Nyambura v Ndungu t/a Kingpin Auctioneers & another (Civil Appeal E628 of 2022) [2023] KEHC 17288 (KLR) (Civ) (4 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17288 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E628 OF 2022

CW MEOLI, J

MAY 4, 2023

BETWEEN

TABITHA NYAMBURA ..... APPLICANT

AND

RUTH NDUNGU T/A KINGPIN AUCTIONEERS ..... 1ST RESPONDENT

DAPHINE KEMUNTO ..... 2ND RESPONDENT

RULING

1. The live prayers in the motion dated 11.08.2022 by Tabitha Nyambura (hereafter the Applicant) seek that:-

> " 4. That there be an order directing Ruth Ndungu t/a Kingpin Auctioneers and Daphine Kemunto (hereafter 1st and 2nd Respondent/Respondents) or their agents from effecting any change of ownership of Motor Vehicle Registration No. KCS 701M pending hearing and determination of Nairobi MCCC No. E646 of 2022;
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> 5. That pending the hearing and determination of the appeal against the entire ruling..... in Nairobi MCCC No. E646 of 2022 there be an interim order stopping the 1st and 2nd Respondent, their agents and or servants from in any way interfering with, alienating, disposing off, transferring or otherwise affecting the Applicant's rights in respect of Motor Vehicle Registration No. KCS 701M;
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> 6. ....." (sic)

2. The motion is expressed to be brought pursuant to Section 1A, 1B, 3A & 63e of the *Civil Procedure Act*, Order 40 of the Civil Procedure Rules inter alia. On grounds on the face of the motion, as amplified in the supporting affidavit sworn by Applicant.

3. To the effect that being aggrieved and dissatisfied with the ruling delivered in Nairobi MCCC No. E646 of 2022 (hereafter lower court suit) on 14.07.2022 she has preferred an appeal which raises arguable grounds with a high chance of success. That the suit before the lower court emanates from a landlord-tenant relationship between herself and Daphine Kemunto (hereafter 2nd Respondent) who during the tenancy period, without proper notice increased her monthly rent and in response to an inquiry by the Applicant had issued an illegal notice of termination of tenancy and unwarranted threats of eviction.

4. She goes on to depose that the threat of eviction was actualized when the 2nd Respondent evicted her and unjustly proceeded to detain her household goods and further instructed Ruth Ndungu t/a Kingpin Auctioneers (hereafter the 1st Respondent) to forcefully detain her motor vehicle registration No. KCS 701M (hereafter the subject motor vehicle) without notice of proclamation or notification of sale. That the said motor vehicle was due for sale by way of public auction albeit without a court order; that her business operations are dependent on her ability to move around hence the said motor vehicle is a tool of trade. She further deposes that purchase thereof was financed and that the Respondents did not seek and or obtain consent from the financier prior to the purported attachment and intended sale and therefore, their conduct is unlawful and illegal. In conclusion, she asserts that unless the court intervenes by granting the prayer sought herein, she is at risk of losing her interest in the subject motor vehicle.

5. The 1st Respondent opposed the motion through the replying affidavit dated 16.09.2022. She takes issue with the motion by deposing that having been duly instructed by the law firm of K. O. Obae & Co. Advocates to levy distress for rent arrears against the Applicant, she issued the requisite proclamation notices to the Applicant and upon the expiry of seven days' mandatory notice she proceeded to attach motor vehicle registration number KCS 701M and issued the Applicant with a notification of sale.

6. Further, that the Applicant thereafter sought stay and injunctive orders which motion was dismissed and consequently she advertised the sale of the subject motor vehicle; and that a public auction was conducted in respect of the subject motor vehicle and the same was sold to the highest bidder at Kshs. 1,200,000/-. that the net proceeds were duly forwarded to the instructing firm. In conclusion, she deposes that the subject motor vehicle is no longer in her possession, having been legally auctioned to a third party and the instant motion ought to be dismissed with costs.

7. The 2nd Respondent on her part filed grounds of opposition dated 22.08.2022 and a replying affidavit dated 31.08.2022 in response to the motion. She takes issue with the motion on grounds that the application is an abuse of the court process and is calculated to defeat justice and delay the 2nd Respondent from realizing her rent arrears now estimated at Kshs. 720,000/- while the Applicant continues to occupy the Respondent's premises and while not paying monthly rent; that the application lacks merit, is frivolous, vexatious, scandalous, and misconceived; that motion is misleading and is an afterthought for the sole purpose of frustrating the 2nd Respondent and subjecting her to unnecessary legal litigation expenses.

