REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL NO. E048 OF 2024

EDWIN KIMELI KEMBOI……..
…….....APPELLANT
VERSUS
GABRIEL WANYONYI MATANDA……...……..1ST RESPONDENT
BRAVE AUCTIONEERS……...……..2ND RESPONDENT
NANCY JEPKENEI TANUI……...……...INTERESTED PARTY

RULING

1. There are two different Applications for determination herein. It was agreed that the Applications, being related, be determined in this one Ruling. The genesis of this Appeal and by extension, the two Applications, is the seizure and/or sale or advertisement for sale of the Appellant's motor vehicle registration number KCH 522Y in execution of the Decree arising from the Judgement rendered in **Eldoret CMCC No. 916 of 2022** on 8/03/2024. The Appeal was filed on 14/03/2024 through **Messrs Anassi Momanyi Advocates**.

2. The 1st Application is filed by the Appellant, through his "*new*" Advocates, **Messrs Kesse & Kesse & Co. Advocates**. It is dated 2/07/2025 and basically, seeks orders of injunction to restraining the Respondent from advertising or selling the said motor vehicle, and also seeks that possession of the vehicle be restored back to him.

3. The Appellant, in his Affidavit filed in support of the Application, deponed that the Auctioneers, in collusion with the Respondent, raided his premises and took away the motor vehicle, which is now due for advertisement for sale and which, if not stopped, will cause him loss and irreparable damage yet his Appeal has not been heard. He deponed further that he does not have any other car to use for his daily chores with his family, and that he has established an arguable case, has not also demonstrated any arguable appeal with chances of success.

4. In opposing the Application, the Respondent has relied on the Replying Affidavit sworn by his Counsel, **Mr. Stephen Mukhogosi Imbwaga** on 28/07/2025, filed through **Messrs Imbwaga, Yogo & Partners Advocates**. Counsel deponed that the Application is being used to delay justice and does not bring any special or unique circumstances to necessitate grant of stay of execution. He averred further that the Appellant has not demonstrated adequately or at all what substantial loss he may face unless stay of execution is granted. He

also pointed out that the Appellant's new Advocate did not seek leave to come on record. He contended further that the motor vehicle has already been proclaimed and sold to a 3rd party in execution of the Judgment. Regarding the Appellant's statement that he is ready to deposit the security, he urged that should the stay of execution be granted, the Appellant be ordered to deposit the entire decretal sum. He contended further that execution was carried out regularly and lawfully as the sale of the vehicle was advertised and the sale was conducted at a public auction and the Appellant did not act within the statutory stipulated timelines to register his interests. Counsel also deponed that there has been an inordinate delay by the Appellant to prosecute the Appeal since he filed it, and urged that the Application is an afterthought. He then exhibited copies of documents demonstrating that indeed the motor vehicle was advertised in the media on 17/06/2025 for sale and subsequently sold on 24/06/2025 to the Interested Party as the highest bidder at a sum of Kshs 550,000/-.

5. The 2nd Application is filed by the Interested Party, also through **Messrs Imbwaga, Yogo & Partners Advocates**. It is dated 31/07/2025 and basically seeks, in addition to joinder of the Interested Party, that the said vehicle be restored back to the Interested Party who purchased it at a public auction.

6. The Affidavit filed in support of the Application is again sworn by **Mr. Imbwaga Advocate**, who again contended that the Appellant, since filing the Appeal has not prosecuted the same and has now been overtaken by events as the motor vehicle was already attached and has now been sold. He exhibited copies of the same documents he had exhibited in his earlier Replying Affidavit to demonstrate that the vehicle has since been sold in execution of the Judgment.

7. The parties then filed written Submissions. The Appellant's Submissions is dated is 2/11/2025, while the Respondent's (encompassing the Interested Party, I believe) is dated 29/10/2025.

8. In his consolidated Submissions to the 2 Applications, Counsel for the Appellant basically contended that the attachment of the motor vehicle was null and void because at the time of attachment and sale, the same was the subject of litigation.

9. On his part, Counsel for the Respondent basically restated the position already taken in his Affidavits, including that the Application has not demonstrated any substantial loss as the

motor vehicle was already sold at a public auction in execution of the Judgment, that the Appellant has not deposited security

Determination

10. The issue for determination herein is **"whether, pending hearing and determination of this Appeal, a temporary injunction should be issued restraining the Respondent from advertising, or selling the Appellant's motor vehicle in execution of the subject decree herein."**

11. Generally, the law governing the grant or refusal of interlocutory injunctions is set out under **Order 40(1) (a)** and **(b)** of the **Civil Procedure Rules 2010** which provides as follows:

> **"Where in any suit it is proved by affidavit or otherwise—**
>
> **(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or …….;**
>
> **(b) That the defendant threatens or intends to remove or dispose of his 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;**
>
> **the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further."**

12. Specifically, this Court's power to grant an injunction pending Appeal, sitting as an appellate Court, is provided under **Order 42 Rule 6(6)** of the **Civil Procedure Rules**. The same is premised in the following terms**:**

