



**Mongare v Sirme Agencies Auctioneers & another (Civil Appeal E1334 of 2024) [2026] KEHC 6046 (KLR) (7 May 2026) (Judgment)**

Neutral citation: [2026] KEHC 6046 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL APPEAL E1334 OF 2024**

**AN ONGERI, J**

**MAY 7, 2026**

**BETWEEN**

**ZABLON ARAK MUGAMBI MONGARE ..... APPELLANT**

**AND**

**SIRME AGENCIES AUCTIONEERS ..... 1<sup>ST</sup> RESPONDENT**

**MOMENTUM CREDIT LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment of Hon. Thomas Nzyoki (CM)  
in Milimani CMCC No. e381 of 2024 delivered on 4/11/2024))*

**JUDGMENT**

1. The appellant in this appeal ZABLON A. MONGARE filed Milimani CMCC no. E381 of 2024 seeking orders of release of motor vehicle registration no. KCH 674N Isuzu matatu by the respondent unconditionally pending the hearing and determination of the suit.
2. The appellant also sought for orders that the I.G of police do enforce the orders.
3. The respondent filed grounds of opposition in reply to the application.
4. The appellant's case in summary is that he took a loan from the 2<sup>nd</sup> respondent which was secured by the motor vehicle registration no. KCH 674N Isuzu matatu.
5. That the parties entered into a consent re-adjusting the loan.
6. That on 26/6/2024, the 1<sup>st</sup> respondent impounded the motor vehicle without notice when the appellant was in arrears of kshs.10,000.
7. The respondents stated that the repossession of the motor vehicle was in accordance with the agreement of the parties.



8. The trial court found that the application dated 11/11/2024 did not meet the conditions for grant of an injunction and dismissed it with costs.
9. The appellant has appealed to this court on the following grounds:
  - i. The learned trial magistrate erred in law and fact by denying the appellant to prosecute his application through either verbal submission or written submission to articulate his grounds for the orders.
  - ii. The learned trial magistrate erred in law and fact to entirely rely on the Defendant's written submissions which the Plaintiff/ appellant was not directed to file in support of his application dated 11<sup>th</sup> October, 2024.
  - iii. The learned trial magistrate erred in law and fact by denying the Appellant/ Applicant his right to prosecute the application.
  - iv. The learned trial magistrate erred to note that the Appellant/Applicant had made some payments towards the repayment of the Loan despite the interference of the Respondents into appellant's business.
  - v. The trial court erred to note that the 2<sup>nd</sup> Respondent committed contempt of the court orders that were issued on 9<sup>th</sup> February, 2024 restraining the Auctioneers (Antique auctions Agencies) by taking another auctioneers (sirme agencies auctioneers) to attach the appellant's Motor Vehicle while there were existing orders.
  - vi. That the learned magistrate failed to note that the Appellant and the 2<sup>nd</sup> Respondent had consented on the mode of repayment of the Loan and which consent was to be adopted by the court but the 2<sup>nd</sup> Respondent ignored to file the said consent which stipulated how the Appellant/Applicant was to make the payments.
  - vii. That the trial magistrate erred to note the terms of the consent was an exhibit to appellant's application and when the repayment was to start which could have attracted the arrears.
  - viii. The trial magistrate failed to note that at the time of impounding/attaching the Appellant's Motor Vehicle, the Appellant was only in arrears to attune of Kshs. 10,000/= but decided the opposite.
  - ix. The trial magistrate erred to note that the Appellant was not served with any Notice of impoundment/ attachment of his Motor Vehicle for the arrears.
  - x. The trial magistrate erred in condemning the Appellant without being heard.
  - xi. The learned trial magistrate erred to note that the appellant's Motor vehicle KCH 674N ISUZU MATATU being contested was the only source of income of the Plaintiff/Applicant in repayment of the Loan.
10. The parties filed written submissions as follows; the appellant submitted that he obtained orders restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents against their actions.



11. At the time of the issuance of orders against it 1<sup>st</sup> and 2<sup>nd</sup> respondents the 2<sup>nd</sup> respondent engaged the firm of auctioneers by the name of Antique Auctions Agencies and named the 1<sup>st</sup> respondent in the application dated 3<sup>rd</sup> July 2024.
12. Despite the restraining orders in place the 2<sup>nd</sup> respondent engaged another firm of auctioneers by the name of Sirme Agencies Auctioneers who proceeded and attached the appellants Motor Vehicle while there was existing restraining orders.
13. The appellant submitted that he had made payment of substantial money to the 2<sup>nd</sup> respondent which would have not warranted the 2<sup>nd</sup> respondent to interfere with the appellant's business.
14. Additionally, there were restraining orders against the 1<sup>st</sup> and 2<sup>nd</sup> respondent which were ignored by them.
15. The appellant and the 2<sup>nd</sup> respondent had executed a consent which the 2<sup>nd</sup> respondent ignored to file that entailed how the payment of the loan was to be paid by the appellant.
16. The appellant at the time of impounding of his motor vehicle was only in arrears of Kshs. 10,000 which would have been considered to create a provision for payment considering that the only source of income of the appellant was the motor vehicle in issue.
17. The 2<sup>nd</sup> respondent alternatively submitted that the Memorandum of Appeal filed herein contains eleven (11) grounds challenging various factual findings of the trial court. However, despite the numerous grievances raised, the memorandum is completely silent on the actual prayers that the Appellant seeks from this Court.
18. There is no request to set aside the orders granted in the impugned ruling, no prayer to vary, no prayer to remit, no prayer for reinstatement, no consequential relief, and no alternative prayer.
19. The memorandum ends with the enumerated grounds but does not articulate any order sought.
20. Thus, an appeal without prayers is not merely incomplete; it is substantively defective because it fails to invoke the remedial jurisdiction of the appellate court.
21. The 2<sup>nd</sup> respondent submitted that the Appellant was given every opportunity by the trial court to present his case but instead chose not to file submissions in the impugned application.
22. The Appellants Notice of Motion dated 11th October 2024 fully presented the Appellants entire case before the trial court and as thus Appellant cannot come back around and allege that he was not given an opportunity to present his case.
23. It is not in dispute that the Appellant applied for and was issued a loan by the 2nd Respondent.
24. It is also not disputed that the Appellant and the 2nd Respondent entered into a consent dated 24th April 2024, restructuring the repayment of the loan.
25. In the event of default, the 2nd Respondent would be at liberty to repossess the secured asset. The consent expressly provided in paragraph 8 that:

“THAT the failure of the Plaintiff to honour the terms shall proceed to execute in full without consultations”.
26. The 2<sup>nd</sup> respondent indicated that the Appellant admitted in his affidavit that by the time of repossession, he was in arrears of Kshs. 10,789/=.



27. It is settled that a consent has the same force as a binding contract between the parties.
28. The Appellant neither pleaded nor proved any fraud, misrepresentation, or mistake in the formation or execution of the consent. Having defaulted, the Appellant cannot now turn around and fault the Respondent for exercising its rights under that same agreement.
29. The issues for determination in this appeal are as follows;
  - i. Whether the appellant's right to be heard was violated at the subordinate court, and
  - ii. Whether the trial court erred in refusing the injunction and release of the motor vehicle.
30. On the first issue, the 2nd respondent has raised a significant procedural objection, noting that the memorandum fails to articulate the reliefs sought. Order 42 Rule 1 of the Civil Procedure Rules requires a memorandum to set out the grounds of objection concisely.
31. While the omission of specific prayers is a technical irregularity, the court is guided by Article 159(2)(d) of *the Constitution* of Kenya, 2010, which mandates that justice shall be administered without undue regard to procedural technicalities.
32. As held in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, the focus should be on whether the procedural deficiency goes to the root of the court's jurisdiction or causes prejudice that cannot be compensated by costs.
33. Given that the grounds of appeal clearly imply a desire to set aside the trial court's dismissal, this court shall treat the appeal as competent in the interest of substantive justice.
34. Regarding the right to be heard, the appellant contends that the trial magistrate erred by not allowing verbal or written submissions.
35. The record indicates that the application was determined based on the pleadings filed.
36. Under the principle of *audi alteram partem*, parties must be given a reasonable opportunity to present their case.
37. However, the right to be heard does not always equate to oral advocacy and it is satisfied if a party is given an opportunity to present their case through written pleadings and affidavits.
38. The appellant filed a Notice of Motion supported by an affidavit which contained his entire case.
39. While it is best practice for a court to give directions on submissions, the failure to do so does not necessarily vitiate a ruling if the court had sufficient material to make a determination.
40. The appellant's grievance that the court relied solely on the respondents' submissions is noted, but the primary evidence remained the affidavits filed by both sides.
41. On the merits of the injunction, the appellant admitted to being in arrears of Kshs. 10,000.
42. A consent order is a contract between the parties and is binding with the force of a court order and it can only be set aside on grounds that would justify setting aside a contract, such as fraud, mistake, or misrepresentation.
43. The appellant does not deny the existence of the consent or the default, however small the amount.



44. Paragraph 8 of the consent explicitly allowed the respondent to execute in full without further consultation upon default.
45. Consequently, the respondents were exercising a contractual right.
46. The appellant in the plaint dated 9<sup>th</sup> February 2024 and amended on 11<sup>th</sup> October 2024 did not seek injunctive prayers.
47. Furthermore, the appellant failed to meet the three-pillar test for an injunction as set out in *Giella v Cassman Brown & Co. Ltd* [1973] EA 358.
48. Specifically, he did not demonstrate a prima facie case with a probability of success given his admitted default, nor did he show that he would suffer irreparable injury that could not be compensated by damages, as the loss of income from a commercial vehicle is a quantifiable financial loss.
49. In other words, the appellant will be adequately compensated with a monetary award should the attachment be found to be wrongful.
50. The allegation of contempt regarding the change of auctioneers does not invalidate the underlying debt or the right of repossession under the consent.
51. Consequently, this court finds that the trial magistrate did not err in his findings and the appeal is hereby dismissed.
52. However, the Appellant is not without a remedy since the law protects the appellant's ownership interest by allowing him to "buy back" his vehicle at any point before it is sold.
53. Even though the consent order allowed the respondent to "execute in full," this does not strip the appellant of his inherent right to redeem the property by clearing the financial obligations.
54. To recover his vehicle, the appellant is directed to immediately clear the outstanding arrears along with any accrued auctioneer fees to the 2nd respondent.
55. The appellant is also at liberty to file an urgent application for redemption in the subordinate court, invoking the principle of equity against forfeiture to prevent the loss of a significant commercial asset over a relatively minor debt.
56. Each party to bear its own costs of the appeal.
57. Orders to issue accordingly.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 7<sup>TH</sup> DAY OF MAY, 2026.**

**A. N. ONGERI**

**JUDGE**

In the presence of:

Mr Ondieki for the Applicant

Miss Akoth holding brief Oyunge for the Respondent

<b>NAIROBI HIGH COURT CIVIL APPEAL NO. E1334 OF 2024</b>	<b>0</b>
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