8. Further, that the application and the orders sought herein have been overtaken by events, the Applicant's motor vehicle registration number KCS 701M Toyota Harrier having been sold legally and regularly at a public auction in distress for rent; that the orders sought in the motion are similar to orders sought by the Applicant in her application dated 11.02.2022 and 18.03.2022 which applications

were found unmerited and dismissed with costs to the Respondents; and that the Applicant's only available recourse to this court is to appeal against the said ruling but not to seek the same prayers.

9. By her affidavit in response, she reiterates the grounds of opposition and contends that the motion is res judicata and constitutes a waste of precious judicial time and resources. She concludes by asserting that the motion ought to be dismissed with costs.

10. In a rejoinder by way of a further affidavit the asserted that the Respondents have avoided the question regarding the joint ownership of the subject motor vehicle; that the vehicle in question could not be distrained for rent arrears to the prejudice of the asset financier. That the illegal, irregular, and improper notice of auction rendered the auction void and sale arising therefrom untenable. She asserts that the right of distress for rent that the 2nd Respondent sought to exercise is a non-existent right and all actions undertaken by the Respondents in furtherance thereof were illegal.

11. The motion was canvassed by way of written submissions. Counsel for the Applicant while addressing the court in respect of prayer (iv) & (v) of the motion anchored his submissions on the decision in Giella v Cassman Brown & Co. Ltd [1973] EA 358, Amir Suleiman v Amboseli Resort Limited [2004] eKLR, Mrao Ltd v First American Bank of Kenya Ltd [2003] eKLR, Section 3 of the *Distress for Rent Act* and the English statute on Tribunals, Courts and Enforcement Act 2007 to contended that the Respondents action of detaining the subject motor vehicle selling it in distress for rent was null and void ab initio. Further, that the Respondents have not disputed that the subject motor vehicle was jointly owned hence the same could not be lawfully distrained for rent, as the alleged rent owed was attributable to only one of the joint owners.

12. That under the Auctioneers Rules notice of sale ought to have been issued to each of the joint owners of the subject motor vehicle. That because of the foregoing the purported auction was a violation of the law and void in its entirety. It was further contended that the advertisement of the auction and resultant auction were an invalid attempt the deprive the Applicant and asset financier of the subject motor vehicle. Hence, the Applicant has established a prima facie case to warrant this court's intervention. The decision in Nguruman Limited v Jan Bonde Neilsen & 2 Others [2014] eKLR was called to aid in respect of the foregoing.

13. Concerning the question of irreparable damage and balance of convenience it was submitted that *the Constitution* dictates no person is to be arbitrarily deprived of property and the Applicant's right to property has been violated and the resultant injury irreparable by an award of damages. While calling to aid the decision in Pius Kipchirchir Kogo v Frank Kimeli Tanai [2018] eKLR, counsel contended that, if the orders as sought are denied, the subject motor vehicle may be conveyed severally before the appeal and the lower court suit are concluded. Thereby occasioning grave inconvenience to the Applicant and asset financier of the subject motor vehicle.

14. Concerning prayers (vi) (vii) (viii) & (ix) counsel anchored his submissions on the English decision in Zockoll Group Ltd v Mercury Communication Ltd [1997] EWCA 2317 in urging the court to issue a mandatory interlocutory injunction. In conclusion, concerning the 2nd Respondent's legal objection it was contended that the instant motion is not res judicata therefore the court ought to dismiss the said objection and allow the motion as prayed.

15. On behalf of the 1st Respondent counsel's submissions concerning whether Applicant has established a prima facie case, were anchored on the decisions in Giella (supra), Mrao (supra), Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 4 Others [2014] eKLR, Francis Munyoki Kilonzo & Another v Vincent Mutua Mutiso [2013] eKLR and Kenleb Cons Ltd v New Gatitu Service Station Ltd & Another [1990] KLR 557.

16. It was his contention that execution was lawfully and properly carried out by the 1st Respondent who is mandated to execute court warrants. It was further submitted that the Applicant was the party in possession of the subject motor vehicle as of execution, pointing out that the purported asset financier is not a party to the instant proceedings and did not object to the attachment of the subject motor vehicle. That on account of the foregoing the Applicant has not established a prima facie case to warrant this court intervention.

17. In response to the Applicant's submissions on irreparable harm and balance of convenience, counsel cited the decisions in Nguruman (supra), East African Development Bank v Hyundai Motors Kenya Limited [2006] eKLR and Amir Suleiman (supra) to submit that the Applicant has failed to demonstrate irreparable harm as she owed arrears in rent and the attachment was carried out in compliance with law. Therefore, the balance of convenience tilts in favour of the 1st Respondent. In summation, the court was urged to dismiss the motion with costs.

