



REPUBLIC OF KENYA



**National Bank of Kenya Limited & another v Kanampiu & another (Civil Appeal E174 of 2023) [2025] KEHC 6387 (KLR) (2 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6387 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E174 OF 2023**

**JM OMIDO, J**

**MAY 2, 2025**

**BETWEEN**

**NATIONAL BANK OF KENYA LIMITED ..... 1<sup>ST</sup> APPELLANT**

**DANIEL MAINA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DOUGLAS THURANIRA KANAMPIU ..... 1<sup>ST</sup> RESPONDENT**

**MOHAMMED MUTIA MUKARIA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Ruling and Order of Hon. T.M. Gesora, Chief Magistrate delivered/issued on 15th September, 2023 in Maua CMCC No. E067 of 2023)*

**JUDGMENT**

1. This appeal emanates from the ruling and order of Hon. T.M. Gesora, Chief Magistrate, delivered/issued on 15<sup>th</sup> September, 2023 in Maua CMCC No. E067 of 2023.
2. The grounds of appeal presented by the Appellants vide the Amended Memorandum of Appeal dated 1<sup>st</sup> February, 2024, upon which they seek to upset the ruling and order of the lower court, are as follows:
  1. The learned Magistrate erred in law and in fact by failing to appreciate the fact that a loan was advanced to the 2<sup>nd</sup> Respondent and secured by motor vehicle registration number KDH 063R (which fact is admitted by all parties), the same was defaulted (admitted by the 2<sup>nd</sup> Respondent) and that by the said default, realization of the security crystalized and the 1<sup>st</sup> Appellant is entitled to recover its loan by disposing of the security (admitted by the 2<sup>nd</sup> Respondent).
  2. The learned Magistrate erred in law and in fact in failing to appreciate the fact that the 1<sup>st</sup> Respondent is not the registered owner of the motor vehicle registration number KDH 063R (subject motor vehicle and security) and lacks the locus standi to institute the suit.



3. The learned Magistrate erred in principle by failing to appreciate the fact that the subject motor vehicle is of perceptible value and which value (if lost) is not irreparable because it can be compensated by way of damages.
  4. The learned Magistrate erred in law and in fact by failing to appreciate the fact that the subject motor vehicle is a moveable property whose value depreciates with time and proceeded to mislead himself to find that the motor vehicle remains on lock down pending the hearing and determination of the entire suit.
  5. The learned Magistrate erred in law and in fact by failing to appreciate the fact that the loan keeps ballooning and by virtue of depreciation, the value of the subject motor vehicle will eventually outstrip the security, further worsening the already dire loan situation.
3. The Appellants propose that the Appeal be allowed with costs to the Appellants and that the ruling and order of the lower court delivered on 15<sup>th</sup> September, 2022 be set aside and be substituted with an order allowing the 1<sup>st</sup> Appellant (also referred to as “the bank”) to recover loan amounts owed to it by disposing the security in its possession.
  4. The Court directed that the appeal proceeds by way of written submissions and gave the parties herein timelines for filing their submissions. Both sides filed their respective submissions.
  5. This being the first appellate court, I am required under Section 78 of the Civil Procedure Act and as was espoused in the case of *Sielle v Associated Motor Boat Co. Ltd* [1969] E.A. 123 to reassess, reanalyze and reevaluate the evidence adduced in the Magistrate’s Court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.
  6. In *Sielle*, Sir Clement De Lestang observed that:
 

“This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

However, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
  7. The suit before the lower court was commenced by the Respondents vide an undated plaint filed in court on 12<sup>th</sup> May, 2023. The Respondents alleged that the Appellants unlawfully took motor vehicle registration number KDH 063R Fuso Truck Model FJ 1623 that the 1<sup>st</sup> Appellant had financed the two Respondents to purchase vide a facility for Ksh.6,120,000/-. The Respondents stated that the vehicle was jointly registered in the names of the 2<sup>nd</sup> Respondent and the 1<sup>st</sup> Appellant.
  8. The Respondents claimed that the actions by the 1<sup>st</sup> Appellant of taking away the vehicle from the 2<sup>nd</sup> Respondent was unlawful and malicious as no notice was issued and that the 2<sup>nd</sup> Respondent had not defaulted in servicing the loan.
  9. The Respondents pleaded in the plaint that the 1<sup>st</sup> Respondent had before the vehicle was carted away been using the same for commercial purposes.
  10. The prayers that were sought in the plaint were as follows:
    - a. The release of the said vehicle (sic) to the 1<sup>st</sup> Plaintiff.



