REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. E074 OF 2025

AUGUSTINE KIBET BUNGEI……………….APPELLANT/ APPLICANT

VERSUS

CO-OPERATIVE BANK OF KENYA LIMITED……...1ST RESPONDENT

PHILIP MWAURA T/A

GILLETTE TRADERS AUCTIONEERS……………...2ND RESPONDENT

JOSEPH NDULO T/A TOPRIFT AUCTIONEERS…...3RD RESPONDENT

KAMALIZA STORAGE YARD………………………...4TH RESPONDENT

RULING

1. By way of Notice of Motion dated 7th April 2025, the Applicant seeks the following orders;

1) **Spent**
2) **Spent**
3) **That the Respondents herein, their servants and agents are restrained from selling or in any other way interfering with the ownership of motor vehicle registration number KDA176N pending the hearing and determination of this suit.**
4) **Costs of the Application are awarded to the Appellant/Applicant.**

2. The Application is expressed to be brought under **Articles 40,48,50 and 159 of the Constitution of Kenya, sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act**, Orders 40 Rule 1 and 2, and 51 Rule 1 of the Civil Procedure Rules, 2010 and all enabling-provisions of the law.

3. The Application is premised on the grounds on the face of it and the averments of the Applicant in his Supporting Affidavit. He deposed that he lodged a suit before the trial court seeking for a declaration that the recovery process commenced by the Respondents was irregular, illegal and wrongful hence void ab initio, annexing and marking as 'AB1' a true copy of the Plaint. He urged that he lodged an Application for a temporary injunction pending hearing and determination of the suit before the trial court and the court gave the Orders on 5th February, 2024. He annexed and marked as AB 2' a copy of the Court Order dated 26th February 2024.

4. The deponent averred that the Respondents lodged an Application dated 15th October, 2024 seeking to set aside the temporary injunctive orders, which was allowed vide the ruling dated 11th March, 2025. He Annexed and marked as 'AB 4' a copy of the Ruling. That the ruling by the Trial Court has now opened a window for the sale of his motor vehicle and the intended sale by the Respondents will extinguish the substratum of the instant Appeal and the suit before the trial court, hence depriving him of his right to be heard.

5. He stated that the subject motor vehicle is his only source of livelihood being an instrument of trade hence its sale will render him destitute. It was his deposition that he stands to suffer irreparably if the instant motion is not heard urgently and the orders sought therein granted. The deponent averred that the Respondents will not suffer any prejudice by the grant of the orders sought herein since it retains a right to recover interest on an amount legitimately due to them from him.

6. The 1st respondent opposed the application vide a Replying Affidavit dated 6th May 2025, sworn by Jonathan Karaba, the business banker of the 1st Respondent, Uganda road, Eldoret Branch Limited. He denied the allegations

set out in the Application and urged that the Application is fatally and incurably defective, bad in law, an abuse of the court process, misconceived and as such ought to be struck out or dismissed with costs to the Respondents. Further, that the Applicant is not deserving of any orders sought in the application dated 7th April 2025.

7. In response to paragraph 2,3,4,5 and 6 of the Supporting Affidavit, he stated that he confirmed that the 1st Respondent advanced a credit facility of Kshs 3,668,400/= to the Appellant on 28th October 2020 to enable him purchase motor vehicle registration No. KDA 176 N (Isuzu NPR 66P Truck) pursuant to an agreement entered into between the Appellant and the 1st Respondent. He annexed and Marked as J-l(b) a copy of the Hire Purchase Agreement.

8. That the subject motor vehicle was jointly registered in the name of the bank and the Appellant to secure the interests of the bank as a financier and with the aim of transferring the vehicle to the Appellant upon completion of payment of the agreed instalments. He Annexed and Marked J-2 a copy of the log book. He deposed that the Appellant and the bank agreed in the said Hire Purchase Agreement that the asset finance facility so advanced to the Appellant was to be repaid in monthly instalments of Kshs 83.467.37/= for a maximum period of 60 months.

9. He Annexed and Marked as J-3 is a copy of approval of the Hire Purchase finance facility. He urged that the Appellant defaulted in repayments of the loan and caused the loan account to run into arrears as at 13th June 2023 to a tune of Kshs 206,390.08/=, which amounts continued to accrue interest and bank charges until paid in full. He Annexed and Marked as J-4 a copy of the bank statement. As a result, the 1st Respondent repossessed the subject motor vehicle hence necessitating the suit at the subordinate court and the application for injunctive reliefs.

