

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT VOI

CIVIL APPEAL NO. E021 OF 2025

KENYA COMMERCIAL BANK.....

APPELLANT

=VERSUS=

JESEE KARWEGO NGATU.....1ST

RESPONDENT

STANLEY NGOLUA MUROKI.....2ND

RESPONDENT

JUDGMENT

1. This is an appeal from the ruling delivered on February 13, 2025, at the Taveta Magistrate's Court, the court addressed an application by the plaintiffs, Jese Karwego Ngatu and Stanley Ngolua Muroki, seeking a mandatory injunction for the unconditional release of their motor vehicle, registration number KDD 124V.
2. The trial court observed that the first Respondent had approached Kenya Commercial Bank in March 2021 for an asset-based finance loan of Kshs 6,128,359.00 to

purchase the vehicle, which was then jointly registered as security.

3. The court noted that the first respondent had already paid approximately Kshs 6 million toward this primary loan, and importantly, the repayment period for that facility had not yet lapsed.
4. The trial court further examined a second loan of Kshs 3,000,000.00 taken by the first respondent, which the court characterized as an unsecured loan.
5. The Magistrate found that there was no express provision in the agreements that specifically designated the motor vehicle as security for this second loan.
6. Based on these observations, the significant repayment of the first loan and the unsecured nature of the second, the court determined that special circumstances existed warranting the issuance of a mandatory injunction.
7. Consequently, the Magistrate ordered the unconditional release of the motor vehicle to the first respondent, effectively preventing the bank from selling or disposing of the asset at that stage.

8. This decision rested on the finding that the loanee had substantially met his obligations on the secured facility and that the bank could not extend its security interest to the separate unsecured debt without clear contractual authorization.

9. The Appellant has appealed against the said judgment on the following grounds;

(i) That the learned Magistrate erred in law and fact by granting that mandatory injunction without considering the substantial outstanding arrears on the first loan, which amounted to Kshs 1,455,449.25 at the time of filing, and by failing to appreciate that the second loan, though unsecured, was legally consolidated under the terms of the loan agreements.

(ii) That the Magistrate further erred, according to the Appellant, by disregarding Clause 8.3 of the Letter of Offer which expressly designates the motor vehicle as continuing security for all amounts owed, including the second loan; by

finding that the vehicle could not be repossessed to settle the second loan contrary to Clause 11 which provides that default includes failure to discharge any indebtedness; and by disregarding Clause 3(e) of the Vehicle and Asset Finance Agreement which authorises the Bank to consolidate all liabilities.

(iii) That the Magistrate wrongfully relied on extraneous considerations by holding that the borrower had already paid Kshs 6 million toward the first loan when in fact the loan remained in arrears.

(iv) That the Magistrate predisposed his mind to a position unfavourable to the Bank, depriving it of a fair hearing.

(v) That the decision is contrary to settled legal principles on injunctive relief in loan default cases, which hold that courts should not protect defaulting loanees, and that an injunction cannot issue where the loan is in

arrears and the borrower has neglected repayment obligations.

(vi) Finally, that the Magistrate failed to consider the financial risk to the Bank if the vehicle is released, given that the arrears now exceed the vehicle's value, the borrower has ceased servicing the loan, and the vehicle could be disposed of or concealed, irreparably hindering recovery.

(vii) The Appellant therefore prays that the appeal be allowed, the ruling set aside, and its right to repossess the vehicle upheld.

10. The appellant, Kenya Commercial Bank, submitted that they are challenging a ruling from the Principal Magistrate's Court in Taveta that ordered the unconditional release of a motor vehicle to the 1st respondent, Jeseo Karwego Ngatu, despite his outstanding loan arrears.

11. The appellant argues that the 1st respondent took a secured loan of Kshs 6,128,359 in March 2021 to purchase the motor vehicle, which was jointly registered as

collateral, and later received an unsecured loan of Kshs 3,000,000. Default began in August 2023, leaving the first loan with arrears of Kshs 1,455,449 and the second loan entirely unserviced.

12. The bank lawfully repossessed the vehicle under the terms of the letter of offer and the vehicle and asset finance agreement. The trial court nonetheless issued a mandatory injunction for the vehicle's unconditional release at an interlocutory stage.

13. The appellant contends that this was a clear legal error because mandatory injunctions are exceptional and require special circumstances, which the 1st respondent did not demonstrate. Relying on Halsbury's Laws of England, *Locabail International Finance Ltd v Agroexport*, and *Kenya Breweries Ltd v Washington O. Okeyo*, the appellant submits that such an order should not relieve a defaulting borrower of contractual obligations.

14. The appellant further argues that the magistrate failed to interpret and apply key contractual clauses, particularly clauses 8.3 (continuing security), 11 (repossession on default), and 3(e) (consolidation of

loans), which expressly make the motor vehicle continuing security for all amounts owed by the 1st respondent. Because the 1st respondent signed these documents voluntarily, the court should enforce them as written, not rewrite the contract.

15. The appellant also maintains that the magistrate misapplied the principles of injunctive relief, ignoring that the 1st respondent approached the court with unclean hands while in substantial arrears, that the outstanding debt now exceeds the vehicle's value, and that unconditional release would strip the bank of its primary security, causing irreparable harm. Quoting Justice Sifuna in *Ann Wangari Thuku v Kenya Commercial Bank*, the appellant asserts that courts should not provide refuge to unconscionable loan defaulters.

