



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Commercial Bank v Ngatu & another (Civil Appeal
E021 of 2025) [2025] KEHC 9568 (KLR) (2 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 9568 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E021 OF 2025
AN ONGERI, J
JULY 2, 2025**

BETWEEN

KENYA COMMERCIAL BANK APPELLANT

AND

JESEE KARWEGO NGATU 1ST RESPONDENT

STANLEY NGOLUA MUROKI 2ND RESPONDENT

RULING

1. The application coming for consideration in this Ruling is dated 20th February 2025 brought under Sections 1A, 1B, 3, 3A of the Civil Procedure Rules, Article 159(2)(d) of *the Constitution* of Kenya, 2010 and all other enabling provisions of the law seeking the following orders:-
 - i. That this motion application be certified urgent and for hearing on a priority basis.
 - ii. That pending hearing and determination of this application, this Honourable Court be pleased to order stay of execution of the ruling delivered on 13th February 2025 and any other consequential order thereto.
 - iii. That pending hearing and determination of the appeal, this Honourable Court be pleased to order stay of execution of the Ruling delivered on 13th February 2025 and any other consequential order thereto.
 - iv. That costs of this application be in the cause.
2. The application is based on the following grounds:-
 - i. On 13th February 2025, the Magistrate at Taveta (hereinafter “the Learned Magistrate”) delivered a ruling granting among other orders, the unconditional release of motor vehicle registration number KDD 124V (“the Motor Vehicle”).



- ii. In arriving at this decision, the Learned Magistrate observed that special circumstances existed, warranting the issuance of a mandatory injunction. Specifically the court noted that the 1st Respondent had already paid Kshs. 6Million toward the first loan, and the repayment period had not yet lapsed.
 - iii. The Magistrate also observed that the second loan was unsecured and that no express provision designated the Motor Vehicle as security for it.
 - iv. The findings aforesaid of the Learned Magistrate are erroneous for the following reasons:
 - v. The Learned Magistrate erred in unconditionally ordered the release of the Motor Vehicle without considering the outstanding arrears on the first loan and in disregard of the express provisions of the Letter of Offer and the Vehicle and Asset Finance Agreement.
 - vi. Applying this principle, the Learned Magistrate’s decision to unconditionally release the Motor Vehicle – despite substantial arrears on both loans – is legally flawed.
 - vii. Accordingly, it is evident that the Appeal raises substantial and arguable legal grounds with a high likelihood of success.
 - viii. The arrears on the 1st loan now exceed the value of the Motor Vehicle. Given the 1st Respondent’s failure to service the loan, there is a real risk that the Applicant will suffer irreparable loss should the vehicle be released before the pending appeal is heard and determined.
 - ix. Failure to grant a stay of execution will render the pending appeal nugatory and severely prejudice the Applicant’s right to recover its debt.
 - x. In the interest of justice, this Honourable Court is urged to issue a stay of execution pending the hearing and determination of the Appeal.
 - xi. Further legal argument will be made at the hearing of the application.
3. The application is supported by the affidavit of John Egesa Mukewa in which he deponed as follows:-
- i. I am the branch manager at the Applicant’s Branch in Taveta. In my capacity aforesaid, I am well seized of the facts of this matter and being duly authorized by the Applicant, I am competent to swear this affidavit.
 - ii. On 6th September 2024, the Respondents filed a Notice of Motion under certificate of urgency (hereinafter “the Injunction Application”) seeking several orders inter alia:
 - a. An order restraining the Appellant from selling or in any way disposing off Motor Vehicle registration number KDD 124V make Isuzu FTR 90 SU (hereinafter “the Motor Vehicle”).
 - b. An order for the unconditional release of the motor vehicle to the Respondents.

I produce a copy of the Injunction Application and mark it Exhibit-JM1 for the kind perusal and consideration of this Honourable Court
 - iii. The Injunction Application was opposed by the Appellant by way of a Replying Affidavit sworn on 30th September 2024 arguing inter alia that:-
 - a. The 1st Respondent took two loans from the Appellant, the first loan amounting to Kshs. 6,128,359.00 (hereinafter “the 1st Loan”) which loan was secured by joint



registration of the Motor Vehicle, and the second unsecured loan amounting to Kshs. 3,000,000.00.

