



**Platinum Credit Limited v Ahmed & another (Civil Appeal  
E142 of 2021) [2023] KEHC 2302 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2302 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E142 OF 2021  
F WANGARI, J  
MARCH 17, 2023**

**BETWEEN**

**PLATINUM CREDIT LIMITED ..... APPELLANT**

**AND**

**AHMED BUNU HAJI AHMED ..... 1<sup>ST</sup> RESPONDENT**

**CASH GATE AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the Ruling and Order of the Hon. J.M. Nyariki,  
Resident Magistrate sitting at Mombasa Chief Magistrates' Court as  
delivered on 14th September, 2021 in Civil Case Number 19 of 2021)*

**JUDGMENT**

1. This is an appeal against the ruling delivered by Honourable J.M. Nyariki, Resident Magistrate on 14<sup>th</sup> September, 2021. The Appellant being dissatisfied with the said ruling has preferred this appeal. The Appellant preferred a total of eight (8) grounds of appeal in urging this court to set aside the ruling delivered on 14<sup>th</sup> September, 2021 amongst them that the Learned Trial Magistrate erred in law and fact by allowing the 1<sup>st</sup> Respondent's notice of motion application dated 13<sup>th</sup> January, 2021 as filed in Mombasa CMCC No. 19 of 2021 yet the application did not meet the requirements for grant of the orders sought.
2. Directions were taken and the appeal was disposed of by way of written submissions where both the Appellant and the Respondents duly complied and relied on various decisions in support of their rival positions.
3. As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Ano. vs. Associated Motor Boat Co. Ltd* (1968) EA 123). This court nevertheless appreciates that an appellate



Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni – versus- Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga –versus- Kiruga & Another* (1988) KLR 348).

4. I have carefully perused and understood the contents of the pleadings, application, proceedings, proceedings, grounds of appeal, submissions and the decisions referred to by the parties. To be able to ascertain whether the ruling ought to stand or otherwise I will carefully revisit the record.
5. The 1<sup>st</sup> Respondent vide a plaint dated 13<sup>th</sup> January, 2021 and filed on an even date sought for judgement against the Appellant and the 2<sup>nd</sup> Respondent (Defendants before the Lower Court) for orders of permanent injunction restraining them, their servants and/or agents from proceeding with the sale, transferring and/or in any way dealing with the Plaintiff's motor vehicle registration number KCM 721F Toyota Prado and the 1<sup>st</sup> Defendant be compelled to unconditionally release the said motor vehicle registration number KCM 721F Toyota Prado to the Plaintiff forthwith. There was equally a prayer for general damages and exemplary damages for breach of contract together with costs of the suit.
6. Contemporaneously with the suit, the 1<sup>st</sup> Respondent filed an application wherein he sought for several orders among them an order for the release of motor vehicle registration number KCM 721F. The application was certified urgent and thereafter fixed for interpartes hearing. The application was disposed of by way of written submissions. The Trial Court upon considering the application, responses and the submissions, delivered its ruling on 14<sup>th</sup> September, 2021 wherein it allowed the application dated 13<sup>th</sup> January, 2021. This is what precipitated the present appeal.

### **Appellant's Submissions**

7. The Appellant argued grounds 2, 3, 4 and 8 of the appeal together and grounds 1, 5, 6 and 7 together. It was submitted that the Appellant and one Zachariah Gichiri Kariuki executed a loan agreement date 25<sup>th</sup> March, 2020. The agreement was subsequently restructured vide the log book financing loan application forms dated 29<sup>th</sup> October, 2020 together with the terms and conditions. It was a term of the agreement that the motor vehicle was to be utilized as a collateral to secure the borrower's indebtedness thus the same was subsequently jointly registered in the names of the Appellant and the borrower.
8. Citing section 15 of the Moveable Properties Securities Rights Act, No. 13 of 2017 (hereinafter MPSRA), the Appellant submitted that for a security right to be effective against third parties, a notice with respect to the security right must be registered with the Registrar of security rights. It was the Appellant's view that it had demonstrated it registered interest in the motor vehicle with the registrar of security rights as required by the law. The case of *I & M Bank Limited v ABC Bank Limited & Another* [2021] eKLR was cited for this proposition.
9. Sections 26 and 34 of MPSRA as well as section 19 (2) were cited by the Appellant to challenge the 1<sup>st</sup> Respondent's position of being a bonafide purchaser without any notice. On mode of disposal of motor vehicle jointly owned by two people in execution of a decree of court, the Appellant submitted that the interest of the judgement debtor is only available for attachment by way of notice prohibiting alienation of the property jointly owned to third parties. Order 41 Rule 41 of the Civil Procedure Rules, 2010 and the case of *C.M.C Motor Group Limited v Garex Kenya Ltd & Another* [2001] eKLR were cited in support of this proposition.
10. On grounds 1, 5, 6 and 7, the Appellant submitted that the three conditions for grant of interlocutory injunction as set is the case of *Giella v Cassman Brown & Co. Ltd* [1973] 1 EA 358 were not met



by the 1<sup>st</sup> Respondent. The case of *Nguruman Ltd v Jan Bonde Nielsen & 2 Others* [2014] eKLR was cited for the proposition that the existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between. The Appellant therefore urged that the appeal be allowed and the Lower Court ruling be set aside with costs.

