



**Machage v Director of Criminal Investigations; Director of Public Prosecution & another (Interested Parties) (Petition E006 of 2023)
[2023] KEHC 23762 (KLR) (18 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23762 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
PETITION E006 OF 2023
HM NYAGA, J
OCTOBER 18, 2023**

BETWEEN

DOUGLAS MUSA MACHAGE PETITIONER

AND

DIRECTOR OF CRIMINAL INVESTIGATIONS RESPONDENT

AND

DIRECTOR OF PUBLIC PROSECUTION INTERESTED PARTY

NATIONAL TRANSPORT AND SAFETY AUTHORITY . INTERESTED PARTY

RULING

1. The petitioner brought a petition dated 17th March, 2023 under Rule 4(1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. He sought several orders which are set out in the Petition.
2. Contemporaneously with the Petition, the Petitioner moved the court through a Notion of Motion of even date, brought under Article 49 of *the Constitution* 2010, Rules 19 and 23(1) &(2) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and procedure Rules 2013. He seeks three substantive Orders, namely :-
 - i. That this Honorable Court be pleased to order the Respondent to release to the petitioner original registration certificate, registration plates, insurance and speed governor stickers for motor vehicle registration number KAM 577 L pending the hearing and determination of the petition.
 - ii. That this Honorable Court be pleased to grant the petitioner bail pending arrest pending the hearing and determination of the petition herein.



- iii. That this Honorable Court be pleased to issue an order restraining the Respondent either by itself, its agents and/or servant from seizing and detaining the petitioner's lorry with registration Number KAM 577 L pending the hearing and determination of the petition herein.
- iv. That costs of this Application be provided for.
3. The application is predicated on the grounds on its face and supported by an affidavit of the petitioner, Douglas Musa Machage, sworn on the even date.
4. He deponed that in 2006, he and his business partner purchased a lorry registration number KAC 382 T from one Eliud Mwangi Maina for use in their partnership business. That when the partnership was dissolved, the partners shared the business assets whereby he was given the aforesaid lorry and following a change from manual records to digital records at the National Safety and Transport Authority, it was realized that there were two vehicles bearing registration number KAC 382 T.
5. He further deposed that the officers from the Directorate of Criminal Investigations confirmed that the chassis and engine number of the suit motor vehicle had not been tampered with and he was duly registered as the owner of the suit lorry by the 2nd Interested Party, who issued him with a registration certificate and registration plates for Motor Vehicle registration number KAM 577L.
6. The applicant contended that on 15th July, 2021 officers from the Directorate of Criminal Investigations Headquarters visited his home and arbitrarily seized and detained the said lorry's Original registration certificate, registration plates, insurance and speed governor stickers which items they have detained to date.
7. He asserted that as a result of the aforesaid seizure, he has been prevented from using his lorry which is wasting away and he has incurred huge losses.
8. He further averred that the said police officers keep summoning him to their officers at Mazingira House along Nairobi-Kiambu Road and they are threatening him with criminal investigation, and that the respondent may at any time arrest him.
9. He believes that no party will be prejudiced if the orders sought are granted.
10. PC Milton Mwanzi the investigation officer of the Respondent in opposition to the Application swore a replying affidavit on 2nd June, 2023. He averred that the application is mischievous and an abuse of the court process and it should be dismissed with costs.
11. He also averred that the instant suit relates to double registration of the suit motor vehicle with the same chassis number and registration plates but different makes and owners, the owners being Ephantus Ndegwa and the Petitioner.
12. He averred that as per the agreement dated 17.8.2006 the petitioner bought KAC 382 ISUZU LORRY, grey in color and with engine number 6RBI-121401. However, the log book dated 23.2.2021 indicates the engine number as 177719 and the color as white/cream.
13. He contended that on 26th February, 2021 they received a complaint from Ephantus Ndegwa (complainant) who claimed that he co-owned KAM 577 L with Equity Bank LTD and that upon applying for registration of the said Motor Vehicle he discovered it was registered in the names of the petitioner, and to prove this assertion, the complainant issued them with a copy of the vehicle report dated 2.8.2019 and log book registration No.20143532656.