10. The deponent averred that they entered appearance and filed a replying affidavit sworn by Zenah Kemei on 14th June 2024 in ardent opposition to the said Application and Annexed and Marked as J-5 a copy of the Replying affidavit. That a ruling was delivered on the application for injunction *to wit*: - *i. The subject motor vehicle be released to the Appellant on condition that he pays all instalments due from the date the Motor vehicle was repossessed to the date of the Ruling; ii. Parties to expeditiously fix the matter for hearing and; ii. Costs shall be in the cause.*

11. He Annexed and Marked as J-6 a copy of the Ruling and averred that the Respondents, in full compliance with the orders of the court of 5th February 2024, informed the Appellant, on 28th March 2024, of the outstanding arrears as at 5th February 2024 which was Kshs 1,236,203.46/= which amounts were to be settled in order for the 1st Respondent to release the Motor vehicle. He Annexed and Marked J-7, J-8 and J-9 copies of the letter dated 28/3/2024, e-mail thread in proof of service thereof and e-mail thread dated 29th March 2024 respectively.

12. The deponent averred that despite acknowledging receipt of the letter and promising to revert, this was never done causing the bank through its advocates to do a reminder on 29th August 2024 to comply with the orders of the court of 5th February 2024 which letter bore no positive response. He Annexed and Marked as J-10, J-11 and J-l 2 copies of the letter dated 29th August 2024, e-mail thread dated 29th August 2024 and e-mail thread dated 3rd September 2024 respectively. He urged that he was also aware that the Appellant filed an application dated 18th March 2024 to review the orders, which application was dismissed on 20th August 2024. He Annexed and

Marked as J-l 3 and J-l 4 copies of the application dated 18th March 2024 and the Ruling dated 20th August 2024 respectively.

13. He stated that due to lack of response to the letter dated 29th August 2024, the Respondents instructed their advocates on record to lodge an Application dated 15th October 2024 for the court to set aside the injunctive reliefs of 5th February 2024. He Annexed and Marked as J-l5 a copy of the Application dated 15th October 2024. Further, that a ruling on the said Application was delivered on 11th March 2025 with the court allowing the Application and setting aside the interim injunctive reliefs of 5th February 2024. He Annexed and Marked as J-16 a copy of the ruling dated 11/3/2025.

14. In response to paragraph 7 he stated that the suit Motor vehicle was repossessed on 11th March 2023 and has been lying in the storage yard since then to date to the detriment of the 1st Respondent as the same is depreciating while the Appellant is not repaying the loan. Further, that ever since the Appellant obtained the initial interim orders, he has never paid any single cent to offset the loan account, annexing and marking as J-l7 a copy of the statement of account.

15. Further, that the subject Motor vehicle was purchased at Kshs 4,076,000/= with the bank, financing Kshs 3,668,400/= of the said amount. The outstanding loan as at 24th April 2025 is Kshs 2,934,444/= which amounts continue to accrue interest and bank charges until payment in full. He annexed and marked as annexure J-l 7 a copy of the statement of account. He stated that a motor vehicle being a depreciating asset, there is high chance that the outstanding loan may outstrip the value of the subject motor vehicle and the bank will not be able to recover its owed debt.

16. He urged that the subject motor vehicle is the Appellant's only source of livelihood, and questioned how he has been sustaining himself for the last 2 years to date when the subject motor vehicle has been lying in the yard. He stated that the appellant in his application dated 18th March 2024 and paragraphs 7-12 has indicated his inability to raise the money due to the 1st Respondent hence the need for the court to give the bank the go ahead and salvage some of the outstanding amounts or it might risk losing it all; The circumstances created by the Appellant herein pose a real risk to the 1st Respondent as the vehicle is wasting away at the yard yet the 1st Respondent bank is yet to receive payments for the loan advanced to its detriment.

17. The deponent averred that the Appellant is not deserving of the orders sought as he is acting in bad faith and has come to court with unclean hands as he has not addressed the outstanding debt and how he intends to settle the same noting that it is long overdue. Further, that the instant application does not meet the threshold for grant of orders sought as set out under Order 40 of the Civil Procedure Rules, 2022. Further, that the applicant has expressly admitted his inability and/or capacity to repay the loan arrears or at all. He urged the court to dismiss the application with costs.