> **"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."**

13. The conditions for consideration in applications for injunctions were settled in the celebrated case of **Giella v Cassman Brown & Company Limited (1973) EA 358,** in which the Court pronounced itself in the following terms:

> **"Firstly, an applicant must show a prima facie case with a probability of success. Secondly, 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. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."**

14. The said test was also considered in the case of **American Cyanamid Co. v Ethicon Limited (1975) AC 135** where the elements were broken down that; (**i**) **there must be a serious/fair issue to be tried,** (**ii**) **damages are not an adequate remedy,** and, (**iii**) **balance of convenience lies in favour of granting or refusing the application.**

15. It is also settled that in interim applications, such as in this case, the Court should avoid making final determinations on matters of fact on the basis of the conflicting Affidavit evidence. In connection thereto, in **Mbuthia vs Jimba Credit Finance Corporation & Another [1988] KLR 1,** the Court of Appeal guided as follows:

> **"…… the correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions."**

16. Although as aforesaid, I should not delve deeply into determining substantive matters, to make a determination whether a ***prima facie*** case has been established, the Court may still examine the facts deponed in the rival Affidavits and apply them to the law.

17. As to what amounts to a ***prima facie*** case, the Court of Appeal, in **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 123** held as follows:

> **"A prima facie case in a civil application includes but not confined to a genuine and arguable case. It 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 as to call for an explanation or rebuttal from the latter."**

18. The first matter I notice herein is that there is no Notice of Change of Advocates filed by **Messrs Kesse & Kesse Advocates** to come on record in place of **Messrs Anassi Mommanyi & Co**, which is the firm that filed the Memorandum of Appeal. If this is indeed the case then it means the firm of **Kesse & Kesse & Co**. is improperly on record and pleadings filed by it are incompetent.

19. Secondly, while the Appeal was filed in March 2024, this Application was belatedly filed in July 2025, a whole more than 1 year and 4 months later, and more than 1 month after the Proclamation was effected in May 2025. No explanation has been given for this clear inordinate delay.

20. Thirdly, the prayer for injunction pending Appeal is itself clearly misconceived. This is because the attachment and sale of the motor vehicle was in execution of a decree, not a refusal by the lower Court to grant an injunction. What the Appellant should therefore have applied for is stay of execution pending Appeal, not an injunction.

21. Fourth, it is clear, as argued by the Respondent, that the Application has long been overtaken by events. This is because there is evidence, not contradicted, that after proclamation, and attachment, the motor vehicle was carted away by the Auctioneer and advertised for sale, which sale was then effected on 24/06/2025 when the motor vehicle was sold to the Interested Party at a public auction as the highest bidder, at the sum of Kshs 550,000/-. No irregularity in compliance with any of these procedures has been alleged.

22. Fifth, all indication is that the decree arose from an ***ex parte*** Judgment. In such circumstances, the first port of call for a Defendant against whom ***ex parte*** Judgment has been entered is to file an Application seeking setting aside such Judgment if sound grounds exist for doing so. In this case, the indication is that the Appellant never at all applied for setting aside of the ***ex parte*** Judgment. If he did, then he has not disclosed so, or the outcome thereof. Having not participated in any hearing before the lower Court and if he did not file an Application for setting aside the ***ex parte*** Judgment, it means that there will be no Statement of Defence on record, draft or otherwise, for consideration by this Appellate Court. How then is this Court going to determine the merits of the grounds stated in the Memorandum of Appeal?

23. For the above reasons. I have serious misgivings over the arguability of the Appellants' Appeal and its strength and chances of success. This applies in equal measure to the Application. Granting the Application under these circumstances, would therefore be clearly futile.

24. My finding is therefore that, apart from the Application being misconceived, the Appellant has also failed to demonstrate the existence of a ***prima facie*** case.

25. Having found that no ***prima facie*** case has been established, it is no longer necessary to consider the second and third limbs of the rule in **Giella vs Cassman Brown**. For this position, I refer to the case of **Nguruman Limited v Jane Bonde Nielsen and 2 Others, NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR**, where the Court of Appeal reiterated as follows*:*

> **"These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. (See Kenya Commercial Finance Co. Ltd V. Afraha Education Society *[2001] Vol. 1 EA 86*). ……. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration ……..."**

26. For the above reasons, it is clear that the Appellant has failed to satisfy the principles guiding the grant of interlocutory injunctions pending Appeal. The Application therefore fails.

Final Orders

27. In the premises, the Appellant's Notice of Motion dated 2/07/2024 is hereby dismissed with costs to the Interested Party. Accordingly, any interim orders earlier issued herein in favour of the Appellant are lifted in their entirety.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 30TH DAY OF JANUARY 2026

……..……..
WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

Mr. Kesse for the Appellant

Mr. Imbwaga for the Respondents and Interested Party

Court Assistant: Brian Kimathi