14. He averred that in addition the above, the complainant produced a transfer form from equity bank to him dated 17.10.2014 and upon requesting for more details from the 2nd interested party, it confirmed that the current owner of the suit motor vehicle was the petitioner.
15. He also stated that further investigations revealed that the petitioner had obtained ownership of the suit motor vehicle through the 2nd interested party and forced transfer vide his letter to Director Licensing and Registrations at NTSA and that his affidavit sworn on 29.11.2018 showed that his request was for a new log book under his name for Motor Vehicle ISUZU CXZ GRAY with registration number KAC 382 T but instead the 2nd interested party registered him as the owner of the suit motor vehicle.
16. He stated that at this point the 2nd interested party should be compelled to shed more light on the events leading to the Petitioner's registration/ownership of the suit motor vehicle and provide a solution.
17. He averred that the above prompted them to confiscate the Petitioner's registration certificates, plates, insurance and speed governor's ticket to enable them conduct further investigations to verify the authenticity of the Petitioner's ownership of the suit motor vehicle.
18. He disputed the Applicant's averments that they have caused the suit motor vehicle to waste and incur huge losses for reason that on 15th July, 2021 when they confiscated the petitioner's items, the suit motor vehicle was not roadworthy and had been in his compound for some time. He urged this court to take judicial notice that the number plates were not on the designated place. He also stated that the insurance sticker indicates the most recent insurance was paid for on 11th December, 2014 and was to expire on 21.10.2015.
19. It was his deposition that the confiscated log book indicates the suit motor vehicle was manufactured in 2000 and the affidavit sworn by the Petitioner on 29.11.2018 indicates that the his Motor Vehicle was a CXZ model while the manual log book indicates that the petitioner bought KAC 382 T which is grey in colour and was manufactured in 1992.
20. He further deponed that the master register of KAC 382 T indicates that the same was a saloon car, the chassis and Engine numbers were 609030300 and 3A56795371983 which is in contradiction with the details in the copy of records from the 2nd interested party.
21. He averred that they conducted a forensic examination for the motor vehicle in the petitioner's possession and they are yet to receive a report from the forensic examiner. According to him the delay in obtaining the said report has been occasioned by the official duties undertaken by the designated officer at Shakahola Forest.
22. He asserted that the Applicant's ownership to the suit motor vehicle is questionable as he has failed to prove that Equity Bank LTD and Ephantus Ndegwa legally transferred the suit Motor Vehicle to him.
23. It was also his averment that the petitioner has failed to adhere to the principles of Constitutional Avoidance as the issues raised in this suit can be dealt with through an ordinary suit as opposed to a petition.
24. He thus prayed that the application and the petition be dismissed with costs.
25. The 1st interested party similarly opposed the application through a replying affidavit sworn by its state counsel Loice Nekesa Murunga on 15th May, 2023. She averred that these proceedings are not criminal proceedings where the 1st interested party is called upon on behalf of the state under the provisions of Article 157(6) of *the Constitution*.