### **1<sup>st</sup> Respondent’s Submissions**

11. The 1<sup>st</sup> Respondent isolated two issues for determination which are whether the mandatory injunction granted by the Learned Magistrate ought to have been granted and secondly, whether he had met the threshold for the grant of the orders on interlocutory injunction. Citing various authorities among them *Magnate Ventures Ltd v Eng. Kenya Ltd* [2009] eKLR, *Mbuthia v Jimba Credit Finance Corporation & Another* [1988] eKLR, *Sheng Shuang Quarry Limited v National Industrial & Credit Bank Ltd* [2019] eKLR, *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] eKLR, *Weston Gitonga & 10 Others v Peter Rugu Gikanga & Another* [2017] eKLR and *Katana Kalume & Another v Municipal Council of Mombasa & Another* [2019] eKLR, the 1<sup>st</sup> Respondent resolved the two (2) issues it had identified in the affirmative. In the end, he prayed that the appeal be dismissed with costs.

### **2<sup>nd</sup> Respondent’s Submissions**

12. The 2<sup>nd</sup> Respondent identified one (1) issue being whether the appeal filed was proper. It was submitted that the present appeal is misplaced and a mischievous attempt by the Appellant to confer this court jurisdiction while there are similar proceedings in relation to the same subject matter in CMCC No. 19 of 2021. According to the 2<sup>nd</sup> Respondent, this appeal offends the provisions of section of the [Civil Procedure Act](#) as the same is res subjudice. Reliance was placed on the case of *Francis Ndahebwa Twala v Ben Nganyi* [2018] eKLR. The 2<sup>nd</sup> Appellant thus prayed that the appeal be struck out with costs with an order that CMCC No. 19 of 2021 does proceed to its logical conclusion.

### **Analysis and Determination**

13. After considering the pleadings, evidence, submissions and the law, I find that the following are the issues for determination: -
  - a. Whether the appeal should be struck out;
  - b. If the answer to (a) above is in the negative;
  - c. Whether the 1<sup>st</sup> Respondent met the threshold for grant of interlocutory injunction;
  - d. Whether the mandatory injunction issued was merited; and
  - e. What is the order as to costs?
14. The 2<sup>nd</sup> Respondent has poured cold water on the competence of the appeal on the grounds that the Appellant’s application for stay of execution orders was dismissed hence this court has no jurisdiction. Having perused the court record, I note that this court got seized of the matter on 24<sup>th</sup> September, 2021 when an application of even date was filed. The court having considered the said application issued stay of execution orders of the ruling delivered on 24<sup>th</sup> September, 2021 and thereafter fixed the application for interpartes hearing. The court having considered the application, responses and submissions of the parties allowed the application on 10<sup>th</sup> March, 2022.



15. I note from the said ruling that the orders for stay were confirmed pending the hearing and determination of the appeal. Secondly, the proceedings in CMCC No. 19 of 2021 were stayed pending the hearing and determination of the appeal. Based on the foregoing, I am satisfied that the appeal herein is competent and I thus return a negative finding as to the first issue.
16. Having found as above, I turn to the third issue. The application before the Lower Court was seeking interlocutory orders of injunction as well as mandatory injunction. The principles in granting or denying the same are now old adage (see *Giella V. Cassman Brown & Co. Ltd* [1973] EA 358) The fundamentals about the implications of the interlocutory orders of injunction are settled, at least for over four decades, since *Giella* (supra) they could neither be questioned nor be elaborated in detailed research. Since those principles are already codified by authoritative pronouncements in the precedents, they may be conveniently noted in brief as follows: - In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
- (a) establish his case only at a prima facie level,
  - (b) demonstrate irreparable injury if a temporary injunction is not granted, and
  - (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.
17. As held in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* (supra), the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the Applicant is expected to surmount sequentially. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.
18. The Court of Appeal in *Mrao Ltd V First American Bank of Kenya Ltd* [2003] KLR 125 defined a prima facie case to mean: -
- “ ... In civil cases, a prima facie case 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case...”
19. It has been held 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. In the present case, the 1<sup>st</sup> Respondent approached the Trial Court complaining that his motor vehicle registration number KCM 721F had been by the Appellant and he thus sought for orders to preserve the said vehicle. The trial court found that a prima facie case had been established.
20. On this appeal, the Appellant contends that the 1<sup>st</sup> Respondent has not demonstrated that he has a prima facie case as he has failed to establish any infringement of its right to warrant the grant of the injunction sought. Its grounds are that the subject motor vehicle was a loan facility advanced to the borrower. The Appellant has dwelt in detail on several provisions of Moveable Property Security Rights Act to assert its rights over the subject motor vehicle and in my considered view, a full analysis of the said provisions would turn the matter into a mini-trial as those are issues which ought to be reserved



for the full hearing. I am satisfied that the 1<sup>st</sup> Respondent made out a prima facie case and I therefore cannot fault the Trial Court on this limb. The 1<sup>st</sup> Respondent's averments that the subject motor vehicle had been taken over by the Appellant were uncontroverted and that was a clear infringement of his rights and he was thus entitled to apply for orders of injunction.