- b. A transfer of the loan from the 2<sup>nd</sup> Plaintiff to the 1<sup>st</sup> Plaintiff bank account and an order that the 1<sup>st</sup> Plaintiff to continue the loan instalments as per the charge (sic).
  - c. Loss of income of Ksh.150,000/- per day from 25<sup>th</sup> April, 2023 to the date of release of the vehicle to the 1<sup>st</sup> Plaintiff.
  - d. Interest on the said damages (sic) at such rate and for such period as the court deems fit.
  - e. Costs of this suit.
  - f. Any other relief that the court deems fit to grant.
11. The 1<sup>st</sup> Respondent Douglas Thurania Kanampiu filed an application by Motion on Notice dated 13<sup>th</sup> July, 2023 in which he sought the following orders against the Appellants:
1. [...]
  2. That this Honourable Court be pleased to issue an order of temporary injunction restraining the Defendants/Respondents jointly and/or severally by themselves, their agents, officers, employees and/or through anybody else acting on their behalf including Faith Birech from selling, auctioning, removing from Purple Royal Yard Kiambu Road, leasing, dismantling and/or otherwise howsoever parting with the possession and/or ownership of motor vehicle registration number KDH 063R Mitsubishi FUSO until this application is heard and determined.
  3. That this Honourable Court be pleased to issue an order of temporary injunction restraining the Defendants/Respondents jointly and/or severally by themselves, their agents, officers, employees and/or through anybody else acting on their behalf including Faith Birech from selling, auctioning, leasing, dismantling and/or otherwise howsoever parting with ownership of motor vehicle registration number KDH 063R Mitsubishi FUSO until this suit is heard and determined.
  4. That an order of mandatory injunction be issued compelling National Bank of Kenya Limited, through their Manager Maua Branch, Mr. Daniel Maina to deliver/bring (and/or cause to be delivered/brought) the said motor vehicle registration number KDH 063R Mitsubishi FUSO to Maua Police Station for inspection by court and custody until the suit is heard and determined.
  5. That upon issuance of Order 4 hereinabove, the OCS Maua Police Station be ordered to ensure that motor vehicle registration number KDH 063R Mitsubishi FUSO is kept securely until further orders of this court are issued in respect thereto.
  6. That this Honourable Court be pleased to issue such other and/or further/better orders as it may deem fit in respect of the preservation of the subject matter of this suit (i.e. motor vehicle registration number KDH 063R Mitsubishi FUSO).
  7. That the cost of this application be borne by the Respondents.
12. In gist, the 1<sup>st</sup> Respondent vide the application substantively sought for two sets of orders, i.e. a temporary injunction restraining the bank, its employees or agents from selling, auctioning and/or disposing of the subject motor vehicle pending the hearing and determination of the suit and a mandatory injunction compelling the bank, its employees or agents to deliver the vehicle to Maua Police Station from the bank's agent's yard (Purple Royal Auctioneers) yard, for custody pending the hearing and determination of the suit.



