REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA.

CIVIL APPEAL NO. E048 OF 2025

NGAO CREDIT LIMITED.....APPELLANT

-VERSUS-

JACINTA AUMA ACHIRO.....1ST RESPONDENT

GNEY G.M. AUCTIONEERS .....2ND RESPONDENT

(Being an appeal from the ruling of Hon Benjamin Limo (PM) in Siaya CMCC No. E0054 of 2025 dated 18/7/2025)

BETWEEN

JACINTA AUMA ACHIRO.....PLAINTIFF/APPLICANT

-VERSUS-

NGAO CREDIT LIMITED.....1ST DEFENDANT

GINEY G,M AUCTIONEER.....2ND DEFENDANT

JUDGMENT

1. The appeal herein arises from the ruling of Hon Benjamin Limo (PM) dated 18/7/2025 in Siaya CMCC NO. E054 of 2025 wherein he allowed the 1st Respondent's application dated 18/6/2025 and granted orders inter alia; that an order of temporary injunction was granted restraining the Appellant from repossessing m/v registration KDC 371E from the custody of the 1st Respondent pending the hearing and determination of the suit; that the suit m/v be released to the 1st Respondent as soon as is practicable but not more than 3 days; that the Appellant is orderd to avail up to date statements of accounts within 15 days of the date of the ruling; that the matter was referred to Court Annexed Mediation for possible settlement; that the matter be listed for pre-trial directions.

2. The Appellant, being dissatisfied with the whole ruling of the trial Court, filed its Memorandum of Appeal dated 18th July 2025 wherein it raised the following grounds of appeal :

i) The Learned Magistrate erred in law and in fact by ignoring the cardinal principle that parties are bound by their own pleadings and giving orders that were not sought by the 1st Respondent in her application.

ii) The learned Magistrate erred in law and in fact in stepping into the 1st Respondent's shoes; and descending into the arena and litigating on her behalf by ordering the Appellant to furnish the 1st Respondent's Counsel with an up-to-date Statement of Accounts within 15 days from the date of the ruling.

iii) The learned Magistrate erred in law and in fact in ignoring the 1st Respondent's prayers and converting her application to a fishing expedition for evidence in support of her case.

iv) The learned Magistrate erred in law and in fact in disregarding the Appellant's submissions that courts are barred from allowing debtors avoid paying their just

debts by taking the defence of challenging contractual interest rates and allowing the 1st Respondent evade her contractual duties.

v) The learned Magistrate erred in law and in fact in ordering the Appellant to release motor vehicle KDC 371E to the 1st Respondent and ignoring the Appellant's cogent evidence that the 1st Respondent is a cunning person who can hide the subject motor vehicle to frustrate the Appellant's statutory right of sale in the likely event that her suit is dismissed.

vi) The learned Magistrate erred in law and in fact in disregarding the Appellant's watertight evidence that the 1st Respondent is a habitual defaulter in repayment of her loan instalments and holding that she has an arguable case.

vii) The learned Magistrate erred in law in disregarding the Appellant's evidence that it had followed the due procedure in attaching the motor vehicle registration number KDC 371E.

viii) The learned Magistrate erred in law and in fact in holding that the 1st Respondent had established a prima facie case; that she will suffer irreparable loss that cannot be adequately compensated by way of damages; and that the balance of convenience tilts in favour of granting the injunction.

3. The Appellant therefore prayed that the appeal be allowed and the ruling of the Magistrate Court at Siaya delivered on 18th July 2025 by Hon. Benjamin Limo in MCCC E054 of 2025 be set aside and that costs be awarded to the Appellant.

4. This being the first appellate court, its duty is to re-evaluate the evidence adduced before the trial court and subject it to an independent analysis so as to arrive at its own conclusion as to whether or not to uphold the decision of the trial court. The court must also take into account the fact that it neither saw nor heard the witnesses testify and thus to make due allowance for that. See **Selle & Another Vs Associated Motor Boat Co. Ltd [1968] 1 EA 123** where it was held:

"...this court is not bound necessarily to accept the findings of facts by the court below. An appeal to this

court from a trial...is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances and probabilities materially to estimate the evidence."