26. She contended that it is in the interest of justice that the office of the Attorney General be made a party to these proceedings in order to represent the interest of the respondent and interested parties since they do not represent themselves.
27. She averred that the orders sought in the petition are meant to interfere with the constitutional mandate of the respondent which is to investigate and if need be, effect arrests.
28. She further contended that if the orders sought are granted then the ongoing investigations will be curtailed and items which would be treated as exhibits returned to the owner.
29. The petitioner swore a supplementary affidavit to the aforesaid Replying Affidavit on 16th June, 2023. He averred that his application to be issued with a duplicate logbook was in respect of Motor Vehicle Registration Number KAC 382T and that he swore an affidavit in support of this application and furnished the 2nd interested party with appropriate documents, and upon being satisfied about the propriety of the application, the 2nd interested party determined to register the vehicle as KAM 577L.
30. He asserted that he was aware the 2nd interested party called the other owner of the same registration number and asked him to take it for tape lifting at the respondent but he did not cooperate and he equally reached out to him in vain.
31. He stated that the 2nd interested party approved the forced transfer of the vehicle to him and issued him with the registration plates for KAM 577L.
32. He averred that if the respondent was desirous of compelling the 2nd interested party to shed light on any issue it ought to have done that in appropriate proceeding but it has not done so since the year 2021.
33. He contended that there is no evidence that the suit motor vehicle was un-roadworthy and the fact that it was seen in his compound for some time does not justify detention of his documents and registration plates.
34. It was his deposition that if the respondent had been desirous of resolving the issue it would have procured the report by now since the unnamed forensic examiner is an officer within its ranks.
35. He averred that he is not required to produce a transfer form from Equity Bank and Ephantus Ndegwa as he has not stated anywhere that he acquired the suit motor vehicle from them.
36. It was his further averment that there is no evidence that he acquired the ownership of the motor vehicle illegally.
37. The 2nd interested party did not file any response to the Application.
38. The court directed that the application be canvassed through written submissions. At the time of writing this ruling, only the applicant had filed his submissions. The respondent chose to rely on its Replying Affidavit.

Applicant's Submissions

39. The Applicant submitted that the only issue for determination is whether the orders prayed for should issue.
40. Citing the provisions of Article 47 of *the constitution*, the Applicant submitted that the alleged complaint by the said Ephantus Ndegwa has never been served upon him and he learnt of the same upon being served with the replying affidavit which act according to him is in violation of Article 47 of *the constitution*.



41. He submitted that if at all there is double registration, the respondent ought to have moved the 2nd interested party to correct the error. He contended that by seeking more time two years after it commenced investigation, is a clear pointer that the respondent have not commenced investigation expeditiously as required by Article 47 and as such the orders sought should issue.
42. Regarding order 6, the applicant submitted that Article 49 of *the Constitution* guarantees arrested and accused person the right to be released on bail. The applicant relied on the case of Ibrahim Gichuhi Mugo vs Inspector General of Police [2013] eKLR where the court stated that Article 49 envisages a situation where a person has already been arrested or has been arraigned in court after criminal charges are preferred. However, the High Court pursuant to Article 22(1) of *the Constitution* has jurisdiction to determine a matter where fundamental bill of right has also been threatred and further under Article 165 of *the Constitution*, the High Court has jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
43. The applicant also referred to paragraph 4.29 of the Bail and Bond Policy guidelines which provide that the High Court may grant anticipatory bail and urged this court to grant anticipatory bail as his contention against the respondent of threat to arrest and prosecute him is uncontroverted.
44. On costs , the applicant referred this court to the case of Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & 4 others [2014] eKLR where the court stated inter alia that the award of costs would normally be guided by the principle that “costs follow the event” the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suits fails, but if this party shows legitimate occasion, by successful suit, then the defendant/respondent will bear the costs.
45. He prayed for costs.

Analysis and Determination

46. The issues that arise for determination are :-
 - i. Whether the petition is improperly in court, by dint the principle of Constitutional Avoidance.
 - ii. Whether anticipatory bail should be granted.
 - iii. Whether this court should order release of the original registration certificate, registration plates, insurance and speed governor stickers for Motor Vehicle Registration Number KAM 577 L to the petitioner pending determination of the suit herein.
 - iv. Whether the restraining order sought under prayer 7 should be granted.
47. I will deal with the above issues sequentially.
48. The Respondent in paragraph 22 of the replying affidavit, averred that the applicant has failed to adhere to the principles of Constitutional Avoidance in that the dispute in question raises issues that would be addressed in an ordinary suit as opposed to a Constitutional Petition.
49. Ideally, this issue ought to have been raised as a preliminary objection, on point of law, as a finding in the affirmative would dispose of the entire Petition. Nevertheless, since it has been raised, then the court is enjoined to address it. The court can also deal with the issue suo moto, if it is of the view that there are no constitutional issues raised.



