



**Xue v Molova & 3 others (Civil Appeal E1520 of 2024)
[2025] KEHC 12193 (KLR) (Civ) (8 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 12193 (KLR)

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

CIVIL

CIVIL APPEAL E1520 OF 2024

TW CHERERE, J

MAY 8, 2025

BETWEEN

WENLIANG XUE APPELLANT

AND

ALEX KIDAKE MOLOVA 1ST RESPONDENT

CAROLINE MUTHONI KARANJA 2ND RESPONDENT

KIDAKE FOUNDATION LIMITED 3RD RESPONDENT

MWANANCHI CREDIT LIMITED 4TH RESPONDENT

RULING

“When ownership is disputed and trust is alleged, the law must pause the hammer of enforcement—lest it crush a right that has yet to be fully heard.”

Background

1. It is not in dispute that the Appellant has filed a substantive suit before the subordinate court in which the current dispute is a central issue. That suit remains pending. The instant appeal arises from the dismissal of the Appellant’s interlocutory application seeking injunctive relief before that court. This application, therefore, seeks temporary relief pending the hearing and determination of this appeal.

Notice of Motion

2. Before the Court is a Notice of Motion dated 20th December 2024 brought by the Appellant pursuant to Sections 1A, 1B, 3A, and 63(e) of the *Civil Procedure Act*, and Order 42 Rule 6 and Order 40 Rules 1(a) and (b) of the Civil Procedure Rules, 2010. The appellant seeks the following reliefs:



1. That a temporary injunction be issued restraining the respondents, their servants, agents, or any person acting under their authority from auctioning, alienating, disposing of, transferring, or in any other way dealing with motor vehicle registration number KDN 888J, pending the hearing and determination of the appeal;
 2. That the 4th Respondent be compelled to forthwith and unconditionally release the said motor vehicle, which is currently under attachment by Messrs Sirme Agencies Auctioneers, acting on instructions of the 4th Respondent, pending the hearing and determination of the appeal;
 3. That the costs of this application be provided for.
3. This application is predicated upon the grounds set out in the supporting affidavit sworn by the Appellant on 20th December 2024. In the said affidavit, the Appellant deposes that he was introduced to the 1st Respondent by a mutual acquaintance, following which the 1st Respondent introduced him to the 2nd Respondent, who is his wife. The 1st and 2nd Respondents are both directors of the 3rd Respondent. Acting on the advice and representations of the 1st and 2nd Respondents, the Appellant imported a motor vehicle, registration number KDN 888J. He avers that he solely financed the purchase of the said vehicle and met all requisite import duties and charges. Notably, he remitted a sum of KES 4,049,616 to the 1st Respondent for purposes of customs clearance, among other payments, as evidenced by annexed documentation. The vehicle was registered in the name of the 3rd Respondent, which the Appellant contends was solely as trustee and not as the beneficial owner.
 4. The Appellant asserts that he has, at all material times since importation, been in physical possession, custody, and control of the said vehicle. He later learnt that the motor vehicle had been used as security for a loan of KES 7,440,000 advanced by the 4th Respondent to the 2nd Respondent. The loan was secured through a charge registered under the Movable Property Security Rights Act (MPSRA). The Appellant contends that the said arrangement was executed without his knowledge, consent, or authority, and amounted to a fraudulent scheme by the 1st, 2nd and 3rd Respondents to dispossess him of his property. He subsequently lodged a complaint with the police, and the vehicle was taken to Kilimani Police Station.
 5. The Appellant further deposes that his prior application to restrain the auction of the vehicle in the trial court was dismissed on 25th November 2024, prompting the filing of this appeal. He believes the appeal enjoys overwhelming prospects of success and contends that unless injunctive relief is granted, the motor vehicle may be disposed of, rendering the appeal nugatory and occasioning him irreparable loss.
 6. Despite service, the 1st, 2nd and 3rd Respondents did not file any responses or submissions.
 7. The application is opposed by the 4th Respondent through a replying affidavit sworn on 28th January 2025, by one Saleh Jacqueline, who describes herself as the 4th Respondent's legal administrator and analyst.
 8. The 4th Respondent in response contends that it is a stranger to the Appellant and was not privy to any agreement or arrangement between the Appellant and the 1st, 2nd and 3rd Respondents. It is averred that the subject motor vehicle was lawfully charged by the 2nd Respondent as collateral to secure a loan advanced to her, and that at the time of the transaction, the 3rd Respondent was the duly registered owner of the said vehicle. The 4th Respondent disputes the Appellant's assertion of any beneficial interest in the vehicle and maintains that the Appellant has failed to establish a prima facie case with a likelihood of success. Further, it is averred that the motor vehicle was lawfully attached following default in loan repayment, and that its continued detention is causing the 4th Respondent financial



loss, as the outstanding loan continues to accrue interest and penalties, while storage charges on the motor vehicle continue to accumulate.

