



**Cooperative Bank of Kenya v Oduor (Sued as the Legal Representative of the Estate of Rose Achieng Otit) (Civil Appeal E029 of 2024) [2025] KEHC 5349 (KLR) (2 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5349 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CIVIL APPEAL E029 OF 2024**

**DK KEMEL, J  
MAY 2, 2025**

**BETWEEN**

**COOPERATIVE BANK OF KENYA ..... APPELLANT**

**AND**

**FRANCIS OMONDI ODUOR (SUED AS THE LEGAL REPRESENTATIVE OF  
THE ESTATE OF ROSE ACHIENG OTIT) ..... DEFENDANT**

**JUDGMENT**

1. The appeal herein arises from the ruling of Hon. Tsimonjero (SRM) dated 11/6/2024 in Ukwala SRMCC No. E092 of 2022 wherein he had issued a temporary injunction against the Appellant from taking possession and/or interfering with the suit motor vehicle registration number KDC XXXX make Isuzu d- Max pending determination of the suit and further suspended further deductions or accrual of interest on the Respondents mother's loan facility with the Appellant pending the hearing and determination of the suit. The trial court further ordered the Appellant to render accounts statements to the Respondent.
2. Aggrieved by the said decision, the Appellant lodged a Memorandum of Appeal dated 10/7/2024 wherein it raised the following grounds of appeal;
  - i. That the learned trial magistrate erred in law and in fact by reaching a determination on the application before him that upon the demise of the deceased borrower the outstanding hire purchase amount became a liability upon the estate of the deceased which is only recoverable after succession proceedings in respect of the estate of the deceased have been commenced and finalized yet the ownership and property in the motor vehicle forming the subject of the hire purchase agreement being motor vehicle registration No. KDC XXXX (Isuzu D-Max) had not passed to the deceased borrower at the time of her demise and does not therefore form part of her estate.



- ii. The learned trial magistrate erred in law and in fact in reaching a determination on the application before him that the Applicant cannot repossess the motor vehicle against the deceased as doing so amounts to intermeddling in the deceased's estate in total disregard of the principle that in a hire purchase agreement the absolute property in the goods let on hire remains with the owner of the goods, the Appellant herein until the hirer exercises the option to purchase.
- iii. The learned trial magistrate misdirected himself by issuing an order suspending further deductions and or accrual of interest on the borrower's loan facility with the Appellant pending the hearing and determination of the suit before him thereby rewriting the terms of the contract between the parties against the weight of evidence and submissions by the Appellant.
- iv. The learned trial magistrate erred in law and in fact by failing to consider the Appellant's submissions in making his determination hence arriving at an erroneous finding against the weight of the evidence and fact on record.

The Appellant therefore prayed that the appeal be allowed and that the impugned ruling be set aside and substituted with an order dismissing the Respondent's application dated 15/4/2022 with costs. The Appellant also seeks for costs of the appeal.

3. This being the first appellate court, its duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and come up with its own independent conclusion as to whether or not to uphold the decision of the trial court. See *Selle & Another v. Associated Motor Boat Co. Ltd & Others* (1968) EA 123.
4. A perusal of the lower court record indicate that the Respondent had filed a suit against the Appellant vide a plaint dated 27/9/2022 seeking several prayers:
  - i. A temporary injunction be and is hereby issued restraining the Respondent, whether by themselves, their gents, workers, servants or anyone claiming in their name from alienating, selling, taking possession or in any other way interfering with motor vehicle registration No. KDC XXXX ISUZU D-MAZ on any such date pending the hearing and determination of this suit.
  - ii. An order be and is hereby issued suspending further deductions and or accrual of interest on the Applicant's mother's loan facility with the Respondent pending the hearing and determination of the application and consequently the suit.
  - iii. An order be and is hereby issued requiring the Respondent to render account and avail an updated statement to the Applicant; and
  - iv. Each party to bear their own costs.

