

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT HOMA BAY
CIVIL SUIT NO. E003 OF 2025

CALVINE OTIENO ODIWUOR.....
.....PLAINTIFF

-VERSUS-

SIMPLE PAY CAPITAL LTD.....1ST
DEFENDANT
JOKOGO AUCTIONEERS.....2ND
DEFENDANT

RULING

[1] The Chamber Summons dated 25th March 2025 was filed by the applicant, **Calvine Otieno Odiwour**, pursuant to **Article 50** of the Constitution, **Section 3A** of the Civil Procedure Act, **Section 7(1)** of the Arbitration Act, **Order 53** of the Civil Procedure Rules and **Rule 2** of the Arbitration Rules, 1997 for the following orders:

[a] Spent

[b] That the Court be pleased to grant an order restraining the respondents, their agents, employees or any other person acting at their behest from selling or advertising the applicant's Motor Vehicle Registration No. KBP 722K Mitsubishi Canter FES pending the hearing and determination of the application *inter partes*.

[c] That the Court be pleased to order the release of Motor Vehicle Registration No. KBP 722K Mitsubishi Canter FES pending the hearing and determination of the suit.

[d] That costs of the application be borne by the respondents.

[2] The application was premised on the grounds that the 2nd respondent, acting on the instructions of the 1st respondent, illegally and prematurely repossessed the subject motor vehicle, yet it was an express term of the loan agreement that in the event of default by the applicant, the 1st respondent would only charge interest and not repossess the subject motor vehicle. The applicant averred that the motor vehicle constitutes his sole tool of trade and its continued detention by the respondents prejudices his ability to generate income and earn a living to settle the pending loan with the 1st respondent.

[3] The applicant further deposed that it was malicious for the respondents to continue holding the motor vehicle and at the same time demand repayment of the loan, yet the motor vehicle was the tool that generated income for the repayment of the loan. He therefore posited that, unless stay of sale is granted the respondents will dispose of the subject motor vehicle thereby exposing him to imminent loss and damage. He added that he has an arguable case and has come to court without undue delay.

[4] The respondents opposed the application. They relied on the Replying Affidavit sworn on 24th April 2025 by the Managing Director of the 1st respondent, **Ms. Susan Karimi**. The respondents explained that the 1st respondent is a non-deposit taking money lending company; and that it operates on the principles of the law of contract whereby it lends money to the

public against a collateral and upon acceptance of a letter of offer by the borrower and execution of loan agreement that governs the terms and conditions under which the loan is given to the borrower.

[5] The respondents further averred that the applicant approached the 1st respondent for a loan of Kshs. 535,000/= in respect of which Motor Vehicle Registration Number KBP 722K was offered as security. The respondents pointed out that, since the motor vehicle was in the name of one **Vincent Otieno Odiwour**, the said **Vincent Otieno Odiwour** signed the application form as the referee and guarantor of the borrower. The application was approved and a Letter of Offer given to the applicant for consideration and signature.

[6] The respondents further averred that upon accepting the terms set out in the Letter of Offer, the applicant signed the Loan Agreement by which he gave the 1st respondent authority to deal with the security as it deemed fit in securing its interest as a financier.

[7] The respondents averred that, although the loan was to be repaid within 12 months in instalments of Kshs 67,368/=, the applicant defaulted in making the repayments as agreed; which default prompted the 1st respondent to demand repayment as per its letter to the applicant dated 17th October 2024. The respondents deposed that it was upon failure by the applicant to honour the demand, that the 1st respondent instructed the 2nd respondent, as its agent and auctioneer, to repossess the motor

vehicle. The motor vehicle was seized and when the plaintiff failed to redeem the chattel or make good the repayment of the loan, the car was then advertised for sale and was sold by public auction to recover the amounts owing to the 1st defendant.

[8] The contention of the respondents was therefore that the repossession and sale were justified in the circumstances, granted the breach and failure by the applicant to adhere to the loan agreement and his subsequent failure to redeem the chattel when it was seized. They asserted that the suit and the instant application have been overtaken by events in that, after the sale by public auction the 1st defendant wrote to the Director General of National Transport and Safety Authority (NTSA) to effect a forced transfer of the subject car on the 24th November 2024. They surmised that the orders sought cannot, in the absence of evidence to the contrary, issue.

[9] The respondents relied on several documents exhibited as annexures to their Replying Affidavit. They included:

- [a]** A copy of the loan application by the applicant and his undertaking (Annexure SK1)
- [b]** A copy of the Letter of Offer (Annexure SK2)
- [c]** A copy of the Loan Agreement (Annexure SK3)
- [d]** A copy of the Personal Guarantee (Annexure SK4)
- [e]** A copy of the Power of Attorney (Annexure SK5).
- [f]** Copies of Letters of Authority to Transfer Funds to the applicant's bank account (Annexure SK6 and SK7)
- [g]** A copy of the demand letter (Annexure SK10).

[h] A copy of the Repossession Order (Annexure “SK11”).

[i] A copy of the advertisement posted by the 2nd respondent (Annexure SK12).

[j] A copy of the Certificate of Sale (Annexure SK13)

[k] A copy of the letter by the 1st respondent to NTSA to effect transfer (Annexure SK14)

[10] The application was canvassed by way of written submissions pursuant to the directions given herein on 23rd April 2025. Accordingly, the applicant filed written submissions dated 13th May 2025 in which he proposed the following issues for determination:

[a] Whether a *prima facie* case has been made out by him to warrant issuance of the orders sought; and,

[b] Whether the applicant has demonstrated that he stands to suffer damage if the orders sought are not granted.

