



**Orina v Palmieri (Civil Appeal 138 of 2022)  
[2024] KEHC 15368 (KLR) (4 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15368 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL APPEAL 138 OF 2022  
SM GITHINJI, J  
DECEMBER 4, 2024**

**BETWEEN**

**GEOFFREY ORINA ..... APPELLANT**

**AND**

**GIORGIO PALMIERI ..... RESPONDENT**

*(Being an Appeal of the whole decision and Ruling and Order made on the 14<sup>th</sup> day of December, 2022 by Hon James Ongondo – SPM in Malindi CMCC Case No. E260 of 2022)*

**JUDGMENT**

**Representation:**

Mouko & Co. Advocates for the Appellant.

Njuki & Co. Advocates for the Respondent.

1. The Appellant aggrieved by the Ruling and order of the learned Senior Principal Magistrate in Civil Suit No. E260 of 2022 dated 14<sup>th</sup> December, 2022 set forth the following grounds in the Memorandum of appeal dated 15<sup>th</sup> December, 2022;
  1. That the learned Magistrate erred in law in holding that the Respondent had satisfied the conditions set out in the case of Giella vs Cassman Brown when non had been established.
  2. That the Learned Magistrate erred in law and in fact in holding that the Respondent had made up a case not only for a temporary injunction but for a mandatory injunction.
  3. That the Learned Magistrate erred in ordering the Appellant to repair the subject motor vehicle which was not part of the prayer by the Respondent and which the court was not urged to in submission.



4. By ordering the release of the motor vehicle, the Honourable Magistrate denied the Appellant his right to a repairers' lieu under the express law of contract.
5. That the Learned Magistrate erred in law and fact by revising the contractual obligations between the parties.
2. The Appellant sought to have the appeal allowed, the subordinate court order of the 14.12.2022 set aside and substituted with a dismissal of the Respondent's application dated 12<sup>th</sup> October, 2022 and costs be awarded to the Appellant.
3. The appeal was determined by way of written submissions.
4. The Appellant through the firm of Mouko & Company Advocates filed submissions dated 11<sup>th</sup> October, 2024 while the Respondent through the firm of Metto & Co. Advocates filed submissions dated 11<sup>th</sup> October, 2024.

### **Determination**

5. The crux of this appeal is the application by the Plaintiff dated 12<sup>th</sup> October, 2022. In that application, the Plaintiff sought mandatory orders as well as temporary injunctive orders restraining the defendant from selling the motor vehicle in question by way of public auction. I have also perused the ruling by the subordinate court. In my view, a mandatory injunction should only be granted in special circumstances and in clearest of cases.
6. A mandatory injunction is a court order compelling a party to take a specific action to rectify a wrong or fulfill an obligation. Its purpose is to restore a situation to its original state or enforce compliance with a legal duty. For a court to grant it, the applicant must demonstrate a clear and strong case, as this order disrupts the status quo. Mandatory injunctions are generally therefore more difficult to obtain due to their intrusive nature.
7. Prohibitory injunction on the other hand is a court order restraining a party from performing a specific act to prevent harm or a legal violation. Its purpose is to maintain status quo and prevent anticipated harm or breach of rights. Here the applicant must prove there is a prima facie case, risk of irreparable harm, and that the balance of convenience favours the injunction. Prohibitory injunctions are more common as they focus on preserving the status quo.
8. Bearing that in mind, the main issue in this appeal is whether the subordinate court erred in granting a mandatory injunction in the circumstances of this case and whether doing so constituted an erroneous exercise of judicial discretion. An applicant in a mandatory injunction must, in fact, establish the existence of special circumstances. Furthermore, such an applicant for mandatory injunction must prove his case on a standard higher than the standard in prohibitory injunctions.
9. In the present case, the Respondent in the application dated 12<sup>th</sup> October, 2022 asserted that he was the registered owner of the motor vehicle in question and that sometime in February, 2022, he took the motor vehicle to the applicant who is a mechanic for repair and that after paying the requested amount, the applicant failed to release the motor vehicle. The Applicant on the other hand contended that after repairing the motor vehicle, the respondent protested paying the agreed amount alleging that the bill was too high. He further contended that the order as issued by the subordinate court is incapable of being met since the Respondent is yet to pay for parts of the motor vehicle that had been replaced.



10. In the case of Kenya Breweries Ltd & Another vs Washington O. Okeya [2002] eKLR, the Court of Appeal stated as follows on mandatory injunctions;

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

11. The Court also reaffirmed its decision in Shariff Abdi Hassan Vs Nadhif Jama Adan (2006) eKLR where it stated that:

“The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.”

12. From my analysis of the respective positions presented above, I have not come across any compelling factors that would warrant the granting of a mandatory order of injunction at this stage. I also find that the applicant has not brought any credible evidence to show that the injury to the motor vehicle is so immediate as to result in grave hardship unless and until a mandatory injunction is granted at this interlocutory stage.

13. I concede that a mandatory injunction bringing a matter to conclusion at an interlocutory application cannot be issued in the absence of special circumstances. I am not convinced that special circumstances existed in this matter that may warrant the grant of a mandatory injunction in the nature of the orders issued in the ruling dated 12<sup>th</sup> December, 2022. Further, I am also not convinced that this case is so clear that it ought to be decided summarily. On perusal of the issues, I am of the view that there are competing claims by both parties and these require further interrogation at full hearing.

14. Having said that, the orders of 14<sup>th</sup> December, 2022 are hereby set aside. It is also directed that the matter be placed before the trial court for determination of the orders sought in the Plaint and Counter claim.

**JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 4<sup>TH</sup> DAY OF DECEMBER, 2024.**

.....

**S.M. GITHINJI**

**JUDGE**

In the Presence of; -

Miss Metto for the Respondent

Mr Mouko for the Appellant (absent)

