

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
HCCA NO. E035 OF 2025

**HARRY MWANGI
GITHIOMI.....
.....APPELLANT**

VERSUS

**SIDIAN
BANK.....1ST
RESPONDENT**

**GERALD THUITA MUTAHI
T/A STARTRUCK
AUCTIONEERS.....2ND RESPONDENT**

RULING

1. Before the court is the appellant's notice of motion dated 7.2.2025 made under **Order 42 Rule 6 of the Civil Procedure Rules.**
2. The appellant seeks a temporary injunction to restrain **Garth Day Year Auctioneers** and the respondents or their employees or agents from repossessing, advertising for sale, selling by private treaty or by public auction, disposing of, or otherwise completing by conveyance or transfer any sale or otherwise interfering with the appellant's possession or ownership, possession

and title to motor vehicle registration no. **KDD 084V**.

3. The application is supported by the affidavits sworn by the appellant on 7.2.2025 and 1.5.2025. The applicant also filed written submissions dated 13.5.2025.
4. The respondents opposed the application through a replying affidavit sworn by its legal officer, **Edwin Karume** on 27.2.2026 and written submissions dated 31.10.2025.
5. The appellant filed this appeal against the ruling dated 28.1.2025 by **Hon. Becky Cheloti Mulemia, Magistrate** in **MCCC/E3837/2024**. A primary ground of appeal is that the trial court erred by dismissing his application for injunction despite evidence that the repossession of the subject motor vehicle was unlawful and irregular.
6. The major grounds are that the respondent had instructed Garth Day Year Auctioneers to sell the subject motor vehicle, an auction slated for 10.2.2025 and that the sale would render the appeal an academic exercise and / or nugatory.

7. The applicant submitted that he has an arguable appeal with high chances of success.

Response

8. The respondents' main contentions are: -

(1)The application is *res judicata* as the applicant filed a similar application dated 31.7.2024 before the magistrate's court in **MCCC No. E3837 of 2024.**

(2)Following the dismissal of the application, the applicant is bound by the principle of finality in litigation.

(3)Injunctive orders cannot issue against Garth Day auctioneers since they are neither substantive parties in the trial court or in this appeal.

(4)The application is a gross abuse of the court process and the applicant is forum shopping.

(5)The orders sought have been overtaken by events following the sale of the motor vehicle to **Mr. Moses Njuguna Munyua** by public auction held on 10.2.2025.

Submissions

9. The appellant argued that *res judicata* is not applicable because an application for stay pending appeal is distinct even if similar interim reliefs were sought earlier. He relied on **Wanjue v Githitu & another [2025] KEELC 733 (KLR)** and **Nyambura v Ndungu t/a Kingpin Auctioneers & another [2023] KEHC 17288 (KLR).**

10. The appellant submitted that it has met the conditions for grant of a stay pending appeal. That he stands to suffer substantial and irreparable loss unless the orders for stay are granted because he used the subject motor vehicle as a source of livelihood. He relied on **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR, Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) [2015] eKLR and Kenya Revenue Authority v Law Society of Kenya & 3 Others (Civil Application E195 of 2023) [2023] KECA 1388 (KLR) (24 November 2023) (Ruling).**

11. The appellant submitted that he had paid over 2/3 of the purchase price of the subject motor vehicle under hire purchase terms and that the purpose for a stay would be to preserve the subject vehicle to not render the appeal nugatory. He relied on **RWW v EKW (2019) eKLR** on the purpose for a stay application.
12. The appellant relied on **Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR** on the purpose of security. He submitted that security is not applicable in this case as he is not appealing against the entire judgment.
13. The appellant asserted that the balance of convenience tilts in his favour.
14. On their part, the respondents argued that the appellant has not met the threshold for the grant of a stay pending appeal. They asserted that the appellant failed to demonstrate substantial loss he would suffer if stay is not granted. They relied on **ANM v VN [2021] eKLR, Kenya Women Microfinance Ltd v Martha Wangari Kamau [2020] eKLR, Century Oil Trading Company**

**Ltd v Kenya Shell Limited Nairobi (Milimani)
HCMCA No. 1561 of 2007 and James
Wangalwa & Another v Agnes Naliaka
Cheseto [2012] eKLR** on substantial loss.

15. The respondents submitted that the applicant has not offered security or proposed the exact amount of security, thus casting doubt as to the candour and commitment of the applicant in repaying the outstanding loan amount.
16. The respondents relied on **Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others [2014 eKLR, Kenya Women Microfinance Ltd v Martha Wangari Kamau [2020] eKLR.**
17. The respondents argued that the 1st respondent is a secured creditor and co-owner of the subject motor vehicle which was registered jointly with the applicant. That the 1st respondent retained legal and equitable interest in the vehicle until full repayment of the loan. That the subject motor vehicle was offered as collateral and was therefore a commodity for sale and that any loss can be adequately compensated in damages.

18. The respondents relied on **John Kingori Kioni v Sidian Bank & another [2020] eKLR and Andrew Mwaniki Wanjohi v Equity Building Society Ltd & 2 others 203/2005.**

Analysis and Determination

19. I have considered the application, the parties' respective affidavits and submissions.

20. The application is brought under **Order 42 Rule 6 of the Civil Procedure Rules**, which deals with stay of execution pending appeal.

