

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
(CIVIL DIVISION)

HCCA NO. E250 OF 2025

WAZIR AUTO LTDAPPELLANT

VERSUS

JAMES WANJOHI NJOROGE

EQUITY BANK (K) LTD.....RESPONDENTS

RULING

1. Vide a notice of motion dated 7th August 2025 the appellant/applicant sought, *inter alia*, a temporary injunction restricting the respondents from selling, advertising for sale, dealing, disposing off, selling in public auction or by private treaty, or transferring to third parties, or disposing of by way of forced transfer or otherwise dealing in any manner whatsoever, with motor vehicle **Reg Number KDK 966 Z Jeep Wrangler**, pending the hearing and determination of the appeal.

2. In the grounds in support of the application, it was stated that the appellant sold the said motor vehicle to the 1st respondent for **Kes 7,450,000**. The 1st respondent paid **Kes 4,000,000** and took possession of the said motor vehicle. He defaulted on paying the balance. The appellant lodged a suit in the court below and concurrently filed an application seeking to prevent the respondents from transferring the said motor vehicle. The court below did not allow the application. Being aggrieved by the said decision, the appellant appealed to this court.

3. The appellant is apprehensive that, unless an injunction is issued, the respondents may dispose of the subject motor vehicle. They contended that the appeal raises substantive questions of law with high chances of success, *to wit*, the proper interpretation of ownership rights under the Traffic Act, the threshold for establishing fraud in interlocutory applications, and constitutional protections against unlawful deprivation of property.
4. The application was opposed by the 2nd respondent. Clement N Mwaura, its Credit Manager, deposed that the appeal was not arguable and denied that it would be rendered nugatory, absent an injunction. Mr. Mwaura contended that the appellant could, in any case, be compensated by an award of damages.
5. The application was canvassed by way of written submissions. Both parties filed written submissions.
6. The written submissions of the appellant are dated 11th November 2025. Counsel for the appellant urged that this court could issue an injunction under Order 42 Rule 6 (1) and (6) of the Civil Procedure Rules, 2010. It was urged that the conditions to be met by an applicant for an injunction pending appeal were enunciated in the case of **PATRICIA NJERI & 3 OTHERS V NATIONAL MUSEUM OF KENYA [2004] KEHC 1614 (KLR)**. In the said case, Visram, J, as he then was, stated as follows:

“In the *Venture Capital* case, 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 whimsical or

arbitrary fashion.” This discretion is guided by certain principles, some of which are as follows:

(a) The discretion will be exercised against an Applicant whose appeal is frivolous (See ***Madhupaper International Limited vs Kerr (1985) KLR 840*** (cited in ***Venture Capital***). The Applicant must state that a reasonable argument can be put forward in support of his appeal (***J. K. Industries vs KCB (1982 – 88) KLR 1088*** (also cited in *Venture Capital*))

(b) The discretion should be refused where it would inflict greater hardship than it would avoid (See ***Madhupaper*** supra).

(c) The Applicant must show that to refuse the injunction would render his appeal nugatory (See ***Butt vs Rent Restriction Tribunal (1982) KLR 417*** (cited also in *Venture Capital*)).

(d) The Court should also be guided by the principles in *Giella vs 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***).”

7. It was submitted that the appeal is arguable, and not frivolous, and that it would be rendered nugatory if the application were denied. Counsel urged that the conditions in ***Giella v Cassman Brown & Co Ltd (1973) EA 358*** had been met. Lastly, it was submitted that the 3rd respondent had a duty to safeguard the interests of the applicant.

8. On their part, the 2nd respondent submitted that an injunction shouldn't issue. Counsel submitted that for an injunction pending appeal to issue, it must be demonstrated that the appellant has an arguable appeal. Relying on the case of **Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others [2014] KECA 153 (KLR)**, it was urged that issues of fraud could only be determined with finality during a full trial and not through conflicting affidavit evidence. Counsel stated that, given the fact that the appeal was based on fraud and in view of the foregoing decision, the ruling of the court below was well-grounded. The appeal couldn't, therefore, be said to be arguable.
9. Counsel further contended that damages were an adequate remedy. In support of that proposition, he relied on the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] KECA 606 (KLR)**, and **Megashell Transporters Limited v Co-operative Bank Limited [2021] KEHC 9440 (KLR)**. Counsel submitted that the loss that could potentially be suffered by the appellant had been quantified in paragraphs 13 and 14 of the amended plaint.
10. The 2nd respondent's counsel submitted that allowing the application would create a greater injustice as the vehicle may be dissipated or lost.
11. I have considered the application, the supporting affidavit and the annexures thereto, the responses filed, and the written submissions of the parties. The issue that I must determine is whether there is a case for the issuance of an injunction pending appeal.