- b. The 1st Respondent had at the time of filing the suit, in arrears of Kshs. 1,455,449.25 on the 1st Loan and Kshs. 2,551,651.97 for the 2nd Loan had completely stopped servicing it.
- c. Clause 8.3 of the Letter of Offer designates the Motor Vehicle as continuing security for all amounts the 1st Respondent may owe the Appellant at any time.
- d. Clause 11 of the Letter of Offer provides that an event of default – including repossession – occurs if the 1st Respondent’s debt becomes immediately due, payable, or in default, or if the 1st Respondent fails to discharge any indebtedness by its due date.
- e. Clause 3(e) of the Vehicle and Asset Finance Agreement expressly authorizes the Bank to consolidate all liabilities of the customer and set off any amounts owed without prior notice.

I produce a copy of the Replying Affidavit and mark it Exhibit-JM2 for the kind perusal and consideration of this Honourable Court.

- iv. The Injunction Application was heard by way of written submissions and on 13th February 2025 the Learned Magistrate delivered a ruling granting, among other orders the unconditional release of the Motor Vehicle. I produce a copy of the Ruling and mark it Exhibit-JM3 for the kind perusal and consideration of this Honourable Court.
- v. In arriving at this decision, the Learned Magistrate observed that special circumstances existed, warranting the issuance of a mandatory injunction. Specifically, the court noted that:-
 - a. The 1st Respondent had already paid Kshs. 6Million toward the 1st Loan and the repayment period had not yet lapsed.
 - b. The 2nd Loan was unsecured and that no express provision designated the Motor Vehicle as security for it.
- vi. The findings of the Learned Magistrate were fundamentally erroneous for the following reasons:
 - a. The Learned Magistrate failed to appreciate that at the time of filing the suit, the 1st Loan was in arrears of Kshs. 1,455,449.25 and the 1st Respondent had completely stopped servicing it.
 - b. The Learned Magistrate failed to consider that Clause 8.3 of the Letter of Offer expressly designated the Motor Vehicle as continuing security for all amounts owed to the Applicant.
 - c. The Learned Magistrate overlooked Clause 11 of the Letter of Offer, which clearly provided that an event of default would occur if the 1st Respondent’s indebtedness became immediately due, payable, or in default, or if the 1st Respondent failed to discharge any indebtedness by its due date.
 - d. The Learned Magistrate failed to appreciate Clause 3(e) of the Vehicle and Asset Finance Agreement which expressly authorized the Applicant to consolidate all liabilities of the 1st Respondent and set off any outstanding amounts owed without prior notice.



- e. The Learned Magistrate wrongly introduced extraneous material to support his findings, thereby descending into the arena of litigation and adopting a biased approach in favor of one party.
 - f. The Learned Magistrate’s decision contradicted the evidence and facts presented before him and failed to fully consider the Applicant’s submissions.
 - g. The Learned Magistrate’s preconceived stance against the Applicant deprived the Applicant of the right to a fair and impartial hearing.
 - h. The ruling was internally inconsistent, plainly erroneous and unfair in effect.
- vii. The Learned Magistrate’s decision to unconditionally release the Motor Vehicle without considering the loan arrears or the express terms of the Letter of Offer and Vehicle and Asset Finance Agreement – was legally flawed.
- viii. I am advised and so submit, that it is settled law, as recently affirmed in *Ann Wangari Thuku & Another =Versus= Kenya Commercial Bank, Milimani HCCC No. E282 of 2022* that:
- “In an application for an equitable order such as an injunction, diligence, good faith, genuineness and clean hands are required. In a suit arising from a bank loan, the party unperturbed by his default must be perceived as having unclean hands. Courts should not be a hiding ground for unconscionable loanees who have critically defaulted on loan repayments. Nor should they serve as a parking bay for cases filed merely to buy time and delay inevitable consequences. To this extent, courts should provide neither refuge nor asylum. An injunction, being an equitable remedy cannot issue where the loan is in arrears and the Applicant has completely neglected their obligation to repay it.”
- ix. Applying this principle, the Learned Magistrate’s decision to unconditionally release the Motor Vehicle – despite substantial arrears on both loans – is legally flawed.
- x. Accordingly, it is evident that the Appeal raises substantial and arguable legal grounds with a high likelihood of success.
- xi. As of 19th February 2025, the arrears on the 1st Loan exceed the value of the Motor Vehicle. Given that the 1st Respondent has ceased servicing the loan, the Applicant has a justifiable apprehension that unless a stay of execution is granted and the Motor Vehicle is released unconditionally, there is a real and imminent risk that the 1st Respondent may dispose of, transfer, or conceal it thereby frustrating any attempts at recovery and exposing the Applicant to significant and irreparable financial loss. The Motor Vehicle remains the only viable security available to the Applicant, given the substantial loan arrears.
- xii. It is in the interests of justice that a stay of execution be granted to preserve the subject matter of the dispute and safeguard the Applicant’s right to recover the outstanding loan. Failure to grant the stay will render the pending appeal nugatory, as the Applicant will be left without any means of securing its financial interest in the event of a successful appeal.
4. The Respondent filed a Replying Affidavit sworn by Jesse Karwego Ngatu opposing the application.
5. The parties filed written submissions as follows;