The Respondent later filed an application dated 27/9/2022 where he sought several reliefs inter alia; that this application be certified as urgent and service thereof be dispensed with in the first instance; that a temporary order of injunction be issued restraining the Respondent, whether by themselves, their agents, workers, servants or anyone claiming in their name from alienating, selling, taking possession or in any way interfering with motor vehicle Registration No. KDC XXXX ISUZU D-Max on any such date pending the hearing and determination of the suit; that a temporary order of injunction be issued suspending further deductions and/or accrual of interest on the applicant's mother's loan facility with the respondent pending the hearing and determination of the application herein; that an



order be issued requiring the Respondent to render accounts and avail an updated account statement to the Applicant; that the cost of this application be provided for.

The Appellant filed a replying affidavit dated 18/11/2022 wherein it strenuously opposed the application inter alia; that the deceased herein Rose Achieng Otit had been a borrower where she was given financial accommodation in the nature of a Hire Purchase Finance to the tune of around Kshs 2.8 million which was the purchase of one new Isuzu Dmax Single Cab. In addition to a deposit made by the borrower of Kshs148,805/= towards the purchase thereof so that the total purchase price of the vehicle came to a total of Kshs 2,976,100/= and that the vehicle was finally registered as KDC XXXX; that the vehicle was registered jointly in the names of the borrower and the Appellant and that it was agreed in the event of default to pay the monthly instalments the Appellant was to issue an appropriate notice and repossess the vehicle and sell it by way of public auction or private treaty in order to recover the outstanding arrears of the loan; that the borrower defaulted in the repayments forcing the Appellant to sent out a demand letter and as a result the Appellant was later compelled to seek to repossess the vehicle; that before the repossession took place, the Respondent filed this suit and obtained orders stopping the said repossession; that the Appellant stands to suffer great prejudice if it is stopped from exercising its right under the hire purchase agreement and to sell it in order to recover the outstanding loan amounts; that the interest rates continues to accrue with the continued delay and non-payment of the hire purchase amount.

5. It is noted that the trial court considered the Respondent's application dated 27/9/2022 and came up with the impugned ruling delivered on 11/6/2024 which allowed it in the following terms: -
  - i. A temporary injunction be and is hereby issued restraining the Respondent, whether by themselves, their gents, workers, servants or anyone claiming in their name from alienating, selling, taking possession or in any other way interfering with motor vehicle registration No. KDC XXXX ISUZU D-MAZ on any such date pending the hearing and determination of this suit.
  - ii. An order be and is hereby issued suspending further deductions and or accrual of interest on the Applicant's mother's loan facility with the Respondent pending the hearing and determination of the application and consequently the suit.
  - iii. An order be and is hereby issued requiring the Respondent to render account and avail an updated statement to the Applicant.
  - iv. Each party to bear their own costs.

The above ruling precipitated this appeal. Indeed, the main suit in the trial court is yet to be heard in earnest once this appeal is determined.

6. The appeal was canvassed by way of written submissions. However, it is only the Appellant who complied.
7. Appellant's submissions are dated 20<sup>th</sup> December 2024. The Appellant reiterated the grounds raised in this appeal and urged the court to overturn the ruling of the learned trial magistrate as there has been a miscarriage of justice. The Appellant went ahead to give a background of the transaction it had entered into with the deceased borrower inter alia: that at the request and instance of one Rose Achieng Otit (hereafter referred to as the borrower) the Appellant granted her financial accommodation and/or Hire Purchase Finance in the sum of Kshs2,827,295/= being the payment towards the purchase of one new Isuzu Dmax Single Cab in addition to the deposit made by the said borrower of Kshs148,805 towards the purchase thereof, thus bringing the total purchase price of the said vehicle to Kshs2,976,100 which vehicle was subsequently registered as No. KDC XXXX upon purchase; that the said loan facility