12. I must note at the outset that this court is clothed with jurisdiction to grant an injunction pending appeal. As was stated by Visram, J, as he then was, in **PATRICIA NJERI & 3 OTHERS V NATIONAL MUSEUM OF KENYA [2004] KEHC 1614 (KLR)**, an injunction pending appeal is issued by the court, in appropriate cases, in exercise of judicial discretion. The court, when doing so, must act judiciously, and not whimsically, or in an arbitrary manner; the court must be guided by principles. An applicant must show that it has an arguable appeal. That issuance of an injunction won't inflict greater hardship, that to refuse to grant an injunction would render the appeal nugatory, and lastly, meet the conditions set out in the case of **Giella case**.
13. Turning to the case at hand, is the appeal arguable? The appeal is in respect of the decision of the court below, vide which an application for an injunction was denied. It is a trite law that an injunction is an equitable remedy. Equitable remedies, on their part, are discretionary in nature.
14. In the case of **Mbogo & another v Shah (1968) EA 93**, it was held that:
“...That this court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted, or because it failed to take into consideration matters that it should have taken into consideration, and in doing so arrived at a wrong conclusion.”

15. That, in my view, is the hurdle that the appellant must surmount. I note that the trial court found that the issue of fraud could only be established upon a trial on the merits. Given the holding in **Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others [2014] KECA 153 (KLR)**, it does not appear to the court that the learned magistrate acted on wrong principles.
16. In the Vivo Energy case, the Court of Appeal stated as follows:
“**The conclusion, at an interlocutory stage, that Mr. Maloba’s conduct was fraudulent, is even more baffling to us. Although Mr. Thangei submitted forcefully that fraud was pleaded and that there was evidence on record upon which the learned judge could rightfully find fraud established, in our view, the learned Judge was not justified in making such findings at an interlocutory stage.**”
17. Even if I were wrong and there were grounds to interfere with the exercise of discretion by the court below, I note that the claim of the appellant is for the unpaid consideration. That is a loss that is in monetary terms and is quantifiable. As the 2nd respondent has submitted, the sum that the appellant may lose is set out in paragraphs 13 and 14 of the amended plaint.
18. In the Nguruman case, it was held that:
“**If damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage.**”

19. The 1st respondent did not file a response and didn't participate in these proceedings. He appears to be least bothered. The contention by the 2nd respondent that leaving the vehicle where it is would lead to double loss for the seller and the financier, and that, in essence, what the applicant was calling for was for the baby, as the biblical fable goes, to be split in half, is persuasive; certainly, there is no guarantee that the 1st respondent, if the conflict is frozen in aspic, by issuance of an order of injunction that merely restricts the transfer, but leaves the vehicle in his hands, will bother to maintain the vehicle, or that he may not engage in further shenanigans.
20. In applying *Visram, J, dictum*, I have considered the principles in the *Giella* case. I have established that there is no prima facie case with probability of success, and that, in any case, damages would be an adequate remedy as the potential loss is quantifiable. I have also considered the balance of convenience and found that it tilts in favour of the denial of the orders sought. The conclusion I have reached is that an injunction shouldn't issue in this case. The notice of motion dated **7th August 2025** is thus dismissed with costs.
21. Orders accordingly.

**Dated and signed in Mombasa, this 11th day of February 2026. Delivered
virtually through Microsoft TEAMS.**

**Gregory Mutai
JUDGE**

In the presence of:

Mr. Gitonga, for the Appellant;

Mr. Odero, holding brief for Mr. Kongere, for the 2nd Respondent; and

Ms. Bancy – Court Assistant.

Original