5. The record of the trial court indicates that the 1st Respondent had filed a plaint dated 18/6/2025 and contemporaneously filed an application dated 18/6/2025 seeking almost similar orders in the plaint namely, an order compelling the release of the suit m/v registration number KDC 371 E to the 1st Respondent, an order of permanent injunction restraining the Appellant from disposing the said suit motor vehicle,

costs of the suit and any other relief that the court could deem to grant.

6. The 1st Respondent's application aforesaid was supported by the 1st Respondent's supporting affidavit sworn on even date and that the prayers sought were as follows:

    i) Spent.

    ii) THAT pending the hearing and determination of this application inter parties, a temporary interim release order do issue compelling the defendants, whether by themselves, their agents, servants or persons claiming through them howsoever, to release the Motor Vehicle Registration Number KDC 371E Suzuki Alto to the plaintiff/applicant.

    iii) THAT pending the hearing and determination of this application inter parties, an order of temporary interim injunction do issue restraining the Defendants whether by themselves, their agents, servants or persons claiming through them howsoever, from selling, disposing, transferring, pledging, auctioning or by other means whatsoever disposing of or otherwise dealing

adversely with suit motor vehicle Reg. No.KDC 371 E Suzuki Alto

iv) THAT pending the hearing and determination of this suit, an interim release order do issue compelling the defendants, whether by themselves, their agents, servants or persons claiming through them howsoever, to release the Motor Vehicle Registration Number KDC 371 E Suzuki Alto to the plaintiff/applicant.

v) THAT pending the hearing and determination of this suit, an order of temporary interim injunction do issue restraining the Defendants, whether by themselves, their agents, servants or persons claiming through them howsoever, from selling, disposing, transferring, pledging, auctioning or by other means whatsoever disposing of or otherwise dealing adversely with suit motor vehicle Reg. No. KDC 371 E Suzuki Alto.

vi) THAT costs of the Application be provided for.

7. The 1st Respondent's gravamen was inter alia; that she is the registered legal owner of the suit motor vehicle Reg. no. KDC 371 E; that sometime on or about the applicant took a loan

amount http://Kshs.KDC 371 E/- from the defendant/respondent and used the suit motor vehicle as a collateral which was to be paid in instalments of 12 months at Kshs.15,000 per month which was totaling to Kshs.92,368/; that the applicant has been diligently making repayments to the defendant/respondent when the instalments fell due according to the security agreement until when the 1st Respondent without any notice to the Applicant instructed the 2nd Respondent to repossess the suit motor vehicle; that the suit motor vehicle was repossessed and taken into the custody of the 2nd Defendant; that the plaintiff/applicant was never served with the mandatory notice as envisaged under section 67(1) of the Movable Property Security Rights Act, 2017 requiring the defendant to serve on the plaintiff/applicant a notification; that the plaintiff/applicant further avers that if at all the mandatory notice under section 67(1) of the Movable Property Security Rights Act, 2017 was addressed to the applicant; the same did not meet the threshold requirements under section 67(2) of the Movable Property Security Rights

Act, 2017; that the plaintiff/applicant's right of redemption has been curtailed through the action of the defendant and his agent under section 69 of the Movable Property Security Rights Act, 2017; that the repossession of the motor vehicle registration no KDC 371 E is unlawfully, irregularly and unjustifiable and in total breach of the security agreement between the parties and the law; that the applicant is now apprehensive that unless the release orders sought are granted there is a real danger that the suit motor vehicle and the s KDC 371 E subject matter of this suit is continuing to waste away and physically deteriorate; that the defendant/respondent's action of unlawfully repossessing the motor vehicle is an act to disentitle the applicant of her rightful interest in the motor vehicle ; that the applicant has a prima facie case against the Defendant, and the balance of convenience tilts in favour of grant of the orders sought which would mitigate losses to both parties to this suit and preserve the suit motor vehicle while awaiting the outcome of the suit; that this application should be granted to meet the ends of justice; that she has a prima facie case against

the Defendant, and the balance of convenience tilts in favour of grant of the orders sought which would mitigate losses to both parties to this suit and preserve the suit motor vehicle while awaiting the outcome of the suit.