21. Having found that a prima facie case had been made out, the Trial Court proceeded to hold that there was no need to delve on the other grounds. This was clearly in error as held in the case of Nguruman Limited (supra). The finding of prima facie case does not permit leap-frogging. It was the Trial Court's duty to consider the other limbs before making a definitive finding on the whole application. Having not done so, this court shall proceed and determine whether the 1<sup>st</sup> Respondent demonstrated irreparable harm if the injunction was not granted. I note that the subject matter of the suit is a motor vehicle whose value can be ascertained. In its submissions, the Appellant submitted that this being the case, the same can be easily compensated.
22. What is irreparable injury? In Halsbury's Laws of England, Third Edition, Volume 21, paragraph 739, page 352, it has been defined as follows: -

“...By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question...” (Emphasis added)
23. Based on the above, I am not convinced that since the value of the subject motor vehicle can be valued and its value ascertained, the same disallows the 1<sup>st</sup> Respondent an order of injunction. Without speculating on the attachment the 1<sup>st</sup> Respondent has on the subject motor vehicle, there must have been a reason he acquired the said motor vehicle. Considering that the Appellant and the 1<sup>st</sup> Respondent have no relationship whether contractual or otherwise, I hold the view that the 1<sup>st</sup> Respondent demonstrated irreparable injury as the Appellant could simply attach the motor vehicle and sell it to third parties to realize its amount. This in my view would destroy the subject matter in question.
24. On the third ground, if the court is in doubt as to the first two (2), it shall then determine in whose favour does the convenience tilt. The Appellant is a limited liability company offering banking services as per the pleadings filed. The subject motor vehicle is said to be a security for a loan advanced to one Zachariah Gichiri Kariuki. At this stage, no evidence has been tendered to show what steps the Appellant has taken to recover the money it is allegedly owed. On the flipside, no averments have been put across to impeach the 1<sup>st</sup> Respondent's evidence that he bought the subject motor vehicle in a public auction. Balancing the rights of the Appellant vis a vis that of the 1<sup>st</sup> Respondent, I find that the 1<sup>st</sup> Respondent has more to lose if the orders sought are not granted and I thus hold that the balance of convenience tilts in favour of the 1<sup>st</sup> Respondent.
25. Though the Trial Court failed to pronounce itself on the two other limbs from grant of injunction, I proceed to find that the application dated 13<sup>th</sup> January, 2021 was merited and I uphold the Trial Court's ruling.
26. On whether the order to have the motor vehicle released to the 1<sup>st</sup> Respondent was merited, I note that the Trial Court the Plaintiff to preserve the suit motor vehicle in good and usable condition until the matter is concluded. It is undoubtedly clear that this was a mandatory order in nature. The



circumstances under which the Court would grant a Mandatory Injunction was well stated out by the Court of Appeal in the Case of Malier Unissa Karim –Versus - Edward Oluoch Odumbe (2015) eKLR as follows: -

“... A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a match on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application...”

27. Based on the above binding authority, a mandatory injunction cannot be issued in the absence of special circumstances, or if the case is a clear one which the court thinks it can be decided at once or if the act done is simple and summary one which can be easily remedied. Was the Trial Court entitled to issue an order directing the release of the subject motor vehicle? In its ruling, the court rendered itself as follows: - “...The Plaintiff should not suffer the predicament caused by a party not in court today. He also acquired possession from the 2<sup>nd</sup> Defendant who also has proved, on a balance of probabilities to have passed possession legitimately and in good faith...”
28. I find that the Trial Court was alive to the principles to grant the orders of release. I say so because the 1<sup>st</sup> Respondent was ordered to preserve the motor vehicle in good and usable condition until the matter was concluded. To this end, I am satisfied that the orders of release of motor vehicle registration number KCM 721F were merited and I so hold. In totality of the above, I have no reason to impeach the Lower Court’s ruling delivered on 14<sup>th</sup> September, 2021.
29. On the issue of costs, it is trite that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. However, this court has discretion to make orders as to costs. Considering that the Lower Court matter is still alive, I direct that the costs of this appeal shall be in the cause.
30. Following the foregone discourse, the upshot is that the following final orders do hereby issue: -
  - a. The Appeal is found to be lacking in merit and is hereby dismissed.
  - b. Costs shall be in the cause.
  - c. The Lower Court file being Civil Case No. 19 of 2021 is hereby referred back to the Trial Court for hearing and final disposal of the matter.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 17<sup>TH</sup> DAY OF MARCH, 2023.**

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**F. WANGARI**

**JUDGE**

**In the presence of;**

Waitiki Adv. h/b for Wafula Adv. for the Appellant

Njeru Adv. for the 1<sup>st</sup> Respondent

Atuti Adv. h/b Nyamweya Adv. for the 2<sup>nd</sup> Respondent

Guyo, Court Assistant