9. Both parties filed submissions. The Appellant in his submissions dated 07th March 2025 reiterates that the uncontroverted facts establish a beneficial interest in the vehicle. He relies on the principles governing the grant of injunctions pending appeal, as outlined in Raphael Mulinge Muthusi & 2 others v Mary Ndila Nyolo [2022] KEELC 1886 (KLR), Patricia Njeri & 3 Others v National Museum of Kenya [2004] eKLR, and the oft-cited authority of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358.
10. The 4th Respondent, on the other hand, relies on Order 40 Rule 1(a) and (b) of the Civil Procedure Rules and reiterates the principles in *Giella v Cassman Brown*, and reaffirmed in *Nguruman Ltd v Jan Bonde Nielsen & 2 Others* [2014] eKLR that the applicant must demonstrate a prima facie case, the likelihood of suffering irreparable harm, and that the balance of convenience tilts in their favour. In support of what constitutes a prima facie case, the 4th Respondent cited *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, where where the Court held that a prima facie case goes beyond a mere arguable claim — it must disclose an apparent right that has been infringed.
11. To oppose the Appellant’s claim of a trust relationship, the 4th Respondent relies on *Agricultural Finance Corporation v Lengetia Ltd & Jack Mwangi* [1985] KLR 765, which affirms the principle that contractual obligations are enforceable only between parties to the contract. Regarding allegations of fraud, 4th Respondent relies on *United Trading Corporation S.A v Allied Arab Bank Ltd* [1985] 2 Lloyd’s Rep 554, where the court emphasized that fraud must be proved with clear and specific evidence, and not by mere allegations or suspicion.
12. The 4th Respondent also refers to *Pelican Investments Ltd v National Bank of Kenya Ltd* [2000] 2 EA 488 and *Andrew Muriuki Wanjohi v Equity Building Society & Another* [2006] eKLR to urge the Court not to impede the enforcement of security rights unless clear fraud or illegality is shown.

Issues for Determination

13. I have carefully considered the application, affidavits, submissions and authorities cited and the issues arising for determination are:
 1. Whether the appellant has established a prima facie case with a probability of success to warrant the grant of a temporary injunction.
 2. Whether the appellant stands to suffer irreparable harm that cannot be adequately compensated by an award of damages if the injunction is not granted.
 3. Whether the balance of convenience tilts in favour of granting or denying the injunctive relief sought.

Analysis and Determination

14. The law governing the grant of interlocutory injunctions is well settled. In the celebrated case of *Giella v Cassman Brown & Co. Ltd* (supra), the Court laid down three sequential principles:
 1. First, that the applicant must demonstrate a prima facie case with a probability of success;
 2. Second, that the applicant stands to suffer irreparable injury that would not be adequately compensated by damages;
 3. Third, that where the Court is in doubt, it ought to decide the application on the balance of convenience.



15. These principles were further restated and refined in *Nguruman Ltd v Jan Bonde Nielsen & 2 Others* (supra), where the Court of Appeal emphasized that the three conditions are not alternatives but cumulative and sequential.

1. Prima Facie Case

16. A prima facie case was defined in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125 as:

“A case 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.”

17. From the evidence on record, the Appellant has placed before the Court evidence of payments made for the importation and customs clearance of the motor vehicle. He also avers to continued possession and use of the vehicle since its importation. These assertions, forming the foundation of his claim to beneficial ownership, have not been challenged by the 1st, 2nd and 3rd Respondents despite service. Their silence and failure to controvert these material facts gives weight to the Appellant’s assertion that the 1st, 2nd and 3rd Respondents acted without his knowledge or consent when they used the subject motor vehicle as collateral.
18. The 4th Respondent, for its part, admits it does not know the Appellant and had no dealings with him. This fact, far from exonerating the 4th Respondent, in fact lends support to the Appellant’s contention that the 1st, 2nd, and 3rd Respondents may have unlawfully dealt with his property and misrepresented the true ownership of the motor vehicle when offering it as security for the loan. Their conduct, in presenting the 3rd Respondent as the rightful owner, facilitated the creation of a charge over property in which the Appellant claims a beneficial interest.
19. Whereas the 4th Respondent argues that the registered owner was the 3rd Respondent, the Appellant’s claim is based on a constructive trust or resulting trust, and such claims raise triable issues fit for determination on appeal.
20. Accordingly, the Court is satisfied that the Appellant has met the threshold of establishing a prima facie case with a probability of success.