was secured by among other legal instruments the same motor vehicle which was registered jointly in the names of the Borrower and the Appellant, and appropriate Blank Transfer forms from the motor vehicle duly executed by the said Borrower such that in the event of default in the repayment of the agreed monthly instalments, the Appellant could repossess and sell it; that the Appellant was agreed to be at liberty upon appropriate notice, to repossess and sell the said motor vehicle by public auction or private treaty to recover the outstanding arrears of the loan still due on the facility; that the repayment terms agreed between the Appellant and the borrower were that the loan was to attract interest at the rate of 13% per annum, and in the event of default by the said borrower, the Appellant would be entitled to charge a penalty interest over and above the then subsisting rate of interest in addition to its right to immediately enforce its security for the loan, being the motor vehicle in question, by having it repossessed and sold to recover the outstanding balance of Kshs2,770,686.21 as at 12/9/2022; that the Appellant was then constrained to invoke its right under the contract to repossess the suit vehicle but before the same could be done, the Respondent herein moved the court under certificate of urgency by an application dated 27/9/2022 in which he sought several orders including; an order of injunction restraining the Appellant from taking possession or selling the suit vehicle pending the hearing and determination of that application and of the suit by extension, an order suspending further deductions and/or accrual of interest on the subject loan account pending the hearing and determination of the application and an order be issued requiring the Appellant to render accounts and avail updated account statement to the Respondent; that the said application was premised on the ground that the Respondent was willing to take up the borrower's obligations under the contract, the said borrower having been reported to have passed on shortly after executing the hire purchase agreement, but that the Appellant had declined to make available to the applicant updated statements of the loan account to enable him make payments of what was outstanding; that the Respondent obtained interim orders on 4/10/2022 restraining the Appellant from taking possession of and selling the suit vehicle pending the hearing and determination of the said application; that an affidavit was filed in response to that application that the Appellant availed updated copies of the loan account statement which the Respondent had claimed he could not access and which he had alleged would, if availed, enable him to regularize the arrears position; that despite the statements sought having been supplied, the Respondent still did not make any attempts to settle the loan at all; that a preliminary objection was then raised challenging the Respondent's capacity to maintain the suit against the Appellant on the basis of lack of privity to the contract between the Appellant and the borrower as well as the fact that he had filed the claim before obtaining the requisite Grant of Letters of Administration ad litem and by a ruling delivered on 7/11/2023, the trial magistrate agreed with the Appellant but instead of striking out the entire suit however, the court granted an order of injunction for 30 days to enable the Respondent regularize his standing in the suit; that the Respondent failed to regularize his position within the timelines set by the court as a result of which orders of injunction lapsed, and the Appellant attempted to repossess the suit vehicle once again considering that the default position was still yet to be regularized; that the auctioneer retained by the Appellant to repossess the vehicle prepared to do so but the Respondent again, filed another application dated 15/4/2024 seeking the same orders previously sought in the application dated 27/9/2022, an application which was strenuously opposed by the Appellant who gave a detailed highlight of the prejudice it continues to suffer in relation to the subject loan in the affidavit sworn on 17/5/2024; that the trial court later ruled in favour of the Respondent vide the impugned ruling dated 11/6/2024; that the said ruling has caused a lot of prejudice to the Appellant and hence this appeal.

8. I have considered the record of appeal and submissions filed herein. I find the issue for determination is whether the orders of the learned trial magistrate dated 11/6/2024 were proper.



9. It is noted that in the application dated 15/4/2024, the Respondent sought inter alia; a temporary order of injunction restraining the Appellant, whether by themselves, their agents, workers, servants or anyone claiming in their name from alienating, selling, taking possession or in any way interfering with Motor Vehicle Reg No. KDC XXXX Isuzu D-Max on any such date pending the hearing and determination of the suit. This order was granted as sought in the ruling dated and delivered on 11/6/2024 a decision which the Appellant now submits was reached without any explanation, due consideration of its submissions made before the subordinate court, the facts of the law, leading to the arrival at an erroneous finding against the weight of evidence. The applicable principles of law in determining whether or not to grant an order of temporary injunction were set out in the case of *Giella v Cassman Brown and Another* [1971] EA 358 and are as follows:
- i. The Applicant must establish a prima facie case with a probability of success
  - ii. The Applicant must show that he stands to suffer irreparable harm which cannot be adequately compensated by an award of damages
  - iii. If the court is still in doubt, then it should decide the matter on a balance of convenience.

10. As regards the first principle on whether a prima facie case was established with a probability of success, a determination on this is disclosed as of necessity require the court to determine whether from the evidence available before the court, the Respondent established that he would be likely to succeed in the main suit upon full trial. What constitutes a prima facie case in relation to applications for temporary injunctions was defined by the court of Appeal in *Mrao Ltd Vs First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 as a Prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and a probability of success of the Applicant's case upon trial. That is clearly a standard which is higher than an arguable case.