8. The Appellant, through its Branch Manager, Anne Ayuma Anyanda filed a replying affidavit sworn on 20th June, 2025 in opposition to the application wherein she averred inter alia; that on 1st August 2024, the Plaintiff approached the 1st Defendant seeking a loan facility of KES. 112,000; that the Plaintiff and NCL entered into a loan agreement; and the Plaintiff was granted a loan facility to the tune of KES. 112,000. The loan was to be paid at a monthly rate of 3.5%; that as a requirement of the loan agreement and in compliance with the Insurance Regulatory Authority, the collateral offered to the Plaintiff was to be comprehensively insured; that on the same date, the Plaintiff being unable to cater for the comprehensive insurance policy and applied for Insurance Premium Financing of KES. 50,818; that the motor vehicle was duly insured through Insurance Policy No. 0101/07/85613/24; that the Plaintiff offered her motor

vehicle registration no. KDC 371E, Chasis No. MR31S-202427 of make SUZUKI HUSTLER as the collateral for the loan facility granted by NCL ; that the Plaintiff and NCL entered into a movable property security agreement with motor vehicle registration no. KDC 371E as the collateral ; that NCL duly registered its charge against the Plaintiff's motor vehicle that the Plaintiff defaulted on repaying the loan as agreed; and was duly served with a demand letter to settle the outstanding loan balance of KES. 243,941.57 as per the terms of the loan agreement between her and NCL ; that despite being served with a demand to pay all the outstanding loan, interest and accrued penalties; the Plaintiff ignored, refused and/or failed to act as per the demand notice; and the terms of the loan agreement; that the loan agreement that is binding between the parties provides that in default of payment of loan, accruing interest and any penalties thereon, NCL shall be entitled to inter alia instruct auctioneers to attach or seize the motor vehicle; and realizing the security by way of either private treaty or public auction; that after the Plaintiff's noncompliance inaction,

NCL instructed G.M. Auctioneers to repossess motor vehicle KDC 371E. The auctioneers issued a proclamation notice on 25th March 2025; that on 8th April 2025 and 15th April 2025, the auctioneer proceeded to Siaya Central Police Station where the Plaintiff operates a police canteen to physically repossess the subject motor vehicle. That the Plaintiff became totally uncooperative and denied them access to the subject motor vehicle; that the auctioneer informed NCL of its futile attempts to repossess the motor vehicle and NCL advised them to seek court orders; that the auctioneers duly moved the Magistrate Court at Nakuru in MCCC/MISC/E164/2025 where the court issued various orders in favour of the 1st Defendant and that they sought police assistance whereupon the Auctioneers duly served the court order dated 5th June 2025 upon the O.C.S Siaya Police Station; who thereafter validated the same at Nakuru Chief Magistrate's Court; that the Auctioneer, in the company of police officers from Siaya Central Police Station, repossessed the motor vehicle from the Plaintiff on 10th June 2025; that the auctioneer issued a notification of sale of the subject

motor vehicle on 10th June 2025.; that the Plaintiff has not been servicing her loan as expected and her arrears stand at KES 311,896 as of 20th June 2025; that the Plaintiff has no arguable case as she is a habitual and notorious defaulter of her loan instalments and that NCL's statutory right and contractual obligation to recover the unpaid amounts by selling the subject motor vehicle is ripe for enjoyment; that the Plaintiff will not suffer any loss that is irreparable by way of damages as the loss can be quantified in monetary terms; that NCL has the financial muscles to compensate the Plaintiff by way of damages; that the balance of convenience tilts in favour of a statutorily entitled lender exercising its power of sale; other than a defaulter who has breached the express terms of the binding contract; that in the alternative and without prejudice to all the depositions herein, this Honourable Court should give the Plaintiff a conditional stay of depositing KES. 311,896 in a joint interest earning account with the 1st Defendant; that this Honourable Court should not hesitate to disallow the Plaintiff's Applications, discharge

the interim orders and allow the 1st Defendant to enforce the terms of the loan agreement.