18. The 2nd Respondent in addressing the preliminary objection, relied on the decisions in Gladys Nduku Ntuki v Letshego Kenya Ltd; Mueni Charles Maingi [2022] eKLR, Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others [1996] eKLR and Moses Mbatia v Joseph Wambura Kihara [2021] eKLR, among others. To support the submission that the reliefs sought in the instant motion are similar to the reliefs earlier sought before the lower court; that the parties before this court and the lower court are similar; that the Applicant's motion was conclusively determined by the lower court; and that whereas as the Applicant has cosmetically attempted to introduce the asset financier of the subject motor vehicle to the instant proceedings that could not render the doctrine of res judicata inapplicable. That the object of the doctrine of res judicata is to ensure finality in litigation so that parties are not harassed by re-litigating the same subject matter. The court was thus urged to find the motion running afoul of the res judicata rule encapsulated in Section 7 of the *Civil Procedure Act*.

19. Concerning the merits of the motion, it was argued that the no irreparable damage incapable of compensation by an award of damages has been demonstrated by the Applicant, whereas allowing the motion, would prejudice the 2nd Respondent the Applicant having admitted in her affidavit material that she was indeed in rent arrears. It was further submitted that the prayers sought are untenable and or have been overtaken by events because the subject motor vehicle had already been sold off in distress for rent as of the date of this motion.

20. Counsel proceeded to submit that the asset financier of the subject motor vehicle is not a party to the suit. Nor did they institute objector proceedings. In response to the Applicant's submissions on applicability of the statute on Tribunals, Courts and Enforcement Act 2007, counsel cited section 3(1) of the *Distress for Rent Act* and Section 3 of the *Judicature Act* to argue that the English statute has no legal application to the instant proceedings and ought to be disregarded by this court. In conclusion, the court was urged to dismiss the motion with costs.

21. The Court has considered the rival affidavit material and submissions canvassed in respect of the motion. Some of the parties' material ventured into the substantive appeal and or issues that are the preserve of the appellate court. At this interlocutory stage, the court is not concerned with the merits of the appeal. That said, the court needs to address the plea of res judicata raised by the 2nd Respondent. In the case of John Florence Maritime Services Ltd and Another v Cabinet Secretary for Transport and Infrastructure and 3 Others [2015] eKLR, the Court of Appeal considered in extenso the application

of the doctrine of res judicata generally, and to constitutional petitions specifically. The Court had this to say:

> " The doctrine of res judicata in Kenyan law is embodied or anchored on Section 7 of the *Civil Procedure Act*. It is in these terms: -
>
> "7. Res judicata
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> No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."
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> From the above, the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally. (see Karia & Another v the Attorney General and Others [2005] 1 EA 83).
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> Res judicata is a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been spilt and is now sufficiently settled. We therefore do not intend to re-invent any new wheel. We can however do no better than reproduce the re-indention of the doctrine many centuries ago as captured in the case of Henderson v Henderson [1843] 67 ER 313: -
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> ".....where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time...."
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> See also Kamunye & others v Pioneer General Assurance Society Ltd [1971] E.A. 263. Simply put res judicata is essentially a bar to subsequent proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives.
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> The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, res judicata

being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application, ...

....

The doctrine of res judicata has two main dimensions: cause of action res judicata and issue res judicata. Res judicata based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Cause of action res judicata extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged. Issue res judicata may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue."

See also Gurbacham v Yowani Ekori [1958] EA 450; George Kihara Mbiyu v Margaret Njeri & 15 Others [2018] eKLR.

22. The court has taken the liberty of perusing the motions before the lower court dated 11.02.2022 and 18.03.2022 marked as "Annexed DK1" in the 2nd Respondent's response. Obviously, the Applicant's present motion seeks among other reliefs injunctive orders in respect of subject motor vehicle pending hearing and determination of the appeal. The motions before the lower court though equally seeking among other reliefs sought primarily injunctive orders in respect of subject motor vehicle pending hearing and determination of the suit. That said, this court while applying itself to the dicta in John Florence Maritime Services Ltd (supra) is of the view that the plea of res judicata is not applicable where the cause of action and issue though determined by a competent court is the subject of appeal. In the circumstances, the court is not persuaded that the plea of res judicata rule is well taken in this instance. Perhaps the plea would have succeeded in response to a similar application made before the lower court.

23. Moving on to the substantive issues, the Applicant's motion is expressed to be brought under Section1A, 1B & 3A of the *Civil Procedure Act* (CPA) and Order 40 the Civil Procedure Rules (CPR). Evidently, the appropriate provisions based on the orders sought would be Order 42 Rule 6 (6) as read with Order 40 of the Civil Procedure Rules. The relevant part of Order 42 Rule 6 of the Civil Procedure Rules provides that: -

> "(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside...
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> (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the 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 tribunal has been complied with."