6. The Appellant, Kenya Commercial Bank Limited, submitted that they are seeking a stay of execution of the ruling delivered on 13th February 2025 by the Principal Magistrate at Taveta, which ordered the unconditional release of Motor Vehicle Registration No. KDD 124V to the 1st Respondent, Jesse Karwego Ngatu.
7. That the ruling arose from a case where the bank had repossessed the vehicle due to the 1st Respondent's default on loan repayments.
8. The Appellant argued that the appeal is arguable, as it raises substantial legal and factual issues, including whether the trial court erred in granting a mandatory order for the vehicle's release at an interlocutory stage, misinterpreted the loan agreement's default clauses, and disregarded the bank's rights as a secured creditor.
9. The Appellant contends that without a stay, the appeal will be rendered nugatory, as releasing the vehicle would irreversibly deprive the bank of its collateral, leaving it with no recourse if the appeal succeeds.
10. Further, the appellant submitted that the application was filed without delay, and the Appellant is willing to provide security as the court may deem fit.
11. The bank urged the court to grant the stay to preserve the subject matter of the appeal and prevent irreparable harm.
12. The submissions rely on Order 42 Rule 6 of the Civil Procedure Rules and supporting case law to demonstrate that the legal threshold for a stay has been met.
13. The Appellant prays for the court's favorable exercise of discretion to stay the lower court's orders pending the appeal's determination.
14. The respondents opposed the appellant's application for a stay of execution, arguing that the appellant has not met the legal threshold for injunctive relief.
15. The respondents contended that the appellant illegally repossessed the motor vehicle without serving the required notices or proving the alleged loan arrears.
16. The respondents highlighted that the loan agreement and letter of offer stipulated written communication for any demands or notices, yet the appellant failed to provide evidence of proper service.
17. Citing case law such as *Giella v Cassman Brown and Trust Bank Ltd v Eros Chemists Ltd*, they emphasized that injunctive relief is equitable and should not reward illegal conduct.
18. The respondents further asserted that the appellant has not substantiated its claim of arrears, as it failed to present clear evidence of the loan terms, repayment structure, or how the alleged default arose.
19. That the bank statements provided are insufficient without contextualizing the loan agreement.
20. The respondents argued that the appellant introduced new evidence at the appellate stage, which was never presented during the trial, undermining its credibility.
21. In conclusion, the respondents urged the court to dismiss the application, as the appellant's actions were unlawful and unjustified.
22. They relied on the principle from *Benjamin Leonard McFoy v United Africa Company Ltd* that an act founded on illegality is void.