9. The appeal was canvassed by way of written submissions. Both parties duly complied.

10. Vide submissions dated 9/2/2026, leaned counsel for the Appellant raised about three issues which can be collapsed into one major issue namely whether the trial magistrate erred in granting the impugned orders.

11. It was submitted that the trial court erred in granting orders that were not sought in the 1st Respondent's Application and that neither of the parties made any submissions thereon.

12. It was contended that the grant of orders that were not sought by any party in their pleadings violate the long-standing principle in law that parties are bound by their own pleadings and courts will not grant a remedy that has not been applied for. This position was affirmed by the Court of Appeal in **Bentley-Buckle & Another & 2 others (Suing in their Capacity as Executors of the Estate of Anthony Suntra Investment Bank Limited v Nicholas**

William Bentley-Buckle-Deceased) KECA 1591 (KLR), the Court of Appeal held thus:

"Parties are bound by their pleadings; courts adjudicate the case presented, not a different one...The point is as old as the system: a court will not grant a remedy that has not been applied for, nor determine matters not pleaded."

13. It was further submitted that grant of orders that were not sought by any party or submitted on by the parties is unacceptable in law. If the 1st Respondent wished to get the impugned orders, nothing would have been easier than for her to indicate the same in her application, give the Appellant a chance to respond and make its submissions on the same; and have the same considered by the trial court. This syncs with the reasoning of the Court of Appeal in **Housing Finance Company of Kenya v J. N. Wafubwa KECA 695 [KLR]** where it was held thus:

None of the parties addressed the judge on this award and relief granted was not sought in any pleading. Neither party

led any evidence on it. No submissions were made by the parties on whether the relief was available...

14. Also, in **Blay v Pollard and Morris 1 KB 628,** cases must be decided on issues on record and if it is desired to raise other issues they must be placed on record by amendment. In **Charles C. Sande v Kenya Co-operative Creameries Limited Civil Appeal No. 154 of 1992** the Court underscored the need for parties to have notice of issues in an action when it stated that:

"All the rules of pleading and procedure are designed to crystallize the issues a judge is to be called upon to determine and the parties themselves made aware well in advance as to what the issues between them are.''

15. The Appellant faulted the 1st Respondent for not indicating in her application that the trial court should make any other orders as it may deem fit. Even if she did, the trial court ought not to make substantive orders like the impugned ones for the reason that such an approach have faced a great distaste in the superior courts, including the

Supreme Court. 16. This is well manifested in the Supreme Court's decision in **Mungai v Housing Finance Company (K) Limited & 5 others KESC 47 (KLR)** where it was held thus:

"One cannot exercise its powers in a carte blanche manner. A litigant's plea must be precise and targeted. One cannot make omnibus prayers to the court with the expectation that the court will be merciful to him and decipher them and grant one or either of them."

16. It was contended that whenever a judicial officer is handling a matter where injunctive orders are sought, he or she ought to focus on the substantive issue and resist the temptation to pluck issues literally from the air and make determinations on them. This was well put by the Court of Appeal in **Mawji v Lalji & Another KECA 306 (KLR),** where it was held thus:

"...the substantive issue before the judge was whether or not to grant the injunction order sought.

All other findings were extraneous to the pleadings. A court of law cannot pluck issues literally from the air and purport to make determinations on them. It is the pleadings which determine the issues for determination."

17. Furthermore, even where an Applicant has invoked the general prayer of "any other relief that the court may deem fit", the unpleaded prayers ought to be consequential to the main relief. This was well elaborated by the Court of Appeal in **Bell & Another v I. L. Matterello Limited KECA 168 (KLR)** where it was held thus:

"The principles of law that guide a court of law when invoking and applying its inherent power for ends of justice to be met to the parties before the court are as crystallized by case law.... Those for invoking the general provision of "any other relief that the court may deem fit to grant", were as enunciated by the predecessor of this court in the case of Rex Hotel Limited vs Jubilee Insurance Company Limited*[1972] *E.A 211 as approved by this Court in Timsales Limited

v Samuel Kamore Kihara*[2016] *KECA 487 (KLR) for the holding, inter alia that " a relief that qualifies to be awarded under the above prayer is one that is consequential to the main relief."