50. What is constitutional avoidance? The Supreme Court in *Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others* [2014] eKLR stated as follows:-

“The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S vs Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936)).”

51. In *Sumayya Athmani Hassan vs Paul Masinde Simidi & Another* [2019] eKLR the Court of Appeal stated:

“... Where legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on *the Constitution* without challenging the legislation in question. That principle has been reinforced by the Supreme Court in *Communications Commission* case (supra).

In conclusion, we find that the alleged unlawful interdiction and termination of a contract of employment was not a constitutional issue and thus the petition did not disclose a cause of action anchored on *the Constitution*. Accordingly, the petition being incompetent, the court acted in excess of jurisdiction and erred in law in determining the petition. ...”

52. In *KKB vs SCM & 5 others* (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) the court stated that Constitutional Avoidance has been defined as a preference of deciding a case on any other basis other than one which involves a constitutional issue being resolved.

53. A look at the petition herein reveals that it seeks a motley of orders including several declarations under *the Constitution*.

54. In my opinion many of these orders can only be granted if the applicant moves the court in a constitutional petition/application. If there are other orders that are not constitutional in nature, this court is not barred from addressing them. The applicant is not expected to separate his claims by filing separate suits. That in itself would amount to an abuse of the court process. I am thus satisfied that the petition and the application are properly before this court.

55. The applicant has moved the court under Article 49 of *the Constitution*. The same provides for the Rights of Arrested Persons and states:

“An arrested person has the right;

- (h) to be released on bond or bail on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.”



56. It is clear from the wording of Article 49 that only an arrested person is entitled to the rights stipulated therein. I am thus of the view that the said article does not aid the applicant. He has not been arrested yet. What he is seeking is to pre-empt his arrest.
57. Article 28 of *the Constitution* provides that;
- “Every person has inherent dignity and the right to have that dignity respected and protected.”
58. Article 29 of *the Constitution* provides as follows:-
- “Every person has the right to freedom and security of the person, which includes the right not to be-
- a. deprived of freedom arbitrarily or without just cause;
 - b. detained without trial except under a state of emergency in which case the detention is subject to Article 58;
 - c. subjected to any form of violence from either public or private sources;
 - d. subjected to torture in any manner, whether physical or psychological;
 - e. subjected to corporal punishment in a cruel, inhuman or degrading manner.”
59. The High Court, therefore, has authority under Articles 23 and 29 as read with Article 258 to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
60. Anticipatory bail is not specifically provided for in *the Constitution*. It is a relief granted by the High Court in exercise of its mandate under Article 165 of *the Constitution*. It provides as follows;
- “ 165
- (3) Subject to clause (5), the High Court shall have—
- (a) unlimited original jurisdiction in criminal and civil matters;
 - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any



law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.”

61. Lady Justice Teresia M. Matheka, in *Simon Mwaniki & 2 others vs Director of Public Prosecution & 2 others* [2021] eKLR aptly captured this position. She observed thus:-

“Anticipatory bail was really necessary in this country in the dark days when one could be arrested and detained for days and months without any reason and, without trial and sometimes for trumped up non- bailable offences.

That changed with the promulgation of *the Constitution* of Kenya 2010 through which we the people put in measures to bring to an end those dark days. The Bill of Rights at Article 25 provides that certain fundamental rights and freedoms shall not be limited, Article 28, guarantees the right to human dignity and Article 29, freedom and security of person whereby everyone has the right not to be deprived of their freedoms arbitrarily or without just cause.

