



REPUBLIC OF KENYA



**KENYA LAW**

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**Kiige v Forward Travelers Sacco Ltd (Civil Appeal E466 of 2022)  
[2023] KEHC 3849 (KLR) (Civ) (3 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 3849 (KLR)

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

**CIVIL**

**CIVIL APPEAL E466 OF 2022**

**JN MULWA, J**

**MAY 3, 2023**

**BETWEEN**

**PETER NJAU KIIGE ..... APPELLANT**

**AND**

**FORWARD TRAVELERS SACCO LTD ..... RESPONDENT**

**RULING**

- 1 Before the court is an application dated 20/09/2022 brought by the Appellant Peter Njau Kiige under provisions of order 42 rule 1, 2, 3 of the [Civil Procedure Rules](#) and sections 3, 3a and 63 of the [Civil Procedure Act](#).
- 2 The Appellant seeks an order for release to him of motor vehicle registration no. KBN 918N pending hearing and determination of the appeal herein. It is based upon grounds stated at the face of the application and his affidavit sworn on the 20/09/2022.
- 3 Reasons for the application are that the Appellant is incurring heavy losses due to the continued unlawful detention of the vehicle since the 17/05/2021 when it was taken by the Respondent through some Auctioneers for purported outstanding loan as at the said date, which the Applicant claims to have had no outstanding loan, and further stating that at all material times, the control and operation of the said vehicle was solely the Respondent's affair and all remittances were being made to the Respondent before any residue, if any were given to him.
- 4 In opposing the application, the Respondent filed a replying affidavit sworn by one Esther Waithera the Manager of the Respondent raising numerous issues including fraudulently obtaining the subject loan, offering the vehicle as a security and none compliance with the terms of the loan.



- 5 The court has perused the Memorandum of Appeal dated 28/06/2022 against the trial court’s ruling dated 30/05/2022. Unfortunately, no copy of the court order is annexed to the Appellant’s affidavit for the court to appreciate the subject of the ruling as against the orders he now seeks from this court.
- 6 Parties have filed written submissions on the application which the court has carefully considered.
- 7 As at 21/07/2022, pursuant to a debt agreement of even date between the Respondent and the Appellant, and annexed by the Appellant as an exhibit “PNK2” to his supporting affidavit, the amount owed to the Respondent by the Appellant was Kshs. 2,124,878.27/=. Under the same agreement, the motor vehicle registration no. KBN 981N was made a collateral, and was to be registered in joint names of the two parties within 30 days of the agreement.
- 8 Further, the loan was to be paid on daily basis from the proceeds from the vehicle (a matatu), which the Appellant avers was being made save for days it was under repair.
- 9 It was a further agreement that the control and operation of the vehicle was solely the Respondent’s responsibility and all remittances being made to the Respondent and that as at 17/05/2021 a sum of Kshs. 690,300/= had been remitted to the Respondent.
- 10 While admitting that at time of detention of the vehicle there was an outstanding loan, the Appellant states that it was not due to his fault and therefore the detention was illegal and unlawful.
- 11 The court further notes that since the detention, the vehicle has been parked at the Respondent’s office compound at Kayole, and is in good condition.
- 12 It is the Appellant’s averments that the said vehicle if released to him can be utilized to generate money for payment of the balance of the loan instead of having the same deteriorate at the parking yard.
- 13 For the Respondent, it is submitted that the rights of the Appellant over the motor vehicle registration No. KBN 918N were extinguished when he failed to comply with the terms of the agreement the parties entered into; that release of the same would occasion to itself loss and damage as the loan is still outstanding; that the vehicle belongs to the Respondent as seen from a copy of the logbook, which the court has duly seen and considered.
- 14 The Appellant seeks an order of mandatory injunction directing the Respondent to release the subject vehicle to him pending hearing and determination of the application and the appeal.
- 15 Orders of injunctions are governed by provisions of order 40 of the *Civil Procedure Rules* that the appellant has not cited. Instead, he cited order 42 rule 6 that underpins orders for stay of execution pending appeal.
- 16 Order 40 rule 1 provides circumstances when temporary orders of injunction may be granted thus-
- a. Where the property in dispute in a suit is in danger of being wasted damaged or alienated by any of the parties in the suit;
  - b. Where the defendant threatens or intends to remove or dispose of the property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit.
- 17 If the applicant has laid sufficient material facts before the court, a temporary order of injunction may be granted pending hearing and determinations of either the suit or an appeal. However, the court cannot grant a permanent order of injunction in an interlocutory stage as that would in effect be determining the main suit, or the outcome of appeal. It is unlawful and unprocedural.



