before an Arbitrator, Courts should have the duty to ensure that the Arbitrator's jurisdiction is not washed away by any further illegal conduct by any of the parties to the dispute. In the circumstances, and in view of the fact that the suit motor vehicle is still in the custody of the defendant with no indication of whether or not it shall be released to the plaintiff, this Court finds that the said vehicle being the subject matter of the arbitration proceedings is under threat of being sold to third parties. In addition, since the suit motor vehicle is currently being held by the defendant at its yard, it is also at the risk of vandalism, as well as wear and tear due to immobilization of the engine. All these factors will lead to alienation of the subject matter of the intended arbitral proceedings. It is therefore my finding that the plaintiff has established a prima facie case with a probability of success.
22. It is also my finding that if the orders sought herein are not granted, the plaintiff stands to suffer irreparable damage since the subject matter of the intended arbitral proceedings will have been alienated, and in the event that the plaintiff's claim ends up being successful, it will be impossible to assess the damages suffered for compensation purposes, which will result in the intended arbitral proceedings being rendered nugatory.
23. The question of the balance of convenience does not arise in this case since the Court is not in doubt, nevertheless, this Court finds that in view of the preceding findings, the balance of convenience tilts in favour of the plaintiff.
24. As a result, this Court finds that the plaintiff has made out a case to warrant being granted an order of temporary injunction.
Whether an order of an interlocutory mandatory injunction should issue.
25. An order of an interlocutory mandatory injunction is given sparingly. This position was well stated by the Court of Appeal in the case of Joseph Kaloki t/a Royal Family Assembly v Nancy Atieno Ouma [2020] eKLR, as follows -

As this Court stated in Kenya Breweries Limited & another vs. Washington O. Okeyo [2002] eKLR a mandatory injunction can be granted on an interlocutory applications as well as at the hearing but should not normally be granted in the absence of special circumstances but that if a case is clear and which the court thinks it ought to be decided at once, a mandatory injunction will be granted at an interlocutory application.



26. In the case of Kenya Breweries Ltd & Another v Washington O. Okeya [2002] eKLR, cited in the foregoing decision, the Court of Appeal stated as follows -

A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the Applicant. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.

27. Earlier on in this ruling, this Court found that the plaintiff has made out a case for being granted an interlocutory injunction. The only question then left for determination by this Court is whether there exists special circumstances to warrant the plaintiff being granted an order of mandatory injunction.

28. Having found that the suit motor vehicle is at risk of wear and tear due to immobilization of the engine since it is held by the defendant at its yard, and that it also faces the risk of vandalism and alienation, I am persuaded that there exist special circumstances in this case for the plaintiff to be granted an order of mandatory injunction.

29. In the end, this Court finds that the plaintiff has made out a case to warrant issuance of interim orders and/or measures of protection in the form of temporary and mandatory injunctions.

30. In the result, the instant application is merited and it is allowed in the following terms -

- i. An order of temporary injunction is hereby granted restraining the defendant from selling, auctioning, or interfering with motor vehicle Reg. No. KBN 466M until the arbitral proceedings are commenced and concluded;
- ii. An order of mandatory injunction is hereby granted compelling the respondent to release the said motor vehicle to the plaintiff;
- iii. The plaintiff is hereby directed to institute arbitration proceedings within the next thirty (30) days, failure to which the orders of temporary and mandatory injunctions shall automatically lapse and the defendant shall be at liberty to repossess the suit motor vehicle and sell it; and
- iv. Costs of this application to be borne by the defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF FEBRUARY 2025.

RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the Presence of:

Mr. Mwalagho h/b for Mr. Davidson Makau for the plaintiff/applicant

No appearance for the defendant/respondent

Ms. B. Wokabi – Court Assistant.

NJOKI MWANGI, J.