24. Visram, J. (as he then was), distilled the applicable principles guiding the grant of injunction pending appeal in Patricia Njeri & 3 Others v National Museum of Kenya [2004] eKLR. The learned Judge stated: -

> " The Appellants did, however, pray (in the alternative) for an order of injunction pending appeal. There was no dispute that the court can, in a proper case grant an injunction pending appeal. What are the principles that guide the court in dealing with such an application"
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> In the Venture Capital case (Venture Capital and Credit Ltd v Consolidated Bank of Kenya Ltd Civil Application No. Nairobi 349 of 2003 (UR)) the Court of Appeal said that an order for injunction pending appeal is a discretionary matter. The discretion must, however, be "exercised judicially and not in a whimsical or arbitrary fashion." This discretion is guided by certain principles some of which are as follows:
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> a) The discretion will be exercised against an Applicant whose appeal is frivolous (See Madhupaper International Limited v Kerr [1985] KLR 840 which cited Venture Capital). The Applicant must state that a reasonable argument can be put forward in support of his appeal (J. K. Industries v KCB [1982 – 88] KLR 1088 (also cited in Venture Capital)
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> b) The discretion should be refused where it would inflict greater hardship that it would avoid (See Madhupaper supra).
>
> c) The Applicant must show that to refuse the injunction would render his appeal nugatory (See Butt v Rent Restriction Tribunal [1982] KLR 417 (cited also in Venture Capital).
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> d) The Court should also be guided by the principles in Giella v Cassman Brown & Company Ltd [1973] EA 358 as set out in the case of Shitukha Mwamodo & Others [1986] KLR 445 (also cited in Venture Capital)." See also Mukoma –Vs Abuoga [1988] KLR 645."

25. The court would propose to start with the well settled principles in Giella (supra) as reiterated in Nguruman (supra), the latter which is particularly illuminating as to the principles applicable to applications for interlocutory injunctions. The Court described the role of the judge in such application to be merely to consider whether the principles for the grant of the interlocutory injunction were met. The Court further observed that: -

> " ...Since the fundamentals about the implications of the interlocutory orders of injunctions are settled, at least over four decades since Giella's case, they could neither be questioned nor be elaborated in detailed research. Since those principles are already ..... by authoritative pronouncements in the precedents, they may be conveniently noted in brief as follows:
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> In an interlocutory injunction application, the Appellants has to satisfy the triple requirements to:
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> a) establish his case only at a prima facie level
>
> b) demonstrate irreparable injury if a temporary injunction is not granted.

c) allay any doubts as to (b) by showing that the balance of convenience is in his favor."

26. The Court further stated that the three conditions apply separately as distinct and logical hurdles to be surmounted sequentially by an applicant. Such that, it is not enough for the Applicant to establish a prima facie case, they must further successfully establish irreparable injury, that is, injury for which damages recoverable at law would not be an adequate remedy. And where there is doubt as to the adequacy of damages, the court will consider the balance of convenience. Conversely, where no prima facie case is established, the court need not consider irreparable injury or balance of convenience. The Court of Appeal emphasized that the standard of proof is to a prima facie standard.

27. Regarding the definition of a "prima facie case" the Court stated:

> " Recently, this court in Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for "prima facie case" in civil cases in the following words:
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> "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 appellant's case upon trial. That is clearly a standard, which is higher than an arguable case.
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> We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate 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. The Appellants need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the appellant's case is more likely than not to ultimately succeed."

28. Concerning the condition requiring the successful applicant to demonstrate a prima facie case which condition also ties in with the requirement on the applicant to demonstrate that he has an arguable appeal, it is not denied that there was a tenant-landlord relationship between the Applicant and the 2nd Respondent. And that the Applicant was in arrears of rent in the material period. It is not possible to tell whether the arrears were made up only of the alleged illegal sum by which rent was increased or of the rent agreed earlier agreed by the parties. Further, it is by dint of the said relationship that the lower court rendered a ruling dated 14.07.2012, that is the subject of the instant appeal. The 1st Respondent was instructed by the law firm of K. O. Obae & Co. Advocates to levy distress for rent arrears against the Applicant and having issued the proclamation notices to the Applicant and proceeded to attach the subject motor vehicle after expiry of seven days' mandatory notice and issued the Applicant with a notification of sale. Pursuant to the said impugned ruling, the 1st Respondent proceeded to advertise

the sale of the subject motor vehicle by way of public auction resulting in the actual sale of the said. (See;- annexures RN2, RN3, RN4, RN6, RN7, RN8 & RN9 to the 1st Respondent's affidavit of reply).