[11] The applicant relied on the case of **Giella v Cassman Brown & Co Ltd** (1973) E A 358 and **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others** [2003] KLR 123 in urging the Court to find that he has made out a *prima facie* case. He particularly drew the Court’s attention to paragraph 21 of the Replying Affidavit, and contended that the 1st respondent admitted the fact that the agreement forbade repossession of the suit motor vehicle at any instance. He added that Paragraph 12 of the loan agreement dated 7th February 2024 was to the effect that in the event of default, it would only charge interest. The

applicant therefore contended that the repossession of the suit motor vehicle was not only premature but also illegal.

[12] The applicant also submitted that the agreement and the power of attorney, both drafted by the 1st respondent, are contradictory to each other; and that the contradiction can only be considered and resolved at the trial on the basis of evidence to enable the Court determine and effectually resolve the conflict. In addition, the applicant denied service and invited proof thereof, if any, as one of the issues for trial. In essence, the applicant posited that he has made out a *prima facie* case with valid triable issues.

[13] On the issue of damage, the applicant submitted that, having demonstrated that he has a *prima facie* case with a probability of success, and having shown that he has been relying in the said Motor vehicle registration number KBP 722K to service the subject loan and provide other necessities in his household, he stands to suffer immense prejudice unless the orders sought are granted. He contended that the whole repossession and sale procedure adopted by the respondent in this instance was flawed in substance and form and ought therefore to be nullified. Accordingly, the applicant prayed that his application be allowed and the orders sought granted.

[14] The defendant filed written submissions dated 10th June 2025. They reiterated their stance that the application has been overtaken by events in so far as the subject motor vehicle has

been sold to a third party as explained at paragraphs 14, 15 and 16 of the Replying Affidavit. They submitted that it is in vain that the applicant is now seeking to restrain that which took place sometime on the 11th November 2024.

[15] It was also the submission of the respondents that since the applicant expressly admitted that he was in default, he cannot be said to be having a *prima facie* case with a probability of success to warrant the issuance of a temporary injunction. In addition, the respondents were of the view that the subject matter is a motor vehicle whose value can be quantified in monetary terms. Accordingly, the respondent urged the Court to find that the applicant has failed to prove irreparable harm.

[16] In terms of the balance of convenience, the respondents urged the Court to take into account that the monies advanced to the applicant are yet to be fully repaid; and that the 1st respondent stands to lose out should the orders sought be granted. They submitted that the balance of convenience tilts in their favour in the circumstances. It was therefore their prayer that the application be dismissed with costs.

[17] I have carefully perused and considered the application from the backdrop of the Plaint dated 18th March 2025. I have also considered the averments set out in the parties' respective affidavits as well as the written submissions filed by learned counsel. A perusal of the pleadings shows that the applicant filed

the instant suit seeking the restitution of Motor Vehicle Registration Number KBP 722K, damages for breach of contract, special damages for loss of user, the costs of the suit and interests at court rates.

[18] It is not in dispute that the applicant entered into a loan agreement with the 1st respondent on or about 7th February 2024. The applicant was accordingly advanced the sum of **Kshs. 535,000/=** which was to be repaid within 24 months. However, during the pendency of the contract, particularly on or about the **17th October 2024**, the 2nd respondent acting on the instructions of the respondent repossessed the Motor Vehicle Registration Number KBP 722 K, alleging that the applicant was in breach of the terms of the loan agreement by defaulting in payment. Consequently, the applicant filed this suit seeking the intervention of the Court in the matter.

[19] In particular, the applicant filed the application dated 25th March 2025 seeking to stop the respondents from selling or advertising the applicant's Motor Vehicle registration number KBP 722K, pending the hearing and determination of this suit. The applicant also prayed that the motor vehicle be released pending hearing and determination of the suit filed herein to enable him service the loan and meet his other financial obligations. The issue for consideration therefore is whether the applicant has met the prerequisites for the issuance of an order of temporary and mandatory orders of injunction as prayed.

[20] The guiding principles for the grant of orders of the temporary injunction are well settled. They were enunciated in **Giella v Cassman Brown (supra)** and have been restated severally. For instance, the Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014) eKLR**, held:

“...In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) establish his case only at a prima facie level,

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

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

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...”

[21] A *prima facie* case was defined in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others (supra)** as follows:

“... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter...”

[22] A fundamental point was raised by the respondents touching on the very foundation of the applicant’s case, namely, that the subject motor vehicle had already been sold and instructions given to the National Transport and Safety Authority to effect the changes in ownership. The respondents availed proof of the sale by way of the Repossession Order (Annexure “SK11”), the advertisement posted by the 2nd respondent (Annexure SK12), the Certificate of Sale (Annexure SK13) and the letter to NTSA to effect transfer (Annexure SK14). Annexure SK12 shows that the

sale was advertised for 11th November 2024 while the Certificate of Sale (Annexure SK13) confirms that the sale took place on 11th November 2024. The letter to NTSA is dated 25th November 2024.

[23] It is plain therefore that this suit was filed long after the sale of the subject motor vehicle and is therefore a classic case of closing the stable door after the horse had bolted. In the case of **Kalya Soi Farmers Cooperative Society v Paul Kirui & Another** [2003] eKLR, it was held:

“As is said, “Equity, like nature, will do nothing in vain.” On the basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the court will decline to grant it.”

[24] In the premises, I find no merit in the application dated 25th March 2025. The same is hereby dismissed with an order that the costs thereof be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19TH DAY
OF FEBRUARY 2026**

.....

OLGA SEWE

JUDGE