18. To buttress the point, orders to furnish the 1st Respondent with account statements and having the parties settle the matter through court annexed mediation are not consequential to injunctive and/or release orders that were expressly sought in the 1st Respondent's Application.

19. It was unusual for the trial court to order the parties to engage in court annexed mediation without listening to their opinion on whether the parties were willing to engage in an out of court settlement. Even though the language of Article 159(2)(c) of the Constitution mandates courts to promote use of alternative dispute resolution mechanisms but not coerce parties to engage in such.

20. That in the pending matter before the lower court, neither party expressed any intentions to engage in ADR. Further, the court did not seek the parties' input before making an order for parties to engage in the same. It was the view of

counsel for the Appellant that obliging unwilling parties to engage in ADR is unacceptable obstruction on their right to access justice under Article 48 of the Constitution as it unnecessarily increases the costs of the dispute; and contravenes the parties' right to have their dispute heard and determined expeditiously. This reasoning rhymes with that of the English Court of Appeal in **Halsey v Milton Keynes General NHS Trust EWCA Civ 576** where it was held thus:

"It is one thing to encourage the parties to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court... If the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived

effectiveness of the ADR process. If a judge takes the view that the case is suitable for ADR, then he or she is not, of course, obliged to take at face value the expressed opposition of the parties. In such a case, the judge should explore the reasons for any resistance to ADR. But if the parties (or at least one of them) remain intransigently opposed to ADR, then it would be wrong for the court to compel them to embrace it.''

21. It was also submitted that the learned trial Magistrate descended into the arena of litigation and stepped into the 1st Respondent's shoes and converted the 1st Respondent's Application into a fishing expedition for evidence when he ordered the Appellant to furnish the 1st Respondent's Counsel with upto date statements of accounts within 15 days of the ruling despite the trite fact that the 1st Respondent's Counsel had not sought for such an order. Further, the 1st Respondent's Counsel had not made the appropriate application to the trial court to compel the Appellant to produce the said documents. It was contended

that it is trite law that whenever an applicant requires the Respondent to furnish them with any piece of evidence for their reliance, they should make an application under Section 22 of the Civil Procedure Rules and have the same determined by the court on merits and thus the impugned ruling did not arise from such an application. By making the impugned order, the learned Magistrate made the said application, argued it himself and made a determination by himself. That is a perfect example of violation to the right to a fair trial that requires hearing by an impartial tribunal as enshrined in Articles 25(c) and 50(1) of the Constitution of Kenya, 2010.

22. In **Ogai v Revoko Highway Service Station [2024] KECA 1499 (KLR)**, the Court of Appeal observed thus:

> **"The court cannot go into a fishing expedition looking for evidence...the court should not be seen to be assisting either side in the dispute... As was observed by Sir Barclay Nihill, P in Jashbhai C Patel vs. BD Joshi 19 EACA 42: 'A trial judge should not descend into the arena where his vision may**

become clouded by dust of the conflict... Where the parties are represented by counsel, it is preferable that ordinarily the conduct of the case should remain in their hands.' The trial judge must be cautious of how it exercises the said powers under the Civil Procedure Act and Evidence Act so that the exercise does not negatively affect the perception of a fair trial.''

23. Furthermore, in **Atek Otech Richard & 11 others v Stelco Properties; M-Oriental Bank Limited (Interested Party) [2022] KEELC 1596 (KLR)**, AW Mwangi J held thus:

"I agree with the Plaintiffs' observations that the court may be perceived to be collecting evidence for the applicants... We must never lose sight of the fact that ours is an adversarial system. The Black's Law Dictionary (10th Edition), defines such a system as a legal system, 'involving active and unhindered parties contesting with each other to put forth a case before an independent decision-maker.' The decision maker,

in this case, the court must remain impartial. Sir Barclay Nihill put it thus, "a trial Judge should not descend into the arena where his vision may become clouded by the dust of the conflict (Jashbhai C Patel vs BD Joshi).''