- 18 Further, it is not enough to plead only, sufficient and persuasive affidavit evidence must be tendered to persuade the court that such an order is necessary to preserve the subject matter of the appeal.
- 19 The conditions for grant of injunctions are well set out in the celebrated case of *Giella v. Cassman Brown* (1972) EA 358 and reiterated in our superior courts in *Nguruman Limited v. Jan Bonde Nielsen & 2 others* CA no. 77 of 2012 (2014) eKLR where the Court of Appeal stated the three conditions that an applicant must for the injunctive orders to be granted: -
- a. Establish a prima facie case
  - b. Demonstrate irreparable injury if a temporary injunction is not granted.
  - c. Ally any doubts, showing that the balance of convenience is in his favour.
- 20 The court further stated that the three conditions are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially.
- 21 On prima facie case, the court in *Mrao Ltd v First American Bank of Kenya* (2003) eKLR stated;
- “In civil cases, it is a case in which, on the material presented to the court or a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation of rebuttal from the later”
- 22 On the matter of irreparable loss, the court in *Pius Kipchirchir Kogo v. Frank Kimeli Tenai* (2018) eKLR held:
- “irreparable injury means that the injury must be that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show irreparable injury will occur to him if the injunction is not granted and there is no other remedy to him by which he will protect himself from the consequences of the apprehended injury”
23. On balance of convenience; the court ought to look at the circumstances of each case and decide on which party it tilts.
- 24 Considering the three conditions together, there is no dispute as to ownership of the subject vehicle. It is registered in the Respondent’s name who has the legal right over it, the same having been voluntarily transferred to it by the appellants who admits that he has an outstanding loan to the respondent.
- 25 The appellants have however not persuaded the court that the Respondent would not be financially able to compensate it should the appeal be successful.
- 26 The applicant has also not convinced the court that there is no other remedy save for a mandatory injunction order available to the appellants to safeguard its interests should the appeal be successful. In any event, a mandatory injunction that the applicant seeks at an interlocutory stage cannot be granted in interlocutory proceedings.
- 27 Considering the circumstances of the case, once again, the balance of convenience without a doubt tilts in favour of the Respondent whose rights in the subject vehicle would be violated if an injunction is granted.
- 28 By the above, it is clear that the appellants have not met the threshold for the grant of a permanent injunction that he seeks pending hearing and determination of his appeal.



- 29 It is important that the appellant appreciates the court's powers in interlocutory applications. They are limited to the extent of preservation of the subject of the appeal. What the appellant in his submissions and in the supporting affidavit has done is, but arguing on the merits of the appeal, and precisely why the ruling appealed against should be set aside and or varied.
- 30 For this court to delve into the interrogation of the ruling, which I have stated is not before this court, would be tantamount to hearing and determination of the appeal, which is not this court's duty to do at the moment.
- 31 For the above reasons, this court finds and holds that the application dated 20/09/2022 lacks merit and is therefore dismissed.
- 32 To progress the appeal, the Appellant is urged to file the Record of Appeal and take all necessary steps towards the hearing thereof without unnecessary delay.
- 33 Costs of the application shall abide by the outcome of the appeal.
- 34 Orders accordingly.

**DELIVERED DATED AND SIGNED AT NAIROBI THIS 3<sup>RD</sup> DAY OF MAY, 2023.**

**J. N. MULWA**

**JUDGE**