From the foregoing authorities, the Respondent was under duty to present the trial court sufficient grounds or reasons that prima facie is case has a high probability of success. It is instructive that the subject matter of the suit related to a hire purchase transaction wherein the Appellant had allowed the Respondent's mother (now deceased) to purchase a motor vehicle which was registered as KDC 233 M Isuzu Dmax on hire purchase basis and that after several months of loan repayments, the borrower fell into arrears and failed to meet her part of the bargain. At the time of filing the suit before the lower court, the loan amount stood at around Kshs 3,200,000/=. Further, the Respondent herein has been aware of the state of affairs regarding the issue of loan repayment but had not done anything about it despite being served with notices by the bank vide several letters. The Respondent having failed to present proof of repayment of the loan, it was obvious that his case against the Appellant did not have a high probability of success. Again, it is trite law that a party who seeks to be granted an injunction must come to court of equity with clean hands. The Respondent's hands were not clean at the time he lodged the suit before the trial court because he had not settled the huge and staggering amount of outstanding loans. Again, the Respondent having coming out expressly to take up the responsibilities of his late mother under the contract was expected to abide by the terms of the hire purchase agreement entered into by his late mother. It is the Appellant's contention that the Respondent while approaching the lower court did not make a full and frank disclosure of all the relevant facts to the trial court and hence he had approached the trial court with unclean hands. An injunction being an equitable remedy, the Respondent ought to have approached the court with honest. The Respondent in his application for injunction had falsely claimed that the vehicle subject matter of this suit was part of his late mother's estate and therefore the Appellant could not repossess it unless he presents its claim to the estate of the deceased. I find this was the Respondent's height of dishonesty because the Respondent's mother had not completed repaying the loan and further she had not started making payments towards owning



the vehicle after being given an opportunity to do so by the Appellant. Further, the property in the vehicle was still under the Appellant and that the same was not part of the estate of the deceased. On those grounds, I find that the Respondent failed to establish a prima facie case with a probability of success and therefore the trial court ought to have declined the orders sought in the application by the Respondent.

11. As regards the second principle whether the Respondent would suffer irreparable harm not compensable by an award of damages if the injunction order is not granted, it is trite law that where an award of damages would be adequate, an order of temporary injunction should not be granted. It is noted that the subject matter of the suit is a motor vehicle which ordinarily does not have an intrinsic value such as land therefore if the same is repossessed and sold then the Respondent can easily be compensated by an award of damages since the value of the vehicle can be ascertained. If the said vehicle is repossessed, the same will be taken through valuation before the same is offered for sale in a public auction. Hence, the order of injunction ought not to have been granted.
12. As regards the third principle, the court is under duty to balance the interest of the parties while entertaining an application for injunction and establish in whose favour the balance of convenience tilts. The scenario that has emerged is that the Respondent sought for the injunction and at the same time sought to be allowed not to continue repaying the loan. Indeed, the trial court granted the injunction and further stopped repayments until the determination of the main suit. This was quite draconian as it has prejudiced the Appellant since it cannot receive any repayments and that the vehicle has been taken out of its reach. Looking at the circumstances, it is my considered view that the balance of convenience tilts in favour of the court declining the injunction sought. In any event, and as noted in paragraph 12 above, the Respondent could be adequately compensated by an award of damages. In that regard, I find that the trial court erred when it granted the impugned orders vide its ruling dated 11/6/2024.
13. The Respondent had pitched camp in the trial court and maintained that the suit vehicle formed part of the properties of the estate of the deceased borrower. I have perused the record of appeal and note that the Appellant entered into a hire purchase agreement with the deceased borrower and thereafter the Appellant issued an offer letter dated 21/3/2021 which stipulated the terms of the hire purchase as follows:

Purchase of the unit(s) being financed Kshs2,976,100  
Down payment to be made by the Applicant Kshs 148,805  
Net amount to be financed by the bank Kshs2,827,295  
Maximum period of finance to be 60 months  
Projected termly/monthly standing order Ksh64,329.65(instalment)  
Commitment/Arrangement of 1% Kshs28,272.95  
Stamp Duty Kshs100.00  
Extension /Change fee N/A  
Late payment commission 1.25% (applied on amount in arrears)  
Annual review fee N/A  
RTGS + 20% Excise Duty Kshs600.00  
Option to purchase fee (Kshs3,000/= per unit) Kshs3,000/=



