

REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL NO. E064 OF 2025

SILA OKAL OCHOLLA
APPELLANT

VERSUS

BIASHARA SACCO LIMITED 1ST
RESPONDENT

KEVIN N. MWAURA
T/A KENTRACK AUCTIONEERS 2ND
RESPONDENT

JAFFERY MOTORS 3RD
RESPONDENT

RULING

1. The application is for injunction pending appeal. The suit in the lower court was dismissed. The order issued in the lower court was a negative order.
2. The Applicant indicated that they were in default, but the respondents should not sell the subject motor vehicle. The Applicant thus sought that the court change the contract between the parties. The Court of Appeal in the case of **National Bank of Kenya Ltd v Pipeplastic Samkolit (K)**

Ltd & another [2001] KECA 362 (KLR) [Tunoi, Shah & Keiwua JJ A] held as follows: -

A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.

As was stated by Shah JA in the case of *Fina Bank Limited vs Spares & Industries Limited* (Civil Appeal No 51 of 2000) (unreported):

“It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain.

3. The arrears are admitted. Consequently, the court has no basis to issue an injunction or rewrite a contract between the parties. In any case, the court cannot stay a negative order.
4. The *raison d’etre* for issuing an injunction is to preserve a subject matter. The *locus classicus* case of *Giella vs Cassman Brown & Co. Ltd* (1973) EA, 358, 360, sets out principles for the grant of an injunction. The court, stated as follows, through the wisdom of Spry VP, as then he was: -

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in east Africa. First, 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 would otherwise suffer irreparable injury that would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

5. There is nothing to preserve as there is no subject matter in a dismissal order, which has a negative order and is incapable of execution. This principle was set out by the Court of Appeal in **Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) [2015] KECA 353 (KLR)**, where S. Ole Kantai JA, as she then was held as follows:-

An order for stay of execution is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay - called a “positive order” - either an order that has not been complied with or has partly been complied with. See, for this general proposition, the holding of the Court of Appeal of Uganda in *Mugenyi & Co. Advocates v National Insurance Corporation* (Civil Appeal No. 13 of 1984) where it was stated:

“..... an order for stay of execution must be intended to serve a purpose

6. The application lacks merit and is accordingly dismissed. This leaves the issue of costs, which is governed by Section 27 of the Civil Procedure Act. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR)** had this to say:

"It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

7. The application is accordingly dismissed. Costs of Kshs. 7,500/= to the Respondent. Directions on 15/4/2026 on the appeal. The parties are to file a record of appeal within 30 days.

Determination

8. In the circumstances I made the following orders:

- a) The application is accordingly dismissed.
- b) Costs of Kshs. 7,500/= to the Respondent.
- c) Directions on 15/4/2026 on the appeal.

d) The parties are to file a record of appeal within 30 days.

DELIVERED, DATED and SIGNED at NYERI on this 19th day of February, 2026. The ruling delivered ex tempore through the Microsoft Teams Online Platform.

KIZITO MAGARE
JUDGE

In the presence of: -

Mr. Makura for the Applicant

Mr. Ng'ang'a for 1st and 2nd Respondents

No appearance for the 3rd Respondent

Court Assistant - Michael