Applicants' Submissions

18. Counsel submitted that the ultimate issue for determination by this Court is whether the instant Application has met the necessary threshold for a temporary Injunction. He urged the Court to consider the following issues; Whether the applicant has established a prima facie case; Whether the Applicant will suffer irreparable harm and Where does balance of convenience tilt to?

19. On whether the Applicant has established a Prima Facie case, Counsel urged that a prima facie case was explained in **Mrao versus First American Bank of Kenya Limited & 2 others [2003] eKLR,** briefly reproducing the same. He urged that the Applicant has demonstrated a prima facie case in the instant matter. That it is apparent from the Pleadings on record that the Plaintiff's proprietary rights are at the risk of being infringed following the decision of the trial court to set aside the injunctive orders that were in force. It's important for this Court to take note of the fact that the cause of action before the trial Court is the illegal and irregular repossession of the subject Motor-vehicle registration Number KDA 176N ISUZU NPR as can be gleaned from the reliefs sought in the Plaint dated 5th June, 2023.

20. It is the applicants' case that the question before the court is to determine whether there is repossession and the intended sale of the Appellant's motor vehicle is regular. That it is evident from the evidence of both the Plaintiff and the Defendants that the repossession of the motor-vehicle was unfair noting that the Defendant admitted that the Plaintiff had defaulted for only a few days and that he even went ahead and made some payments after the repossession.

21. That there is no doubt that the Appellant's proprietary rights have been infringed or are at the risk of being infringed. The question as to whether the Respondent have a right to exercise the right of sale with respect to the subject motor vehicle is a live matter before the trial court. He cited the case of **Platinum Credit Limited v Aluvusi & 2 others (Civil Appeal E116 of 2021) [2024 eKLR** in this regard.

22. Counsel submitted that the entire suit will be rendered nugatory if the Orders sought in this Application are not granted. Further, that the trial court's

decision will leave the Appellant without a remedy or constructively block his Constitutional right to access to justice. It is evident that the Appellant will suffer a great loss from the intended sale of his motor vehicle. Counsel cited the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR** and urged the Court to return a finding that the Appellant has demonstrated a prima facie case.

23. On whether the Applicant will suffer irreparable harm, Counsel urged that the effect of issuance of the orders sought in the instant application is to prevent the sale of the subject property. Counsel urged that if the orders are not granted the Respondents will proceed to sell the property hence divesting the Applicant of his proprietary rights.

24. Counsel cited the decision of Munyao Sila J in **Simon Kipngetich Bett vs. Richard C. Kandie [2012]** and urged that the intended sale by the Respondents will extinguish the substratum of the instant Appeal and the suit before the trial court hence depriving the Appellant/Applicant of his right to be heard. He invited the Court to look beyond the monetary value of the vehicle in order to dispel the notion that compensation can provide an adequate remedy. He placed reliance on the case of **Platinum Credit Limited v Aluvusi & 2 others (Civil Appeal E116 of 2021) [2024] eKLR** in this regard.

25. Counsel submitted that to decline the orders sought would drive the Appellant away from the seat of justice. Further, that to allow the sale of his motor vehicle before he is heard would be a breach of **Article 50(1) of our Constitution** and Rules of Natural Justice. He placed reliance on the case of **The Management of Committee of Makondo Primary School & Another**

v Uganda National Examination Board, HC Civil Misc. Application No.18 of 2010, by the Ugandan Supreme Court.

26. Counsel urged the Court to return a finding that the Appellant/Applicant has demonstrated that he would suffer irreparable harm. On the other hand, the Respondents have not demonstrated any irreparable harm to be suffered if the orders are granted. The delay in the recovery of the outstanding loan can be effectively compensated by way of accruing interests.

27. On balance of convenience, Counsel urged that on an objective scale there is a greater harm to be suffered by the Appellant/Applicant if the orders are not granted than the harm to be suffered by the Respondents if the orders are granted. He urged that the balance of convenience in this scenario tilts in favour of the Appellant/Applicant herein and that the only conceivable harm to be suffered by the Respondents is merely a delay in recovery of the loan. Counsel urged the Court to be guided by the wisdom of Justice Hoffman in the celebrated case of **Films Rover Internationale [1986] BALL ER** and urged the court to find that the Application is merited.