24. It was also submitted that that the trial court erred fundamentally in fact and in law in granting the interim injunctions in favour of the 1st Respondent. As demonstrated hereunder, the 1st Respondent had not met the required threshold for grant of interlocutory injunction as the 1st Respondent had not shown that her case had a prima facie case with a high probability of success. It was contended that the learned magistrate fundamentally erred in law by failing, ignoring and/or refusing to peruse, consider and assess the Appellant's watertight evidence which, on a balance of probabilities, showed that the 1st Respondent was in default of her loan obligations as explained in the replying affidavit of the Appellant's branch manager which gave a detailed account of how the contract was entered

into and how the 1st Respondent defaulted in the loan repayments.

25. It was also submitted that the 1st Respondent is not at the risk of suffering any harm that cannot be compensated by way of damages. The value of the motor vehicle is ascertainable at KES. 650,000 and that the same can be adequately compensated by way of damages in the event that his suit succeeds. This was aptly held by the High Court in **Kaarichel Traders Limited v Mayfair CIB Bank Limited [2023] KEHC 24609 (KLR)**, where it was opined thus:

"On the issue of whether the Plaintiff stands to suffer irreparable injury that cannot be adequately compensated by an award of damages in the event the orders sought are not granted, I am persuaded that this is not the case. This is because the value of the suit motor vehicles is ascertainable from the various valuations carried out on them as correctly submitted by the Defendant's Counsel hence if this Court finds that the said repossession and

subsequent sale was illegal, damages would be an adequate remedy.''

26. The Appellant also faulted the trial Court for holding that the balance of convenience tilts in favour of the Appellant and then proceeding to grant interim orders in favour of the 1st Respondent. Again, it was contended that Courts are barred from granting interlocutory injunctions where damages are recoverable in law and where the defendant would be in a financial position to pay the said damages. This was aptly held in by **Lord Diplock in American Cyanamid Co v Ethicon Ltd [1975] AC 396** as quoted with approval by the Court of Appeal in **Nanji & 2 others v Exobi (Finance House) Limited[2025] KECA 1119 (KLR)** where it was held thus:

"The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial... if damages in the measure recoverable at

common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared at that stage.''

27. Finally, it was submitted the 1st Respondent's account statement reveals that she has been incurring late payment charges throughout the loan duration. Balance of convenience tilts in granting orders in favour of the non-defaulting party. This is because the loan agreement binds upon all the parties and the courts ought not to allow litigants to use them in escaping from their binding contractual obligations. This aligns with the reasoning of this Honourable Court in **Ochiel v Okoth [2026] KEHC 106 (KLR)**, where it was held thus:

"Even though the Appellant has lamented that the amounts demanded by the Respondent are exorbitant as it exceeds the cost of a new ultra sound machine, it is trite that the courts must respect the terms and the conducts of the parties. It is unfortunate that the

Appellant now wants the court to intervene in the matter of the contract yet he and the Respondent had...entered into the contract of their own free will and volition. It is trite law that courts will not interfere with contracts entered into by two consenting parties are on the face of it illegal, unconscionable, oppressive and fraudulent."

28. The above holding of this Honourable Court is reinforced by the Court of Appeal's reasoning in **Nyutu Agrovet Limited v Airtel Networks Kenya Ltd [2024] KECA 523 (KLR)** where it was held thus: [Page 193 of the Appellant's Authorities]

"If there is a signed contract as in this case, its binding nature will be difficult to assail. In the absence of fraud, misrepresentation or error, a party is bound by a document to which he has penned his signature, whether he has read the contents or not."