It is noted that the above offer was accepted by the borrower leading to the execution of the agreement on 24/3/2021. The aforesaid hire purchase agreement had conditions regarding the repayment as well as an option for the borrower to purchase the said vehicle. However, the borrower did not purchase the vehicle by the time she died and that the loan amounts remained outstanding. The Respondent herein instituted a succession cause over the estate of the deceased borrower and it transpired that the deceased died on 17/6/2021 barely three months after entering into the hire purchase agreement and therefore left the repayments unpaid and also failed to exercise the option to purchase the car. The Respondent urged the trial court to treat the suit vehicle as part of the property of the deceased borrower. It seems the learned trial magistrate fell for the Respondent's ruse when he ruled as follows:

“ ... Unfortunately, the deceased passed on before completion of the hire purchase agreement. It therefore goes without saying that upon the demise of the deceased, the outstanding hire purchase amount became a liability upon the estate of the deceased and which is only recoverable only after due succession proceedings in respect of the estate of the deceased have been commenced and finalized. The Respondent cannot purport to repossess the motor vehicle against a deceased person as doing so amounts to intermeddling in deceased's estate..... Even after determination of this suit, the Plaintiff still has to commence the main succession proceedings in respect of the deceased's estate for him to acquire the requisite locus standi to administer the estate. The Respondent's attempt to repossess the motor vehicle which forms part of the deceased's estate amounts to nothing but intermeddling in the deceased's estate.”

From the foregoing decision of the learned trial magistrate, it is clear that the same was erroneous for the reason that the deceased borrower died three months after entering the hire purchase agreement and obviously had not repaid a huge chunk of the loan borrowed. Further, the ownership of the motor vehicle had not passed to the deceased borrower so as to suggest that the same was part of her property before she died. It was therefore erroneous for the trial magistrate to arrive at a finding that the Appellant's lawful exercise in the repossession of the suit vehicle amounted to intermeddling with the estate of the deceased. It is instructive that the deceased borrower died before exercising the option to purchase the vehicle. Therefore, as long as the hire purchase monies had not been repaid and as long as the borrower had not exercised the option to purchase the car, the absolute property or ownership remains with the owner of the vehicle. That being the position, the suit property did not form part of the estate of the deceased borrower and therefore the Appellant did not intermeddle with the property of the deceased.

14. It is noted that the learned trial magistrate in addition to granting a temporary order of injunction against the Appellant suspended further repayment of the loan until the suit is heard and determined. This was a draconian order and which robbed the Appellant the suit vehicle and the loan repayment monies. Indeed, the Respondent did not deny the fact that the suit vehicle is still owned by the Appellant but the trial court went out of its way to find that the vehicle formed part of the estate of the deceased borrower which can only be dealt with vide succession proceedings despite the fact that the ownership of the suit vehicle is still under the Appellant. The order by the trial court to suspend the loan repayments until the suit is heard and determined amounted to the court rewriting the agreements by imposing new terms despite the existence of an express agreement for repayments in place. In *National Bank of Kenya Ltd Vs Pipe plastic Samkolit (K) Ltd & Another* [2002] EA 503 it was held as follows:

“ This in our view, is serious misdirection on the part of the learned judge. A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their



contract unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause.”

The Appellant contends that the trial court has come to the aid of the defaulting party who has now got away and cannot be called upon by the Appellant to address himself on the loan repayments thanks to the trial court. I find the orders by the trial court are unconscionable and must be set aside.

15. In view of the foregoing observations, it is my finding that the Appellant’s appeal has merit. The same is allowed. The ruling of the trial court delivered on 11/6/2024 is hereby set aside and in its place substituted with an order dismissing the Respondent’s application dated 15/4/2024 with costs to the Appellant. The Appellant is awarded the costs of this appeal.

**DATED AND DELIVERED AT SIAYA THIS 2<sup>ND</sup> DAY OF MAY, 2025.**

**D.KEMEI**

**JUDGE**

In the presence of:

M/s Anuro.....for Appellant

N/A Odhiambo Odera.....for Respondent

Okumu.....Court Assistant