Irreparable Harm

21. The irreparability of the harm must be assessed in light of the specific nature of the subject matter.
22. In *Patricia Njeri & 3 Others v National Museum of Kenya* [2004] eKLR, the Court observed as follows;
- “Irreparable injury means that the injury must be one that cannot be adequately compensated in damages... the injury must be substantial or material.”
23. The vehicle in question is a unique asset in which the Appellant claims full proprietary interest. If sold in execution of a loan the Appellant did not procure and had no part in, he will no doubt suffer a permanent deprivation of property.
24. Even though the 4th Respondent submits that damages would suffice, that argument does not hold where the dispute goes to the heart of ownership and possession rather than mere debt.
25. I am therefore persuaded that the harm likely to be suffered by the Appellant is irreparable and not adequately remediable by damages.



Balance of Convenience

26. Where the Court entertains doubt, it must consider which party stands to suffer greater prejudice from the granting or withholding of the injunction.
27. In *Paul Gitonga Wanjau v Gathuthi Tea Factory Co. Ltd & 2 Others* [2016] eKLR, the Court held:

“Where any doubt exists as to the applicants’ right... the court... takes into consideration the balance of convenience to the parties and the nature of the injury... the court will seek to maintain the status quo in determining where the balance of convenience lies.”
28. From the evidence on record, this Court finds that should the injunction be denied and the subject motor vehicle be sold, the Appellant’s right of appeal will be rendered nugatory, as the subject matter of the dispute, the motor vehicle, will no longer be available for effective relief, should the appeal succeed. This would result in a substantial denial of justice, as the Appellant would be unable to obtain the remedy sought in the appeal.
29. Conversely, in the event the injunction is granted, the court finds that the 4th Respondent’s interest in the motor vehicle will not be extinguished but merely postponed, pending the determination of the appeal. The temporary nature of the injunction would ensure that the status quo is preserved, allowing both parties to retain their respective positions without prejudice. The 4th Respondent’s financial interests would remain secure in the event of an adverse judgment on appeal, while the Appellant’s right to pursue the appeal would remain intact.
30. Consequently, I find that the balance of convenience clearly lies in favour of preserving the subject matter of the dispute, to avoid any irreparable harm or injustice to the Appellant, and to allow the appeal to proceed without the risk of the appeal being rendered academic or futile.

Additional Considerations

31. The 4th Respondent invoked *Pelican Investments Ltd v National Bank of Kenya Ltd* [2000] 2 EA 488 and *Andrew Muriuki Wanjohi v Equity Building Society & Another* [2006] eKLR, to caution against interfering with a chargee’s right of realization. While that position is generally valid, it does not apply where the security itself is impugned, as in this case, where allegations of unauthorized use and breach of trust have been raised.
32. Lastly, in *United Trading Corporation S.A v Allied Arab Bank Ltd* [1985] 2 Lloyd’s Rep 554, it was held:

“The evidence of fraud must be clear... The mere assertion or allegation of fraud would not be sufficient... We would expect the court to require strong corroborative evidence...”
33. Though a full finding on fraud is not made at this stage, the Appellant has raised credible and arguable allegations backed by documents. These allegations merit evidential scrutiny.

Disposition

34. In light of the foregoing, I am satisfied that the Appellant has met the legal threshold for granting a temporary injunction. The application dated 20th December 2024 is merited and is hereby allowed in the following terms:



1. A temporary injunction is hereby issued restraining the Respondents, their agents, servants, or any person acting through them from auctioning, alienating, disposing of, transferring or otherwise dealing with motor vehicle registration number KDN 888J, pending the hearing and determination of this appeal.
2. The 4th Respondent is hereby compelled to forthwith and unconditionally release to the Appellant motor vehicle registration number KDN 888J, which is currently attached by Messrs Sirme Agencies Auctioneers.
3. The Appellant shall retain custody of motor vehicle registration number KDN 888J, and shall take all reasonable steps to ensure its proper preservation and maintenance, pending the final determination of this appeal.
4. The Appellant is directed to ensure that the motor vehicle, registered under number KDN 888J, remains within the jurisdiction of this Court pending the final determination of this appeal and to present the motor vehicle to the Deputy Registrar on the last Friday of each month to confirm its continued availability within the jurisdiction
5. Any failure by the Appellant to comply with the terms of orders (3) and (4) may be considered a breach, and may result in further orders of this Court, including but not limited to, the revocation of this preservation order and/or other appropriate sanctions.
6. The costs of the application shall abide the outcome of the appeal.
7. Mention before the Deputy Registrar on 05th June 2025 to confirm filing of the record of appeal.

DELIVERED AT NAIROBI THIS 08TH DAY OF MAY 2025

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Nyambala

For Appellant - Mr. Githinji for Githinji Mwangi & Associates Advocates

For 1st to 3rd Respondents – Mr. Ngaira for Rashid Ngaira & Associates Advocates

For 4th Respondent - Mr. Isoe for Isoe Joel Law Advocates