29. It was finally submitted that based on the foregoing, it is a trite matter of fact that the trial court committed a

fundamental error in law by granting orders that were not sought by the parties herein contrary to the age-old doctrine that parties are bound by their own pleadings; abandoning the neutral seat of justice and tossing itself in the arena of litigation hence clouding its eyes; coercing parties to engage in court annexed mediation when neither of them is willing to do so; and granting temporary injunctions in favour of an undeserving party. The Appellant therefore urged this court to allow the appeal with costs.

30. Vide submissions dated 25th February, 2026, learned counsel for the 1st Respondent gave a background regarding the 1st Respondent's claim in the trial court. Learned counsel raised one issue for determination namely whether the trial court erred when it granted orders of injunction and release of the suit vehicle.

31. It was submitted that this being an application for temporary Injunction, the applicable principles of law in deciding whether or not to grant the orders of temporary Injunction are those that were enumeleted in the celebrated

case of **Giella versus Cassman Brown & Another (1973) EA 358.** The principles being that;

i. The Applicant must establish a prima facie case with a probability of success.

ii. The Applicant must show that he will suffer irreparable harm which cannot be adequately compensated by an award of damages,

iii. And if the court is in doubt it should decide the application on the balance of convenience.

32. As regards the issue of prima facie case, it was submitted that the 1st Respondent has given a lengthy explanation on how she obtained the loan facility of Kshs 112, 000/ from the Appellant and repayable with interest. That she had already cleared her loan with the Appellant who had no right to pursue her and further the 2nd Respondent did not issue the mandatory sale forms/proclamation notice. It is thus clear from the above analysis that the 1st Respondent established a prima facie case with high chances of success at the intended trial before the trial Court.

33. On whether the 1st Respondent established if she will suffer injury which will not be compensated there is no doubt that the Respondent was making payment of the said loan when the installment falls due and the same is clearly evidenced in the mpesa statements that were produced before the Court and the 1st Respondent avered in her supporting affidavit that she was using the said motor vehicle for her business and those are the business where she used to get her income to repay the said loan therefore by retaining the said motor vehicle its like depriving the 1st Respondent her income an issue that will make her run at a great loss that cannot be compensated by way of damages. It was the view of counsel that the court should not disturb the holding of the trial court and that the appeal should be dismissed with costs.

34. I have considered the record of the lower court and the rival submissions. I find the issue for determination is whether the trial court's orders dated 18/7/2025 were appropriate.

35. It is noted that the 1st Respondent's application dated 18/6/2025 basically sought for orders of temporary injunction and hence the applicable principles of law in deciding whether or not to grant the orders of temporary Injunction are those that were set out in the celebrated case of **Giella Vs Cassman Brown & Another [1973] EA 358.** The principles being that;

   i) The Applicant must establish a prima facie case with a probability of success.

   ii) The Applicant must show that he will suffer irreparable harm which cannot be adequately compensated by an award of damages,

   iii) If the court is in doubt, it should decide the application on the balance of convenience.

36. The 1st Respondent's application dated 18/6/2025 had sought for interim orders of injunction pending determination of the suit and hence the trial court was to consider the same in line with the guidelines set out in the **Giella case** (supra). However, the orders issued appear to have gone off tangent in that the learned trial magistrate went ahead to

make orders which appear to have determined the main suit without the parties themselves prosecuting the matter. Ordinarily, a court would often be guided by the need to conserve the subject of the dispute pending determination of the same at a later stage. Indeed, it is not in dispute that at the time the 1st Respondent moved to court for interim orders, the Appellant had already moved in and seized the suit vehicle and hence, the 1st Respondent's concerns at the time was to seek orders of preservation of the suit vehicle pending determination of the main suit. However, a perusal of the orders made by the trial court shows that the trial court went ahead to sort of determine the matter going by the orders issued. For instance, the order preventing the Appellant from taking possession of the suit vehicle from the 1st Respondent amounted to determining the issue before the parties were heard yet the status quo at the time was that the Appellant was already in possession of the suit vehicle. Further, an order for release of the vehicle amounted to determining the matter at interlocutory stage before the main suit is heard. Similarly, the order calling for

statements of account before the matter kicked off was premature and likewise the order to refer the matter to court annexed mediation was also premature before the main suit.

