

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CIVIL APPEAL NO. E249 OF 2024

GRACE NAKAIYO LOKONE.....
APPELLANT

VERSUS

YHIS LIMITED.....1ST
RESPONDENT

DORFIN KEMUNTO OGERO.....2ND
RESPONDENT

*(Appeal from the ruling of the chief magistrate court at
Gatundu in MCCC E132 of 2023 delivered on 3rd September
2024 by the Hon. Daniel Ndalu (Chief Magistrate)*

JUDGEMENT

1. The ruling is with regard to a civil dispute arising from the sale and purchase of a motor vehicle between the Appellant and the Respondent. The appellant alleged that she purchased motor vehicle registration number KCV 796X (subject matter) on 9th May 2023 from one Alphonse Otieno, the registered owner. The motor vehicle was at all times displayed in Sixerz Auto Motors open yard situated in Ruaka Trading centre within Kiambu.
2. Accordingly, the appellant paid Kshs. 905,000.00 as consideration for the said motor vehicle to the registered owner and it was subsequently transferred to her. As a result, she did an overhaul of the engine, the oil system, changed all the tyres, the battery and insured the same at a cost of Kshs. 200,000. Thus, bringing the total cost at Kshs. 1,105,000.
3. The Appellant was surprised when on 29th March 2024 she was served with an application seeking to enjoin her in a civil suit at the Gatundu Magistrate's court. The application

also sought orders for placement of the subject motor vehicle registration number KCV 796X in the custody of the court on the basis that the 1st Respondent was the duly registered and legal beneficial owner of the motor vehicle registration number KCV 796X which the 2nd Respondent had unlawfully retained and continued to use despite receiving requisite notices and in breach of proprietary rights. The 1st Respondent upon learning that the subject motor vehicle had been unlawfully transferred to the Appellant, despite the 1st Respondent being in possession of the original logbook and not authorizing or initiating any transfer, lodged the application resulting in the ruling, subject of this appeal.

4. Despite opposing the application vehemently, the prayers sought were granted and the trial court directed that the subject vehicle be placed in the custody of the court.
5. Aggrieved and dissatisfied with the ruling of the trial court, the appellant lodged the instant appeal on grounds that:
 - i. *The learned magistrate erred in law and fact in arriving at a decision without evaluation of the evidence on record or giving any reasoning.*
 - ii. *The learned magistrate erred in law and fact in holding that M/V registration No. KCV 796X was registered in the name of the 1st Respondent contrary to documentary evidence of the Log Book exhibited before the Court.*
 - iii. *The learned magistrate erred in law and in fact in holding that the control and ownership of motor vehicle registration no. KCV 796X belongs to the Plaintiff contrary to the documentary evidence on record.*
 - iv. *The learned magistrate erred in law and in fact in failing to pay attention or have any regard to the*

Appellant's documents of ownership contained in her affidavits and annexures.

- v. The learned trial magistrate erred in law and in fact in failing to have any regard to the Appellant's submissions and also failed to analyze the case law placed before court.*
 - vi. The learned magistrate erred in placing motor vehicle registration KCV 796X in the custody of the court without regards to costs incurred by the Appellant and the security of the same.*
 - vii. The learned magistrate erred in law and in fact in making a decision not supported by evidence and arriving at an erroneous decision not based on sound principles of law or fact.*
6. The Appellant thus prayed that the appeal be allowed and the ruling dated 3rd September 2024 be set aside.
 7. The court directed that the appeal be canvassed through written submissions.
 8. The Appellant submitted that the trial court, without giving any reason as the Appellant was not a party to the suit in any way. Further, the finding of the trial court that the subject motor vehicle belonged to the Plaintiff/1st Respondent was erroneous as it had no factual or legal basis. In any case, the motor vehicle record annexed to the pleadings clearly demonstrates that it is the appellant and not the 1st Respondent who is the registered owner of the motor vehicle.
 9. The appellant further submitted that leaving the motor vehicle in the custody of the court would result in waste as the motor vehicle will be unserviceable. Thus, causing the appellant to suffer substantial loss. Especially considering

that the defendant in the suit is untraceable and the claim in the plaint is a liquidated sum to be met by the defendant.