21. The subject appeal is an interlocutory appeal from the Magistrate's Court. The ruling and order appealed against dismissed the appellant's application dated 31.7.2024 seeking a temporary injunction to restrain the respondent from selling or disposing of the suit motor vehicle pending the hearing and determination of the suit.

22. To my mind, the order appealed from is a negative order which did not require a party to do or refrain from doing anything. In such circumstances, there is nothing for the court to stay. **Western College of Arts and Applied**

Sciences v EP Oranga & 3 others
[1976] KECA 15 (KLR)

23. The applicant seeks to restrain the respondents from selling or disposing of the motor vehicle pending the appeal.

24. The court has the jurisdiction to grant an injunction pending appeal based on the principles established in **Madhupaper International Limited v Kerr [1985] KECA 116 (KLR)**.

25. Therefore, the central issue before the court is whether the applicant has met the threshold for the grant of an injunction pending an appeal.

26. However, I propose to first address the preliminary issues for good order.

27. The preliminary issues are essentially captured in the respondents' grounds of opposition to the application.

Res judicata

28. The first point of contention is that the application is *res judicata*. The respondents argued that the instant application is *res judicata* as the applicant filed a similar application which

was fully heard and determined before the trial court.

29. However, in my considered view, the application before this court is distinct from the application that was filed before the trial court. The one before the trial court sought an injunction pending the hearing and determination of the suit. The present application seeks a temporary injunction pending the hearing and determination of the appeal.

30. For *res judicata* to apply, the subject matter ought to be the same as per **section 7 of the Civil Procedure Rules**. As such, I find that the plea of *res judicata* is not applicable here.

31. While the respondents relied on the principle of finality in litigation, the applicant has a right of appeal which it has not exhausted as the trial court was of first instance.

32. In any case, the jurisdiction under order 42 rule 6 of the Civil Procedure Rules is such that a party does not come to the appellate court on an appeal against refusal of similar application by the trial court. The law vests jurisdiction in the appellate

court to hear an application for stay pending appeal even if a similar application had been made previously before the trial court. More enlighten: The Court of Appeal described jurisdiction under rule 5(2)(b) of the Court of Appeal Rules as original as it is grantable even where no actual appeal has been filed but a notice of appeal.

Injunctive relief against a non-party

33. The respondents argued that injunctive orders cannot issue against **Garth Day Year Auctioneers** since they are neither substantive parties in the trial court or in this appeal.

34. On this issue, the applicant indicated that he became aware that the instructions to sell the motor vehicle had been issued to **Garth Day Year Auctioneers** and not the 2nd respondent which was merely the storing agent. He also indicated that he intended to amend his pleadings to include **Garth Day Year Auctioneers** as a necessary and proper party.

35. In his submissions, the appellant indicated that the pleadings in the Chief Magistrate's Court have

been amended to add **Garth Day Year Auctioneers** as a party.

Abuse of the court process and forum shopping

36. The respondents claimed that the appellant is abusing the court process and forum shopping. However, the respondents failed to establish these claims as explained in paragraphs 30 and 31 above.

Has the application been overtaken by events

37. The applicant seeks an injunction to restrain the respondents from selling the subject motor vehicle.

38. However, the respondents asserted that the orders sought have been overtaken by events following the sale of the motor vehicle to **Mr. Moses Njuguna Munyua** by public auction held on 10.2.2025.

39. During mention of the matter, the appellant insisted that the motor vehicle has not been sold.

40. In his submissions, the appellant impugned the auction sale for non-compliance with the conditions of sale and the Auctioneers and in

terms of its integrity and legality due to the internal payments received on 11 and 12.2.2025. It highlighted that the court issued orders of 12.2.2025 barring the transfer of the subject motor vehicle to a third party.

41. The appellant urged the court to be guided by its orders of 12.2.2025 in invalidating the purported auction.

42. The respondents exhibited the advertisement of the sale by public auction slated for 10.2.2025. They also exhibited the certificate of sale declaring that **Moses Njuguna Munyua** was the highest bidder of the subject motor vehicle with a bid of Kshs. 5,000,000/-.

43. The order of 12.2.2026 restrained the transfer of the motor vehicle pending the hearing and determination of the application. It was issued based on the lack of clarity as to whether the subject motor vehicle had been sold.

44. The evidence on record is that the motor vehicle has been sold through public auction to **Moses Njuguna Munyua**.

45. At this juncture, an injunction to restrain the sale of the subject motor vehicle is a chase after the wind.

46. In light of the above, and the fact that the claim for damages would compensate any loss herein, in the circumstances, it would be unreasonable to order any injunction. **Simon Njoroge Mburu v Consolidated Bank of Kenya Ltd [2014] eKLR**

Disposal

47. The upshot is that the appellant's application dated 7.2.2025 is dismissed for want of merit with costs.

Dated, signed and delivered at Nairobi through Microsoft Teams online application this 9th day of April, 2026

F. Gikonyo M

Judge

In the presence of: -

Wacuka for Kingara for Appellant

Oguye for Kimani for Respondent
CA - Ivan/Aggrey