



**Waithaka v Letshego Kenya Limited (Commercial Appeal E201 of 2024)
[2025] KEHC 10036 (KLR) (Commercial and Tax) (10 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10036 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E201 OF 2024**

PM MULWA, J

JULY 10, 2025

BETWEEN

PURITY WANGECHI WAITHAKA APPELLANT

AND

LETSHEGO KENYA LIMITED RESPONDENT

RULING

Introduction and Background

1. The Appellant has filed the Notice of Motion dated 13th August 2024 seeking to restrain the Respondent from dealing with her motor vehicle, registration number KCQ *K Toyota Hiace (the motor vehicle) pending the hearing and determination of the appeal. She also seeks an order for statement of accounts showing detailed loan repayments by her to the Respondent. This application stems from a ruling of the subordinate court where the Appellant's application for an injunction to prevent the Respondent from attaching, advertising for sale, selling, or dealing with the motor vehicle was dismissed. The Appellant is dissatisfied with the ruling and has filed the present appeal that is pending determination.
2. The application is supported by grounds on its face and the Appellant's affidavit sworn on 13th August 2024 and it is opposed by the Respondent through the replying affidavit of its advocate on record, Eve Vivian Ouko, sworn on 27th November 2024. The parties have also supplemented their arguments by filing written submissions which I have considered and I will be making relevant references to in my analysis and determination below.



Analysis and determination

3. From the pleadings and submissions, the main issues for the court's determination are whether the Appellant is entitled to the injunctive relief pending appeal and whether the Respondent should be ordered to furnish the Appellant with a statement of accounts showing her repayments to the Respondent.
4. The Appellant's position is that she is the lawful owner of the motor vehicle which was used as security for a loan from the Respondent on 7th November 2022 and that on 31st July 2024, the subordinate court dismissed her interlocutory application for a stay of execution. The Appellant states that she has preferred an appeal with high chances of success and that on or about 18th August 2024, the Respondent, through auctioneers, proclaimed the motor vehicle, which had previously been restrained by a criminal trial court at Makadara. The Appellant claims that she has made several repayments, starting with Kshs. 81,118.00 on 2nd December 2023 and that notwithstanding a valid court order issued on 15th June 2022, by Hon. Francis Kyambia (CM) in Makadara Criminal Case No. 1609 of 2018, prohibiting the disposal of the motor vehicle until the determination of the criminal trial, the Respondent proceeded to attach it.
5. The Appellant presents the following issues for the court's determination:
 - i. Will the Appeal be rendered nugatory if the restraining orders are not granted to the Applicant?
 - ii. Whether the Appellant has established a prima facie case with high chances of success.
 - iii. Whether the Appellant is likely to suffer irreparable loss that cannot be compensated by an award of damages.
 - iv. If the Court is in doubt, it should decide on a balance of convenience in favor of the Appellant
6. The Appellant argues that she has paid a substantial sum towards the loan and is in possession of the motor vehicle used as security and that if the Respondent is not restrained, she may lose both her money and the security, thus rendering the appeal nugatory. She submits that she was offered a Boresha Premium facility of Kshs. 1,400,000.00 for 36 months at Kshs. 61,080.98 per month, and offered property JUJA/KOMO BLOCK 1/782 and joint registration of the motor vehicle as security and she asserts that she has established a prima facie case with high chances of success, and is entitled to accounts of loan repayment to date under Order 20 Rule (1) & (2) of the Civil Procedure Rules.
7. The Appellant argues that the loss of the property JUJA/KOMO BLOCK 1/782 and the motor vehicle would constitute irreparable loss that cannot be compensated by damages and that the balance of convenience tilts in her favor because she stands to suffer irreparable harm that cannot be compensated by damages. The Appellant refers to the three-part test for granting an injunction from R. J. R. Macdonald -Vs. Canada Attorney General [1994] I.S.C.R 311, which considers a serious issue to be tried, irreparable harm to the applicant, and which party will suffer greater harm. She also cites various authorities to support her argument that the inconvenience caused to her would be greater if the injunction is not granted and the suit is ultimately decided in her favor. The Appellant emphasizes that the court should seek to maintain the status quo.
8. In response, the Respondent depones that the learned magistrate heard the Appellant's application on merit and dismissed it, declining to grant the temporary orders of injunction because the Appellant was indebted to the Respondent. It submits that the issues for determination are:
 - i. Whether the Appellant's application is frivolous, vexatious, and an abuse of the Court process.