29. It is on the premise of the foregoing attachment that the Applicant sought to lodge a caveat with the Director General National Transport and Safety Authority (NTSA) pursuant to a letter dated 08.02.2022. All in an attempt to prevent the transfer of the said motor vehicle to a purported unsuspecting buyer for value. Despite this, the subject motor vehicle was sold by way of public auction on 06.08.2022 (See;- Annexure RN 7). As to whether the purchaser (a Mr. Kithinji) of the subject motor vehicle has effected transfer to his name, the court cannot tell from material before it.

30. The Applicant has further claimed that the acquisition of the said motor vehicle was financed, and it is within her knowledge that the Respondents did not seek and or obtain consent from the financier prior to the purported attachment and sale of the subject motor vehicle. Hence the Respondents' conduct is unlawful and illegal. The 2nd Respondent vehemently countered this position by arguing that asset financier of the subject motor vehicle is not a party to the suit neither did they institute objector proceedings and therefore any matters relating to the said party have no bearing to the instant proceedings. Having perused the Applicant's motions before the subordinate court (See;-DK1) the impugned ruling (See;-TNK1), and the Applicant's Memorandum of Appeal, the question of ownership was obliquely raised before the lower court.

31. As pointed out by the 2nd Respondent, the purported asset financier despite being privy to the situation involving the subject motor vehicle as at 21.03.2022 eschewed moving the court appropriately to protect its interest. It appears therefore that the Applicant is the party more invested in protecting the asset financier's interest of which seems odd in the circumstance.

32. On the key issue whether the Applicant has demonstrated a prima facie case, the court is not persuaded. The Applicant has not demonstrated a prima facie case as to the existence "of a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter" (see Nguruman's case). As earlier observed, this finding would equally apply to the question whether the Applicant has an arguable appeal which may be rendered nugatory if the orders sought are denied. In Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others [2013] eKLR that:

> " The first issue for our consideration is whether the intended appeal is arguable. This court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous, a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable".

See also Denis Mogambi Mong'are v Attorney General & 3 Others Civil Appeal No. Nairobi 265 of 2011 (UR 175/2011) where the same Court stated that:

> " An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court's consideration."

33. From the material before the court, the prospects of the appeal succeeding appear doubtful. Besides, if it were to be eventually found after the trial of the suit in the lower court that the subject motor vehicle was unlawfully proclaimed and sold by the 1st Respondent, damages would be quantifiable and adequate to compensate the Applicant and or the purported asset financier of the vehicle.

34. Similarly, it seems to me that granting the prayers sought would inflict more hardship than it would avoid. Specifically, by forestalling the transfer of the vehicle to the apparently innocent purchaser

whereas the Applicant could recover by way of damages if it is eventually found that the distress for rent complained of was tainted by illegality. The purported asset financier has not taken steps to challenge the attachment and sale and it is difficult to assume any prejudice to them in the absence of such evidence. Neither the financier nor the purchaser is a party to this matter and no order can be granted for or against them without, according to them a hearing. The onus of joining them as interested parties or in another capacity lies with the parties presently before the court.

35. The Court of Appeal in Madhupaper International Limited v Kerr [1985] KLR 840 held that: -

> " The Court of Appeal's jurisdiction to grant an injunction pending an appeal is discretionary and is to be exercised judicially and not arbitrarily. It would be wrong to grant the injunction where the appeal is frivolous or where to grant it would inflict greater hardship than it would avoid. In this case, to grant an injunction pending appeal would be wrong as it would probably inflict greater hardship than it would avoid."

36. In Charter House Investments Ltd v Simon K. Sang & 3 Others [2010] eKLR, the Court of Appeal stated: -

> " Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the Court requires protection and maintenance of the status quo. The award of a temporary injunction by Courts of equity has never been regarded as a matter of right even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the Court balances the convenience of the parties and possible injuries to them and to third parties."

37. Consequently, upon reviewing all the material placed before it, the court is not persuaded that this is a proper case for granting a temporary injunction in terms of the live prayers in the Applicant's motion. Prayers 6, 7, 8, 9, 10 & 11 appear moot in the circumstances obtaining herein. The court will therefore dismiss the Applicant's motion dated 11.08.2022 with costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 4TH DAY OF MAY 2023.

C. MEOLI

JUDGE

In the presence of:

For the Applicant: Mr. Michuki

For the 1st Respondent: Ms. Kerubo h/b for Mr. Mwaniki

For the 2nd Respondent: Mr. Obae

C/A: Carol