13. The grounds upon which the application was premised were in precis that: That the 1<sup>st</sup> Respondent used the 2<sup>nd</sup> Respondent's account held at the bank's Maua Branch to acquire the asset loan finance for the purchase of the vehicle in an arrangement and/or agreement between the two Respondents and the 1<sup>st</sup> Appellant acting through the 2<sup>nd</sup> Appellant. That the bank approved and disbursed the loan to the 2<sup>nd</sup> Respondent's said bank account for and on behalf of the 1<sup>st</sup> Respondent to purchase the subject motor vehicle, following which the vehicle was purchased and registered in the joint names of the 2<sup>nd</sup> Respondent and the bank on the understanding that the same was for and on behalf of the 1<sup>st</sup> Respondent, who continued to finance the loan repayments faithfully and diligently through the name and account of the 2<sup>nd</sup> Respondent. That the bank advertised the vehicle for public auction in a local daily.
14. The application was supported by the 1<sup>st</sup> Respondent's affidavit sworn on 13<sup>th</sup> July, 2023 that expounded on the grounds above, emphasizing that there had never been a default in repayment of the loan and that the understanding between the bank, the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent was that 1<sup>st</sup> Respondent used the 2<sup>nd</sup> Respondent's account held at the bank's Maua Branch to acquire the asset loan finance for the purchase of the vehicle for and on behalf of the 1<sup>st</sup> Respondent.
15. The application was resisted and the Appellants to that end filed a replying affidavit sworn on 20<sup>th</sup> July, 2023 by Daniel Maina, the bank's Manager at its Maua Branch, who is the 2<sup>nd</sup> Appellant herein.
16. In summary, the deponent to the replying affidavit stated on oath that the 1<sup>st</sup> Respondent had no proprietary interest over the vehicle. He denied knowledge of the agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that the former used the latter's account to purchase the vehicle through asset finance and annexed a copy of his letter of appointment in the capacity of Branch Manager dated 11<sup>th</sup> April, 2022 while pointing out that the loan that was advanced to the 2<sup>nd</sup> Respondent was initiated on 21<sup>st</sup> March, 2022. He stated that he formally commenced his duties at Maua Branch on 10<sup>th</sup> May, 2022 and never engaged the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on the loan facility.
17. He was emphatic that the loan to finance the purchase of the vehicle was advanced to the 2<sup>nd</sup> Respondent to the exclusion of the 1<sup>st</sup> Respondent as the agreement was signed between the bank and the 2<sup>nd</sup> Respondent and that as at the time of repossessing the vehicle, the amount owed by the 2<sup>nd</sup> Respondent, who was in default, was Ksh.5,861,383.93/- and that the bank was therefore within its rights to realize the security.
18. The lower court directed that the application be canvassed by way of written submissions and the parties filed their respective submissions.
19. On 15<sup>th</sup> September, 2023, the court (Hon.T.M. Gesora) rendered a brief ruling on the application. This appeal seeks to challenge the said ruling and the orders ensuing therefrom, which was in the following terms:

#### Ruling

Upon considering the application dated 13<sup>th</sup> July, 2023 and the replies thereto and the submissions, it is my considered opinion that there is need to preserve the status quo pending the hearing of the main suit.

Prayer 3 of the application is therefore granted. Parties to move with speed and comply with Order 11 and set the matter down for hearing. Costs of the application will abide the final outcome of the suit.

T. Gesora



Chief Magistrate

15<sup>th</sup> September, 2023.

20. I have considered the grounds of appeal as set out in the Memorandum of Appeal, the submissions by the parties herein and the record of the lower court. As I have stated above, the application that was presented before the lower court was one that substantively sought for two sets of orders, i.e. a temporary injunction restraining the bank, its employees or agents from selling, auctioning and/or disposing of the subject motor vehicle pending the hearing and determination of the suit and a mandatory injunction compelling the bank, its employees or agents to deliver the vehicle to Maua Police Station from the bank's agent's yard (Purple Royal Auctioneers) yard, for custody pending the hearing and determination of the suit. I therefore discern the issues for determination in this appeal to be as follows:
- a. Whether the lower court erred by failing to consider the merits of the application dated 13<sup>th</sup> July, 2023?
  - b. Subject to (a) above, what are the orders of this court regarding the application dated 13<sup>th</sup> July, 2023 and the ruling and orders of 15<sup>th</sup> September, 2023?
21. From the lower court's brief ruling (reproduced above), I have no doubt that the injunctive and mandatory injunction prayers that were sought in the application were not considered meritoriously, notwithstanding the fact that the parties presented their respective arguments vide their filed submissions as per the court's directions. One would have expected the court to consider whether or not the conditions for the grant of the two sets of injunctions had been met by the 1<sup>st</sup> Respondent and a considered determination on the same made. To that end, I agree with the Appellants that the learned Magistrate fell into error in failing to determine the application in its merits.
22. The foregoing being the position, this court has the duty to consider the merits of the application and reach its own findings on the same.
23. As regards the prayer for a temporary injunction to restrain the bank, its employees or agents from selling, auctioning and/or disposing of the subject motor vehicle pending the hearing and determination of the suit, the principles that guide the granting of the same were asserted in the celebrated case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 where it was held that an Applicant to succeed, must demonstrate a prima facie case with probability of success; that he will suffer irreparable loss that cannot be adequately compensated by damages; or that the balance of convenience tilts in his favour.
24. In that regard, it was the 1<sup>st</sup> Respondent's duty to show that the application met the test laid down in *Giella* (supra).
25. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR, the Court of Appeal (Bosire JA), stated that the power of the court in an application for an interlocutory injunction is a judicial discretion which has to be exercised judiciously on the basis of the law and evidence.
26. The Judge stated as follows:
- “The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are well settled. In *Giella v Cassman Brown* to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner



he was considering, which was in relation to the pleadings that had been put forward in that case....

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.”

27. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, the Court of Appeal agreed with the definition of a prima facie case in the *Mrao* case and observed as follows:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.”

28. The question that then abounds in this appeal, having well understood from the decisions above as to what amounts to a prima facie case, is whether the 1<sup>st</sup> Respondent established the existence of the first principle in his application.
29. Apart from the depositions made in his affidavit, the 1<sup>st</sup> Respondent did not present any agreement as to the purported arrangement with the 2<sup>nd</sup> Respondent and the bank, for him to use the 2<sup>nd</sup> Respondent’s bank account to obtain the facility to purchase the vehicle. The questions that the 1<sup>st</sup> Respondent left unanswered, if he were to be believed were; What prevented him from opening his own account with the 1<sup>st</sup> Respondent in order to transact directly with the bank? Why was the purported agreement between the three not written down? Why was the vehicle registered in the joint names of the bank and the 2<sup>nd</sup> Respondent and not himself? Why did the 2<sup>nd</sup> Respondent sign the loan document as the borrower and not himself?
30. The loan agreement was signed by the bank and the 2<sup>nd</sup> Respondent. The doctrine of privity of contract is a fundamental principle in contract law which states that only parties to a contract can sue or be sued on it. In other words, a third party who is not a party to the contract cannot enforce its terms or be held liable under it, even if the contract was made for their benefit.
31. A person who is not a party (a “third party”) generally has no right to claim any benefit or enforce performance from a contract they did not sign. The 1<sup>st</sup> Respondent, not being a party to the loan agreement, and having failed to demonstrate any other interest in the vehicle (which was registered jointly in the names of the bank and the 2<sup>nd</sup> Respondent), had no basis of halting the execution of the terms of the contract. The 1<sup>st</sup> Respondent did not therefore establish a prima facie case with probability of success. In my view, it would be preposterous for me to proceed to consider whether the



- 1<sup>st</sup> Respondent met the other conditions for granting an injunction, having already reached the finding that the 1<sup>st</sup> Respondent failed to demonstrate a prima facie case with probability of success.
32. In respect of the prayer for a mandatory injunction compelling the bank, its employees or agents to deliver the vehicle to Maua Police Station from the bank's agent's yard, the prayer (and the other prayers in the application) was ancillary to the first prayer for temporary injunction, for preservation of the vehicle pending the determination of the case. As I have already reached a finding that the 1<sup>st</sup> Respondent had no demonstrable interest in the vehicle or the loan agreement, the prayer for mandatory injunction would not succeed.
33. Being of the foregoing inclination, I allow the appeal and set aside the ruling and orders of 15<sup>th</sup> September, 2023 and substitute the same with an order dismissing the application dated 13<sup>th</sup> July, 2023 with costs to the Appellants.
34. The Appellants' costs of the appeal shall be borne by the 1<sup>st</sup> Respondent.
35. I order that the suit proceeds for hearing before any other Magistrate of competent jurisdiction other than Hon. T.M. Gesora. The lower court file to be placed before the Chief Magistrate/Head of Station Maua Law Court for mention on 27<sup>th</sup> May, 2025 for further directions.

**DELIVERED (VIRTUALLY), DATED & SIGNED THIS 2<sup>ND</sup> DAY OF MAY, 2025.**

**JOE M. OMIDO**

**JUDGE**

For Appellants: Ms. Maina.

For Respondents: No appearance.

Court Assistants: Mr. Ngoge & Mr. Juma.