To achieve this the framers of our Constitution demarcated the lanes for law enforcers, giving them powers needed to carry out their jobs, while at the same time keeping them within the binding boundaries of *the Constitution* and the Bill of Rights. Article 20 clearly speaks to this: It states:

Application of Bill of Rights

(1) The Bill of Rights applies to all law and binds all State organs and all persons.

(2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.’

62. The Applicant herein contended that the he has been threatened with prosecution, which is the sole mandate of the 1st interested party, but not led no evidence to prove that allegation.

63. What is clear is that the matter is being handled by the Respondent. He avers that he has been summoned several times to the respondent’s offices at its headquarters in Nairobi. This has not been controverted by the respondent. What the applicant seeks is anticipatory bail to prevent his arrest.

64. In the case of *Mandiki Luyeye vs Republic* [2015] eKLR, Ngenye J (as she then was) held as follows:-

“Similar sentiments were observed in the case of *Eric Mailu vs Republic and 2 others* Nairobi Misc. Cr. Application No. 24 of 2013 in which it was emphasized that anticipatory bail would only issue when there was serious breach of a citizen’s rights by organs



of state. Accordingly, it is salient that anticipatory bail is aimed at giving remedy for breach of infringement of fundamental Constitutional rights in conformity with what the Constitution envisages constitutes protection of fundamental rights and freedoms of a citizen. It cannot issue where an Applicant labours under apprehension founded on unsubstantiated claims. The fear of breach to fundamental right must be real and demonstrable. An Applicant must demonstrate the breach by acts and facts constituting the alleged breach.”

65. In the case of Republic vs Chief Magistrate Milimani & Another Exparte Tusker Mattresses Ltd & 3 Others [2013] eKLR, Odunga, J(as he then was) held that anticipatory bail ought not to be granted to prohibit investigations, a position that this court wholly associates itself with.
66. Indeed, despite having authority to grant anticipatory bail, courts must exercise great restraint not to interfere with the functions of other bodies and institutions that have been created by statute or the Constitution and/or to prevent such bodies or institutions from carrying out their mandate.
67. In the case of Richard Mahkanu vs Republic [2014] eKLR, the court held the firm view that orders for anticipatory bail or bond must not be sought with the intention of pre-empting the outcome of investigations. This position was also held in the case of Kevin Okore Otieno vs Republic (2013) eKLR.
68. I think that the nature of the investigations herein do not necessitate a physical arrest of the applicant. The officer from the respondent did confirm that they are actively pursuing the matter. They have the documents seized from the applicant.
69. In my view, the fears of arrest are real. Who knows what will happen once the applicant is summoned to the DCI headquarters again. The respondent, by his previous conduct in other cases, has not endeared himself to the Kenyan citizen. It is why this applicant has come to court.
70. To allay the applicant’s fears, I will grant him anticipatory bail/bond, which I set as a personal bond of Ksh. 100,000/-.
71. I hasten to add that the grant of the bond does not in any manner bar the respondent from summoning the applicant, should they require any information from him.
72. Section 52 of the National Police Service Act allows a police officer to require any person, in writing, if they have reason to believe that person has information which may assist in investigation of an alleged offence, to appear before him at the police station. The respondent ought to do so reasonably.
73. The applicant has also sought that the seized documents be released to him. The respondent has objected to this, stating that they are crucial to the investigations currently underway.
74. The Director of Criminal Investigations has powers under Section 35 of the National Police Service Act to conduct necessary investigations into claims reported to it. It provides:-

“The Directorate shall—

- (a) collect and provide criminal intelligence;
- (b) undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cybercrime among others;
- (c) maintain law and order;
- (d) detect and prevent crime;



- (e) apprehend offenders;
- (f) maintain criminal records;
- (g) conduct forensic analysis;
- (h) execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of *the Constitution*;
- (i) co-ordinate country Interpol Affairs;
- (j) investigate any matter that may be referred to it by the Independent Police Oversight Authority; and
- (k) perform any other function conferred on it by any other written law.”