16. Accordingly, the appellant prays that the appeal be allowed, the trial court's ruling set aside, and the bank be permitted either to recover the outstanding arrears or exercise its rights as a chargee over the motor vehicle.

17. The respondents argue that the appeal should fail because the trial court correctly granted a mandatory

injunction for the unconditional release of motor vehicle KDD 124V.

18. They reduce the appellant's three grounds of appeal to a single core issue: whether the magistrate erred in granting the injunction despite alleged arrears and a contractual right of repossession.

19. The respondents emphasize that the parties had a binding contract, but the appellant failed to prove service of any loan arrears notices or repossession notices on the first respondent. Citing *National Bank of Kenya v Pipeplastic Samkolit* and *Trust Bank v Kiran Ramji Kotedia*, they note that once service was denied, the bank bore the burden of proving proper notice, something it did not do.

20. They also rely on *Akshar Industries v Mayfair CIB Bank* to show that proper service of statutory notices is a legal requirement before a bank can exercise its powers. On mandatory injunctions, the respondents refer to *Halsbury's Laws and Locabail International Finance v Agroexport*, arguing that such relief is exceptional but justified where the defendant has stolen a march on the plaintiff. Here, they contend the bank's repossession

without notice was irregular, unlawful, and a nullity, quoting *McFoy v United Africa Company* that an act founded on nothing cannot stand.

21. Finally, citing *Mbogo v Shah*, they submit that an appellate court should not interfere with a trial judge's discretion unless clearly wrong, and since the magistrate's decision was based on available evidence and the bank's failure to prove service, the ruling was proper and just. Therefore, they urge the court to dismiss

22. This court identifies the following issues for determination;

(i) Whether the trial court applied the correct legal principles for the issuance of an interlocutory mandatory injunction;

(ii) Whether the bank had a contractual and legal right to consolidate the two loan facilities and hold the motor vehicle as continuing security for both; and

(iii) Whether the bank complied with the procedural requirements of notice before exercising its power of repossession.

23. The principles governing the grant of a mandatory injunction are significantly more stringent than those for a prohibitory injunction.

24. A mandatory injunction is an extraordinary remedy that should only be granted in the clearest of cases, where the court is satisfied that the applicant has a high degree of assurance that at the trial, it will appear that the injunction was rightly granted.

25. In the present case, the trial court issued an unconditional release of the motor vehicle, effectively final relief at an interlocutory stage, without a full trial on the merits.

26. This court finds that the learned Magistrate erred by failing to recognize that the 1st Respondent was in substantial arrears of Kshs 1,455,449.25.

27. By ordering the unconditional release of the security while a debt remained outstanding, the trial court stripped the Appellant of its primary security without ensuring the protection of the Bank's interests, which constitutes a misapplication of the principles of equity.

28.Regarding the consolidation of loans and the nature of the security, the trial court characterized the second loan as "**unsecured**" and "**separate.**"

29. However, the law respects the sanctity of contracts as held in **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR.**

30. The Letter of Offer and the Vehicle and Asset Finance Agreement contained express provisions, specifically Clauses 8.3 and 3(e), which designated the motor vehicle as a continuing security for all liabilities owed by the borrower to the bank.

31.The Magistrate erred in law by rewriting the contract between the parties and disregarding the "**all monies**" or "**continuing security**" clauses that are standard in banking practice.

32. Under the doctrine of freedom of contract, once the 1st Respondent signed the agreements, he was bound by the term that the vehicle would serve as collateral for both the primary asset finance and any subsequent indebtedness.

33. The Respondents have argued that the repossession was a nullity due to a lack of notice, citing **National Bank of Kenya v Pipeplastic Samkolit.**

34. While the service of notice is a critical procedural safeguard, the trial court's decision to grant a mandatory injunction was not based on the lack of notice but rather on the erroneous finding that the second loan was unsecured and that the first loan was "substantially paid."

35. Even if notice were found to be deficient, the appropriate remedy at an interlocutory stage would rarely be the unconditional release of the asset to a defaulting party, as this ignores the "clean hands" doctrine in equity.

36. In **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR**, it was settled that a "prima facie case with a probability of success" must be established.

37. A borrower who admits to having an outstanding balance and who has stopped servicing their facility cannot be said to have established such a case for the unconditional return of the collateral.

38. Consequently, this court finds that the learned Magistrate exercised his discretion on wrong principles.

39. The balance of convenience tilted in favor of the Bank, which stood to suffer irreparable harm by losing its security for a debt that exceeded the vehicle's value, whereas the Respondents' interests could have been protected by an order for damages or a conditional stay. The appeal is therefore allowed.

40. The ruling and orders of the trial court delivered on February 13, 2025, are hereby set aside.

41. The Appellant is at liberty to exercise its rights under the loan agreements, subject to compliance with any statutory requirements regarding the sale of the repossessed asset.

42. Each party shall bear their own costs of the appeal.

Dated, signed and delivered this 30th day, April 2026 in open court at Voi High Court.

**ASENATH ONGERI
JUDGE**

In the presence of:-

Court Assistant: Millicent

.....**for Appellant**

.....**for Respondents**