23. Since the repossession was improper, the respondents maintained that justice favours returning the vehicle to them, and the appellant's request for a stay of execution should be denied with costs.
24. The sole issue for determination is whether the Ruling dated 13th February 2025 should be stayed.
25. I have considered the affidavits filed herein together with the submissions.
26. The application before this Court seeks a stay of execution of the ruling delivered on 13th February 2025 by the Principal Magistrate at Taveta, which ordered the unconditional release of Motor Vehicle Registration No. KDD 124V to the 1st Respondent.
27. The application is premised on Sections 1A, 1B, 3, and 3A of the Civil Procedure Rules, Article 159(2) (d) of *the Constitution* of Kenya, 2010, and other enabling provisions of the law.
28. The Appellant, Kenya Commercial Bank Limited, contends that the appeal raises substantial legal and factual issues, including whether the trial court erred in granting a mandatory injunction for the vehicle's release at an interlocutory stage, misinterpreted the loan agreement's default clauses, and disregarded the bank's rights as a secured creditor.
29. The Appellant further argues that without a stay, the appeal will be rendered nugatory, as releasing the vehicle would irreversibly deprive the bank of its collateral, leaving it with no recourse if the appeal succeeds.
30. The principles governing the grant of a stay of execution pending appeal are well settled under Order 42 Rule 6 of the Civil Procedure Rules.
31. The applicant must demonstrate that the appeal is arguable, that the appeal will be rendered nugatory if the stay is not granted, and that the application was made without undue delay.
32. In *Halai & Another v Thornton & Turpin (1963) Ltd* [1990] KLR 365, the Court of Appeal emphasized that the purpose of a stay is to preserve the subject matter of the appeal to ensure that the successful appellant is not deprived of the fruits of their judgment.
33. In the present case, the Appellant has established that the appeal is arguable.
34. The trial court's ruling hinged on the finding that special circumstances existed to warrant the issuance of a mandatory injunction, particularly noting that the 1st Respondent had paid Kshs. 6 million towards the first loan and that the repayment period had not lapsed.
35. However, the Appellant contends that the trial court failed to consider the express terms of the Letter of Offer and the Vehicle and Asset Finance Agreement, which designated the motor vehicle as continuing security for all amounts owed to the bank.
36. Clause 8.3 of the Letter of Offer expressly provides that the motor vehicle shall remain as security for all amounts owed to the bank, while Clause 11 stipulates that an event of default occurs if the borrower fails to discharge any indebtedness by its due date.
37. The trial court's omission to consider these clauses raises a substantial legal issue, as held in *Ann Wangari Thuku & Another v Kenya Commercial Bank* [2022] eKLR, where the court emphasized that equitable remedies such as injunctions cannot issue where a loan is in arrears and the borrower has neglected their repayment obligations.
38. On the nugatory aspect, the Appellant has demonstrated that the arrears on the first loan now exceed the value of the motor vehicle, and the 1st Respondent has ceased servicing the loan.



39. If the vehicle is released unconditionally, there is a real risk that the Appellant will suffer irreparable loss, as the 1st Respondent may dispose of or conceal the vehicle, thereby frustrating any recovery efforts.
40. The motor vehicle is the only viable security for the loan, and its release would leave the Appellant without recourse, rendering the appeal nugatory.
41. The application was filed on 20th February 2025, barely a week after the ruling was delivered, and thus there is no undue delay.
42. The Appellant has also expressed willingness to provide security as the court may deem fit, which further tilts the balance in its favour.
43. In *Focin Motorcycle Co. Limited v Ann Wambui Wangui & Another* [2018] eKLR, the court emphasized that the discretion to grant a stay must be exercised judiciously to balance the interests of both parties.
44. The Respondents' opposition to the application is premised on the argument that the Appellant illegally repossessed the vehicle without serving the required notices or proving the alleged arrears.
45. They relied on *Giella v Cassman Brown* [1973] EA 358 and *Trust Bank Ltd v Eros Chemists Ltd* [2000] eKLR to argue that injunctive relief is equitable and should not reward illegal conduct.
46. However, the Appellant has provided evidence of the loan agreements, the arrears, and the clauses that authorize repossession upon default.
47. The Respondents' contention that the Appellant introduced new evidence at the appellate stage is unfounded, as the Replying Affidavit filed in the lower court explicitly referenced the loan agreements and the arrears.
48. The principle in *Benjamin Leonard McFoy v United Africa Company Ltd* [1961] 3 All ER 1169, that an act founded on illegality is void, does not apply here, as the repossession was pursuant to the terms of the loan agreement.
49. In conclusion, the Appellant has satisfied the requirements for a stay of execution pending appeal.
50. The appeal is arguable, the release of the vehicle would render the appeal nugatory, and the application was filed without delay.
51. Accordingly, the ruling delivered on February 13, 2025 is hereby stayed pending the hearing and determination of the appeal.
52. The costs of this application shall be in the cause.

DATED, SIGNED AND DELIVERED THIS 2ND DAY, JULY 2025 VIRTUALLY VIA MT AT VOI HIGH COURT.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Millicent

.....for Appellant

.....for Respondents