Respondents' Submissions

28. Learned counsel for the respondent submitted that this being an application for injunctive relief, the applicant has to show; *a) That he has a prima facie case with a probability of success at the trial; b) That he is likely to suffer irreparable injury which cannot adequately be compensated by an award of damages. If the court is in doubt on the first two principles; c) It should determine the application on a balance of convenience* as was held in the most celebrated case of **Giella vs Cassman (1973) EA 358**. Counsel urged that as observed by the Court of Appeal in the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others (2014) eKLR** these conditions and stages are

to be applied as separate, distinct and logical hurdles which the applicant has to surmount sequentially.

29. Counsel urged that the Court in the primary suit, after granting injunctive reliefs for 1 year and after hearing the Respondents, discharged the orders holding that; '*The Plaintiff in this matter has not demonstrated any good faith to suggest that he has the intention of paying the outstanding loan which continues to accrue interest by the day. Perhaps if he had done so, I would have reason to extend the interim orders. My predecessor was generous enough to indulge the Plaintiff to conditionally pay all loan arrears and interest due from the date the suit vehicle was repossessed until the date of the ruling of 5th February 2024 and he has failed to honour those orders... '*

30. Counsel urged that in so far as a previous Application had been heard and disposed of, no similar Application can be filed by the Appellant/Applicant or at all over the same subject matter. This clearly constitutes an abuse of the due process of this court and waste of the precious judicial time contrary to **Article 159 and 232 of the Constitution.** He urged that it would be a travesty of justice and an absurdity of the highest order for this court to again issue a parallel order to the one issued on 5th February 2024 and discharged on 11th March 2025 over the same subject matter.

31. Counsel urged that the Appellant's main aim of filing the application herein is to frustrate the 1st Respondent bank and reproduced the holding of the trial court in the ruling of 11th March 2025. Counsel urged that there is no material placed before this Court to show otherwise as to the Appellant's conduct is not equitable in the circumstances of this case for this court to grant the orders sought. He urged that the applicant has made zero efforts to pay the outstanding sum.

32. He stated that it is in the interest of justice that the Application be dismissed to avoid a possible embarrassment in the issuance of parallel conflicting orders by the same court and ensure that justice is served.

33. On whether the applicant has a prima facie case, Counsel cited the decision of the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others (2003) eKLR** and urged that from the onset, the Applicant's Application has failed to demonstrate prima facie evidence of a genuine and arguable case.

34. He laid out the sequence of events leading up to the application and urged that the Appellant has not disputed that he defaulted in the loan repayments from the loan facility advanced to him by the 1st Respondent and 1st Respondent bank has adduced evidence of the Appellant's default in repayments of the loan amounts as agreed.

35. Counsel urged that the Appellant was and is still in default of the loan account and from the aforestated, it is clear that he has failed to demonstrate a prima facie case hence this application ought to be dismissed with costs. That the consequences of default of repayment of the monthly instalments; as agreed between the Appellant and the 1st Respondent were set out in Clause 5 of the Hire Purchase agreement that the 1st Respondent was entitled to repossess the security Motor vehicle the moment one instalment or payment remained unpaid after it became due without notice.

36. On the role of the court in contractual claims, Counsel urged that a perusal of the Asset Finance Hire Purchase agreement and the letter of approval of the Hire purchase finance facility clearly distinguishes the obligations and duties of the Appellant and those of the 1st Respondent. It indicates that the

Appellant owed the 1st Respondent a duty with specific emphasis to the covenant to repay the loan advanced in accordance with the agreed monthly instalments. As demonstrated, the Appellant breached the terms of the agreement by failing to repay the loan as agreed hence causing the accounts to run into arrears as a result of which the 1st Respondent repossessed the subject motor vehicle. Having established the continued breach by non-payment of the agreed instalments, the 1st Respondent cannot be flawed for having repossessed the suit motor vehicle as mutually agreed by the parties through their contracts.

37. Counsel urged that the Appellant seems to seek this court to rewrite the contract between himself and the 1st Respondent which is forbidden. He cited the cases of **John Edward Ouko v National Industrial Credit Bank Ltd (2013) eKLR, Kenya Breweries Ltd v Okeyo [2002] eKLR** and **National Bank of Kenya Ltd v Pipeplastic Samkolit Ltd & Another (2001) KLR** on this issue and urged that this is a contract between parties who were at consensus ad idem. The court therefore should not interfere with this but only interpret the same.