75. Investigations are known legal processes in our justice system and do not amount to infringement on the fundamental rights and freedoms to any person. The said processes must be allowed to run their course for proper administration of justice.
76. Investigators must feel and be free to do their work without fear of having their authority and/or mandate stifled by courts merely because courts have power and authority to grant the orders sought. The fact that a person feels inconvenienced by investigations is not sufficient reason for him to be granted such orders. An order of the nature sought, to release the documents seized, should only be granted in the clearest of situations that point to a violation, infringement or threat or contravention of a person’s right under *the Constitution*.
77. In the instant case, I do not find any iota of evidence that the Applicant’s fundamental rights have been threatened by the detention of the said documents. There is need for the investigators to unravel the mystery surrounding the registration of two motor vehicles under the same numbers.
78. The delay in concluding the investigations has been explained by the respondent, though not sufficiently. Nothing would justify holding on to documents for over 2 years and counting. Surely, investigations of this nature must come an end, since the parties claiming ownership of the vehicle have availed their respective documents.
79. In view of what I have stated above, I find that whereas the seizure of the aforesaid items was lawful, there is need to carry out investigation expeditiously to ascertain the process that led to the legal ownership of the suit motor vehicle. The delay is causing harm to the petitioner, and definitely the complainant. The respondent is hereby directed to expedite the process as justice delayed is justice denied.
80. I would therefore be hesitant to grant the orders for the release of the documents at this stage.
81. Curiously, the 2nd interested party did not file any response, despite being the sole authority mandated to register/deregister motor vehicles in Kenya. Whether its silence is deliberate or otherwise remains to be seen.
82. In my opinion, and in agreement with the respondent, the 2nd interested party’s input in the matter will help clear the air over the dispute.



83. I will now deal with the prayer for injunction. Every legal practitioner knows the case of *Giella vs Cassman Brown & Co. Ltd* [1973] EA 358 which provides the guiding principles on whether or not to grant temporary restraining injunctions. These principles are:
- “First the applicant must show a prima facie-case with probability of success; second an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages and thirdly, if the Court is in doubt, it will decide the application on the balance of convenience. See the case of *Ngurumani Ltd vs Jan Bonde Nielson & 2 others* (2014) eKLR.”
84. It is not in doubt that in granting an interlocutory relief which is a discretionary remedy, the Court is guided by the basis of evidence the abovestated legal principles. See the case of *Njenga vs Njenga* (1991) KLR 401.
85. In *Charter House Investments Ltd vs Simon K. Sang and other*, Civil Appeal No. 315 of 2004 the Court held that :-
- “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 temporary injunction by Court 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 balance the conveniences of the parties and the possible injuries to them and to third parties.”
86. This court’s duty is thus to consider whether the Applicant herein has met the threshold for grant of injunctive relief.
87. The applicant has given history of how he acquired the motor vehicle in question. The log book he has attached indicates that the he is the current owner of the suit motor vehicle and the same was issued to him on 11th September, 2019. The respondent on its part have challenged the registration process of the aforesaid lorry. It has given the reasons for suspecting that the registration of the vehicle was clouded in mystery. In particular, the respondent asserted that as per the agreement dated 17th August, 2006 the petitioner bought KAC 382T Isuzu Lorry which was grey in colour and engine number 6RB1-121401, however, the log book dated 23.3.2021 indicates the Motor Vehicle Registration no. KAM 577 L was registered in the names of the petitioner but with 177719 as the engine number and white/cream as its color. The copy of the said agreement annexed to the supporting Affidavit of the petitioner and the attached log book issued in the name of the petitioner confirm this position.
88. The respondent also annexed a copy of the transfer form of the suit motor vehicle, a report and log book showing that the suit motor vehicle was transferred to Ephantus Ndegwa and Equity Bank on 17th October, 2014 and a log book subsequently issued in their joint names on 19th December, 2014. The respondent attached a copy of the complaint letter by Ephantus Ndegwa addressed to it questioning how the applicant became the current owner of the suit motor vehicle without his knowledge. The respondent further annexed an affidavit sworn by the petitioner on 29th November, 2018. In this affidavit, the applicant is requesting the 2nd interested party for a duplicate copy of a log book in his name in respect to Lorry Registration Number KAC 382T Isuzu CXZ gray in color. But what he was issued with is a log book of a lorry registration number KAM 577L.