10. The appellant therefore urged that the ruling be reviewed and set aside.
11. The 1st Respondent submitted that the court duly considered all the factors surrounding the possession and control of the subject motor vehicle before arriving at the impugned decision. This was because, the subject motor vehicle was sold to unsuspecting third parties when there was an active suit pending in court regarding the very same motor vehicle. Therefore, the trial court implicitly rejected the Appellant's claim of ownership of the subject motor vehicle. The fact that a motor vehicle search had been annexed to the pleadings indicating the appellant as the owner of the subject vehicle was indeed evidence that the vehicle had been fraudulently transferred to unsuspecting third parties and not conclusive proof of ownership of the appellant. Reliance was placed **on Car & General Trading Limited v Owino & another (Civil Appeal E098 of 2021 [2023] KEHC 19397** to urge the position that a log book constitutes *prima facie* ownership of a motor vehicle. In fact, mere possession and registration are not conclusive proof of ownership in the face of contrary credible evidence.
12. The fact that the transfer to the appellant was done in defiance of court orders is proof of irregularity and illegality of the transfer to the appellant.
13. Flowing from the above, it was submitted that the trial court did not err in granting injunctive relief to the 1st Respondent as he had met the threshold for grant of injunctions. It was therefore submitted that the appeal is incompetent and the same ought to be dismissed with costs.

Analysis and determination

14. The appeal herein relates to the ruling of the trial court directing that motor vehicle registration number KCV 796X be placed in the custody of the court. Considering the background of the case, the application by the Respondent was one made with a view to protect his rights to property under **Article 40 of the Constitution**. The enjoinder of the Appellant to the proceedings was a means through which the Respondent sought to demonstrate to the honourable court that the property, Motor vehicle registration number KCV 796X, the subject of the court proceedings had unprocedurally changed hands and was in fact in the custody of the Appellant.
15. Therefore, the relief that the Respondent had sought before court was an injunctive relief in the nature of a preservation order. Therefore, in determining this appeal, it is proper to address whether the trial court properly exercised its discretion in granting the injunctive relief sought by the Respondent.
16. **Order 40, Rule 1 of the Civil Procedure Rules** provide 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 according 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 orders.

17. In the instant case, the Respondent duly demonstrated that the motor vehicle, subject of the proceedings of the court, had not only been unprocedurally transferred but the same was in the actual possession and control of a third party who was not a party to the proceedings. With the property in the custody and control of the appellant, nothing barred or prevented her from alienating or dealing with it in any other way.
18. Considering that at the interlocutory stage the court was yet to determine conclusively the manner in which the property came to the possession of the Appellant, the interests of justice shifted towards an approach that would ensure the preservation of the subject motor vehicle pending any other orders that would be made by the honorable court.
19. Fundamentally, the principles applicable in an application for an injunction were laid out in the celebrated case of **“Giella v Cassman Brown & Co Limited citation** where it was stated:

“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 might otherwise suffer irreparable injury which 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.”

20. On the first condition of *prima facie* case, the Respondent demonstrated that, the motor vehicle was a subject of the proceedings before court and had been fraudulently transferred during the pendency of the said proceedings without his consent. To prove this, he annexed the Motor Vehicle search records from NTSA that clearly demonstrated that the appellant was the present registered owner of the said motor vehicle and that she in fact, had both actual possession and control. A fact that has been admitted by the appellant.
21. With the subject motor vehicle in possession and control of a person not party to the proceedings, the Respondent rightly demonstrated that he was likely to suffer irreparable harm not possible of being compensated through damages if the court did not intervene with an appropriate injunctive relief. There was no legal bar to the Appellant alienating, disposing or otherwise dealing with the subject motor vehicle in a way that might be detrimental to the Respondent's rights.
22. On the question of nugatory, it was evident that the subject motor vehicle had already been disposed during the pendency of the suit. Had the court not taken any appropriate steps to preserve the same by having it in its actual custody, then the order issued at the end of the trial would have been rendered otiose as it would have been unenforceable.
23. While I recognise the appellant's frustration over inability to access the subject motor vehicle. The vehicle is the subject of a property dispute and there is therefore need to have the proprietary rights addressed conclusively. A perusal of the record demonstrates that the manner in which the

property came into the possession and control of the Appellant was not a matter actively before the trial court, therefore, this honourable court is not seized with jurisdiction at this time to determine the proprietary rights of the parties.

24. Flowing from the above, I find no reason to fault the reasoning and subsequent finding of the trial court on the issue under dispute.

25. *The upshot of the matter is that the appeal is dismissed for lack of merit. Each party to bear its own costs.*

Dated Signed and Delivered virtually this 30th day of April, 2026.

**HON. T. W. OUYA
JUDGE**

In the presence of:

Mrs. Muhoho - Applicant/Appellant

Wambui holding brief for Nduati - 1st Respondent

Kelvin/Hamza - Court Assistants