38. Counsel urged that Clause 2 of the agreement provided that the advanced amount was to be repaid in the periods outlined and failure to do so, clause 5 of the contract document provided that the bank would exercise its statutory power over the security offered. These clauses and the said agreements cannot be varied through this court, that the court’s role is to interpret the agreement signed by the parties.

39. The Appellant does not dispute the terms of the agreement which is otherwise binding on the parties herein. Having established as such and the fact that the Appellant breached the terms of the agreement and caused the account to run

into arrears, the 1st Respondent had each and every right to commence the process of realization of the security as guaranteed by the agreement between the parties.

40. Counsel urged that the Appellant knew that his obligation was to repay the loan amounts in compliance with the agreement. He placed reliance on the case of **Zap Rack Oyaro Achoki vs Consolidated Bank (2013) eKLR** and urged that the 1st Respondent was therefore acting and exercising its powers and rights under the agreement which the Appellant was aware of. No good and valid reasons have been advanced by the appellant for non- payment and/or compliance with the agreement entered into.

41. Counsel cited the decision in **Appeal No. 39 of 2002 Mrao Ltd v First American Bank of Kenya Ltd & 2 Others** and urged that the fact that the Appellant having defaulted in the repayment of the loan hence being in breach of the agreement between himself and the 1st Respondent, he cannot be granted an injunction against the 1st Respondent who has not breached the agreement in anyway. It hence follows that the Appellant has no right or interest which need to be protected by law and has not demonstrated a prima facie case with high chances of success hence we urge the court to dismiss this application with costs to the Respondents.

42. On irreparable loss, Counsel urged that the Applicant has not demonstrated that he stands to suffer irreparable loss which cannot warrant adequate compensation by damages. That under **Section 108 of the evidence Act,** it is trite law that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. Further, that contrary to the averments of the Appellant under paragraph 7-11 of the supporting affidavit, once property is charged it becomes a commodity which

absent any lawful reason can be sold and there cannot be any irreparable loss. He urged the Court to be persuaded by the findings in the case of **Andrew M. Wanjohi vs Equity Building Society & 7 Others (2006) eKLR** and the case of **Paul Gitonga Wanjau v Gathuthi Tea Factory Company Limited and 2 Others (2016) eKLR** in this regard.

43. Counsel urged that the Appellant, having been established to be in breach of the agreement and in default in repayment of the loans, it is the 1st Respondent who stands to suffer loss if the orders sought are granted since the amount continues to accrue interest, charges and commissions to the 1st Respondent's detriment. The value of the suit property is ascertainable through valuation. The Applicant has not shown that the 1st Respondent would be unable to meet the damages in the event he succeeds in the main suit. In any event, such loss can be compensated in damages.

44. Counsel submitted that the subject motor vehicle was repossessed on 11th March 2023 and has been in the storage yard since then. He cited the case of **Joseph Ng'ang'a Mukundi v Martin Andrew Mugambi & 2 Others (2020) eKLR** in this regard and urged that the more the vehicle continues to stay in the yard, the more it is wasting away and depreciating in value.

45. Counsel urged that it is trite law that where the Application for an injunction fails to establish a prima facie case, the court need not go any further to consider the other limbs of injunction. He cited the case of **Bryan Chebii Kipkoech v Barnabas Tuitoek Bargoria & Another (2019) eKLR** and urged the court to take judicial notice of the fact that the 1st Respondent is a reasonably sound financial institution and it stands better chances to compensate the Appellant should the Appellant succeed in the appeal.

46. That should the injunction be granted to restrain the 1st Respondent from exercising its statutory powers, the amount of debt may continue to rise exponentially and the security may prove to be insufficient to cover the ultimate balance noting that a motor vehicle depreciates in value. He additionally cited the case of **Andrew Muriuki Wanjohi vs Equity Building Society Limited & 2 others (2006) eKLR** and urged that the granting of the injunction would prejudice the 1st Respondent's interests bearing in mind that the loan is accruing interest and charges.

47. Counsel urged that the application is not made in good faith and further that the Applicant has not come to the court with clean hands. He cited the case of **Patrick Waweru Mwangi and Anor vs Housing Finance Co. of Kenya Ltd (2013) eKLR** and the case of **Michael Gitere & Another v Kenya Commercial Bank Limited (2018) eKLR** and submitted that due to the failure to exhibit equity, the applicant cannot come to this court seeking equity since equity is a two-aged sword and the same ought to be used to promote justice to the parties. Counsel urged the court to dismiss the Application with costs.