89. The applicant averred that he and the 2nd interested party called the owner of the suit motor vehicle to take it for tape lifting but he did not cooperate.
90. From the foregoing, it is clear that there are two competing interests over the motor vehicle in question and it is only after due enquiries are made that the applicant can be vindicated. As I stated, the input of the NTSA will be crucial.
91. I noted that P.C. Mwanzi, at paragraph 9 of his affidavit, stated that upon making enquiries at the NTSA, the Authority indicated that the vehicle in question is registered in the name of the Petitioner. Section 8 of the *Traffic Act* provides as follows;

“ 8. Owner of vehicle

The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”

92. For the foregoing reasons, I find that the applicant has established a prima facie case. A prima facie case is not one that must succeed, but it is one that is arguable. Reference is made to the decision in *Mrao Ltd vs First American Bank of Kenya and 2 others*, (2003) KLR 125 which was cited with approval in *Moses C. Muhia Njoroge & 2 others v Jane W Lesaloi and 5 others*, (2014) eKLR, the Court of Appeal defined a prima facie case as:

“ A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

93. On whether the Applicant would suffer irreparable loss which cannot be compensated by an award of damages, the applicant averred that as a result of the seizure of the aforesaid items he has been prevented from using his lorry which is wasting away and he has incurred huge losses. No evidence was led to substantiate this position. It is not clear what loss the applicant has suffered, even though the vehicle in question is a lorry, a commercial vehicle. In my view, if it is later established that he is the legal owner of the motor vehicle and upon establishing the exact loss he has incurred, the same can be compensated by damages.
94. In *Nguruman Limited vs Jan Bonde Nielson & 2 others*: CA No. 77 of 2021 the court observed thus:

“ ... the applicant must establish that “he might otherwise” suffer irreparable injury which cannot be adequately compensated by damages in absence of an injunction. This is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of injury. Speculative injury will not do; there must be more than unfounded or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial, and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which the amount can be measured with reasonable accuracy or the injury or harm is of such a nature that monetary compensation, of whatever, will never be adequate remedy.”

95. In view of the above, I am also in doubt as to the insufficiency of damages as compensation for any harm or loss likely to be suffered by the applicant.



96. It is well settled law that the third limb under Giella's case comes into consideration if the court is in doubt on the first two limbs. The court is enjoined to determine the matter on a balance of convenience, and that is what I proceed to do.
97. It is alleged that the registration process of the suit motor vehicle to the Applicant's name is questionable. These are the issues that cannot be addressed at this stage as investigations are still ongoing.
98. Thus, before the said registration is found to be unlawful or un-procedural, the petitioner is deemed to be the owner of the vehicle and is therefore entitled to its possession. On this ground I find that the balance of convenience tilts in the Applicant's favor.
99. All things considered, and on a balance of convenience, I find that before there is proof of illegality by the applicant, the motor vehicle ought to remain in situ, with the applicant. The applicant shall give access to the investigators should they require such in the course of their investigations.
100. I therefore grant prayer 7 of the application pending determination of the petition or further orders of the court.
101. In the end, I grant prayers 6 and 7(as set out above) of the application. For the avoidance of doubt, all the other prayers are not granted.
102. The costs of this application shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAKURU THIS DAY OF 18TH DAY OF OCTOBER, 2023.

H. M. NYAGA,

JUDGE.