- ii. Whether the application is res judicata and an abuse of the Court process.
 - iii. Whether the Appellant is entitled to the orders sought.
9. The Respondent submits that the application fails to meet the conditions for a stay of execution under Order 42 Rule 6(2) of the Rules which requires satisfaction that substantial loss may result to the applicant unless the order is made, and that the application has been made without unreasonable delay. Further, that provision of security must be made for the due performance of such decree or order as may ultimately be binding on the applicant.
 10. The Respondent further submits that the application does not specify the trial court from which a stay of execution is sought, nor the ruling or appeal it relates to, making it incurably defective and its sought orders incapable of execution. That the main suit in Nairobi MCCC/E3793/2023 is proceeding for a pre-trial conference, making a stay of execution order in vain and that the grounds of the application do not support a stay of execution, as merely putting the execution process in motion does not amount to substantial loss. It states that there cannot be a stay of execution pending an appeal arising from a ruling that merely dismissed an application without requiring any performance from the parties and that the subordinate court's ruling simply dismissed the application with costs. That the Appellant's prayers for temporary injunction and a statement of accounts in the current application seek new and conflicting orders rather than seeking to stay or set aside the Trial Court's ruling.
 11. As such, the Respondent contends that the application is frivolous and vexatious as it is without substance, is groundless, lacks bona fides, and tends to cause unnecessary anxiety, trouble, or expenses and that it seeks to determine issues already determined by the Trial Court without vacation, indicating it is incurably defective and not a proper appeal.
 12. The Respondent asserts that the application is res judicata, citing Section 7 of the *Civil Procedure Act* and contends that the Appellant previously filed a similar application dated 21st January 2023, in seeking temporary injunction orders against the sale of the motor vehicle and orders for a statement of accounts and that the Trial Court heard both parties on merit and dismissed the application on 31st July 2024, determining that the Appellant had not established a prima facie case with a high probability of success.
 13. Further, the Respondent stated that the Trial Court had the necessary jurisdiction to deal with the previous application, and the parties were the same, that the issues raised in the current application are similar and arise from the same facts (financial facility, default, and intended sale of the motor vehicle) and that the Trial Court's ruling made a definitive determination on the issues of temporary injunction and a statement of accounts, rendering the current application res judicata. The Respondent cites *Kivanga Estates Limited v National Bank of Kenya Limited* [2017] KECA 591 (KLR) to support the argument against abuse of court process and forum shopping.
 14. The Respondent states that even if the application were considered despite its defects, the Appellant has failed to meet the threshold for granting an injunction as set out in *Giella v Cassman Brown & Co. Ltd* [1973] EA 358. It submits that the Appellant willfully approached the Respondent for a financial facility of Kshs. 1,400,000.00 to pay off her car loan for the purchase of the motor vehicle. The loan agreement stipulated security over the property Juja/Komo Block 1/782 and joint registration of the motor vehicle and the Appellant was required to repay in 36 equal monthly installments of Kshs 61,080.98.00 from February 2023, and the entire loan became repayable upon demand in case of default.