Determination

48. The law governing the granting of interlocutory injunction is set out under order **Section 40(1) (a) and (b) of the Civil Procedure Rules 2010** which provides that: -

> **"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."

49. **Order 42 Rule 6(6)** of the **Civil Procedure Rules** provides as follows;

"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."

50. The conditions for consideration in granting an injunction were settled in the celebrated case of **Giella v Cassman Brown & Company Limited (1973) EA 358,** where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction as follows: -

"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."

51. The test for granting of an interlocutory injunction was considered in the **American Cyanamid Co. v Ethicom Limited (1975) A AER 504** where three elements were noted to be of great importance namely: -

i. There must be a serious/fair issue to be tried,

ii. Damages are not an adequate remedy,

iii. The balance of convenience lies in favour of granting or refusing the application.

52. 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."

53. The court notes that in his prayer before the trial court, the Applicant sought prayers for an injunction against the Respondents when they repossessed the suit motor vehicle and the same was granted and interim orders issued on 26th February 2024. In granting these orders, the court while releasing the suit

motor vehicle to the Appellant ordered that he pays all the arrears outstanding as at the date the injunction was issued.

54. The Respondents then went ahead and notified the Appellant of the outstanding amount and requested that he pays the same as directed by the court. In seeking to set aside the injunctive orders, the Respondents averred, and the Learned Trial Magistrate in his Ruling found, that the Appellant did not make the payments as ordered by the court in spite of the several reminders that were sent to him by the Respondents which he ignored and did not respond to.

55. The Learned Trial Magistrate also noted that the said injunctive orders had surpassed a period of 12 months without the Appellant taking any action to prosecute his suit. In his Ruling, the trial court held that **Order 40 Rule 6 of the Civil Procedure Rules** is a mandatory provision that provides that in any matter where an interim order of injunction has been issued and in which no action has been taken by the beneficiary thereof within a period of 12 months, the interim orders of injunction therein issued shall be deemed to have lapsed.

56. As a consequence, in its determination, the trial court in finding observed that not only had the Appellant failed to prosecute his Application in time, he had also failed to comply with the conditions that the court issuing the injunction gave. In its Ruling delivered on 11th March 2025, the Learned Magistrate allowed the Application by the Respondents seeking that the orders of injunction be vacated and proceeded to vacate the injunctive orders issued in favour of the Appellant on 5th February 2024 hence the Appeal and the attendant Notice of Motion the subject of this Ruling.

57. I have considered the pleadings as well as the submissions made by the parties in support of and against the Application. I note that the status of the Applicant in this Application as regards compliance with the trial court's directions is still the same as it pertained before the trial court. Nowhere in his pleadings has he deposed that he did comply with the directions given by paying the amount of the loan that was outstanding as at the time that the injunction was given in his favour.

58. He has also not averred, or even alluded to the fact that even those directions aside, he has subsequently made any payments towards liquidating the loan amount after obtaining those orders of injunction. He has also not denied that having obtained those orders, he went ahead and sat on them, and failed to prosecute his motion thereafter, such that the mandatory 12-month period given as the legal lifespan of an order interim injunction lapsed.

59. The above being the case, I am of the finding that the Applicant has failed to establish a prima facie case with a high probability of success. Further to the above, by dint of the fact that an injunction is an equitable remedy that is issued at the discretion of the court if it be satisfied that a party so seeking such an order has come to court in good faith and with clean hands to merit the exercise of discretion in their favour, by the conduct of the Appellant as has as herein been demonstrated, it is my finding that he has not come to court in good faith and with clean hands and does not therefore merit this court's exercise of discretion in his favour.

60. With the above finding, the court then stands guided by the holding of the Court of Appeal in 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 stated 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…....If a prima facie case is not established, then irreparable injury and balance of convenience need no consideration ………..."**

61. Having found that no prima facie case has been established by the Applicant, there is then no need for the court to belabour the other two pillars that a party seeking an injunction is required to demonstrate *to wit* irreparable loss and balance of convenience. The upshot then is that it is my finding that the Applicant's Application not only lacks merit but is also an abuse of the court process and the same is now hereby dismissed in its entirety with costs to the Respondents and the Ruling of the Learned Trial Magistrate is accordingly upheld.

Read dated and Signed at ELDORET on 19th March 2026

E. OMINDE

JUDGE