15. The Respondent claims that the Appellant made sporadic and irregular payments, with an outstanding balance of Kshs. 1,754,602.36 as of 14th November 2024 and that her last payment was Kshs. 10,000.00 on 11th March 2024, which was insufficient. Thus, the Respondent maintains that the Appellant is in perpetual default and has failed to establish a prima facie case.
16. The Respondent argues that the motor vehicle is a moveable asset whose value can be monetarily quantified through valuation and that the Respondent has the financial capacity to compensate the Appellant if her appeal is successful and that the Appellant has not stated the specific loss or damage she would suffer if the vehicle were sold. It argues that the balance of convenience tilts in the Respondent's favor because the Appellant is in clear default of repayment and has not disputed the amounts due.
17. The Respondent also points out that if a criminal case is pending, the Appellant misled the Respondent by using the motor vehicle as security despite court orders barring its disposal. That the criminal proceedings have been ongoing for over five years, and an injunction would allow the Appellant to continue defaulting indefinitely, causing continuous losses to the Respondent which would be unfair to the lender.
18. The Respondent further states that the Appellant has failed to provide current proceedings of the criminal court and that the Appellant is estopped from denying the enforceability of the security given that the motor vehicle was registered as a moveable security. Further, that the Appellant has failed to show how the disposal of the vehicle would compromise the criminal proceedings, especially since photographs were ordered. In conclusion, the Respondent submits that the Appellant is forum shopping and has failed to meet the requirements for equitable orders of injunction. Therefore, the Respondent prays that the Appellant's application be dismissed with costs.
19. Whereas the Respondent has stated that this application is res judicata as the same was heard by the subordinate court, I note that Order 42 Rule 6 of the Civil Procedure Rules actually empowers this court in exercising its appellate jurisdiction to grant a temporary injunction. The rule provides that:
 - “(6) Notwithstanding anything contained in sub rule (1) of this rule, the High Court shall have power in exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or a tribunal has been complied with.”
20. From the above provision, a court will only exercise its discretion to grant an injunction where the procedure for instituting an appeal has been complied with. Since the Appellant has filed a memorandum of appeal stating the ruling being appealed from and the grounds of the appeal, I find that the procedure for instituting the appeal have been complied with (see *Umar Auto Garage New & another v Githere Investments Limited* [2022] KEELC 203 (KLR)).
21. With that out of the way, the court can now determine whether the Appellant has made out a case for the grant of interim injunction where *Visram J.*, (as he then was), while considering an application similar to the one before the court in the case of *Patricia Njeri & 3 Others v National Museum of Kenya* [2004] KEHC 1614 (KLR) spelt out the principles to be followed in considering such an application. He stated that the power of the court to grant any order of temporary injunction is discretionary and that the discretion must however be exercised judicially and not in a whimsical or arbitrary fashion. He added that the exercise of that discretion should be guided by certain principles as follows:
 - a. The discretion will be exercised against an applicant whose appeal is frivolous.



- b. The discretion should be refused where it would inflict greater hardship than it would avoid.
 - c. The Applicant must show that to refuse the injunction would render his appeal nugatory.
 - d. The court should be guided by the principles in *Giella Vs Cassman Brown & Company Ltd* (1973) EA 358.
22. From the record, I cannot say that the appeal is frivolous considering the Appellant raises valid grounds including that the motor vehicle was sold despite the existence of a court order in a separate criminal trial. However, even though the Appellant states that she has made “substantial payments” towards repaying the loan, I note that by stating that she qualifies for a rescheduling of the loan implies that she admits to still being indebted to the Respondent. This admission of indebtedness takes her out of the ambit of a prima facie case as set out in *Giella v Cassman Brown* (supra) and an injunction cannot be granted in such circumstances.
23. Further, I am in agreement that the appeal would not be rendered nugatory if the injunction is not granted as the Respondent can always compensate the Appellant if the appeal is successful considering the motor vehicle’s value is finite. No irreparable loss can actually be occasioned upon the Appellant as she claims as the same can be assuaged by way of damages. In any event, I find that the balance of convenience tilts in favour of the Respondent as the motor vehicle’s value keeps depreciating and the debt may outstrip its value in the long run.
24. In sum, I find that the Appellant has not met the test for the grant of an order of interim injunction pending the hearing and determination of the appeal. On the production of accounts, as the Respondent has annexed the Appellant’s loan account statement as at 14th November 2024 and the same is marked as EVO-4 in the Respondent’s deposition, I find the prayer for a Statement of Accounts redundant.

Conclusion and disposition

25. In the upshot, the application dated 13th August 2024 is dismissed with costs.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 10TH DAY OF JULY 2025.

PETER M. MULWA

JUDGE

In the presence of:

N/A for Appellant/Applicant

Ms. Kimathi for Respondent

Court Assistant: Carlos