37. It is therefore clear that the trial court seems to have gone off radar and went ahead to consider matters that had not been sought in the pleadings and which violate the long-standing principle in law that parties are bound by their own pleadings and courts will not grant a remedy that has not been applied for. This position was affirmed by the Court of Appeal in **Bentley-Buckle & Another & 2 others (Suing in their Capacity as Executors of the Estate of Anthony Suntra Investment Bank Limited v Nicholas William Bentley-Buckle-Deceased) KECA 1591 (KLR),** the Court of Appeal held thus:

"Parties are bound by their pleadings; courts adjudicate the case presented, not a different one...The point is as old as the system: a court will not grant a remedy that has not been applied for, nor determine matters not pleaded."

38. The grant of orders that were not sought by any party or submitted on by the parties is unacceptable in law. If the 1st Respondent wished to get the impugned orders, nothing would have been easier than for her to indicate the same in her application, give the Appellant a chance to respond and make its submissions on the same; and have the same considered by the trial court. The Court of Appeal in **Housing Finance Company of Kenya v J. N. Wafubwa KECA 695 [KLR]** held :

"None of the parties addressed the judge on this award and relief granted was not sought in any pleading. Neither party led any evidence on it. No submissions were made by the parties on whether the relief was available..."

39. Also in **Blay v Pollard and Morris 1 KB 628,** it was held that cases must be decided on issues on record and if it is desired to raise other issues they must be placed on record by amendment. In **Charles C. Sande v Kenya Co-operative Creameries Limited Civil Appeal No. 154 of**

1992 the Court underscored the need for parties to have notice of issues in an action when it stated that:

“All the rules of pleading and procedure are designed to crystallize the issues a judge is to be called upon to determine and the parties themselves made aware well in advance as to what the issues between them are.’’

40. The Appellant has faulted the 1st Respondent for not indicating in her application that the trial court should make any other orders as it may deem fit. Even if she did, the trial court ought not to make substantive orders like those made for the reason that such an approach have faced a great distaste in the superior courts, including the Supreme Court. This is well manifested in the Supreme Court’s decision in **Mungai v Housing Finance Company (K) Limited & 5 others KESC 47 (KLR)** where it was held that:

“One cannot exercise its powers in a carte blanche manner. A litigant’s plea must be precise and targeted. One cannot make omnibus prayers to the

court with the expectation that the court will be merciful to him and decipher them and grant one or either of them."

41. Based on the foregoing decision, the trial court was expected to be circumspect whenever it was handling a matter where injunctive orders are sought and to focus on the substantive issue and resist the temptation to pluck issues literally from the air and make determinations on them. This was well put by the Court of Appeal in **Mawji v Lalji & Another KECA 306 (KLR),** where it was held thus:

"...the substantive issue before the judge was whether or not to grant the injunction order sought. All other findings were extraneous to the pleadings. A court of law cannot pluck issues literally from the air and purport to make determinations on them. It is the pleadings which determine the issues for determination."

42. Again, even where an Applicant has invoked the general prayer of **“any other relief that the court may deem fit”,** the unpleaded prayers ought to be consequential to the main relief. This was well elaborated by the Court of Appeal in **Bell & Another v I. L. Matterello Limited KECA 168 (KLR)** where it was held that:

“The principles of law that guide a court of law when invoking and applying its inherent power for ends of justice to be met to the parties before the court are as crystallized by case law.... Those for invoking the general provision of “any other relief that the court may deem fit to grant”, were as enunciated by the predecessor of this court in the case of Rex Hotel Limited vs Jubilee Insurance Company Limited[1972] E.A 211 as approved by this Court in Timsales Limited v Samuel Kamore Kihara[2016] KECA 487 (KLR) for the holding, inter alia that “ a relief that qualifies to be awarded under the above prayer is one that is consequential to the main relief.”

43. The trial court, for instance, made orders to furnish the 1st Respondent with account statements and having the parties settle the matter through court annexed mediation. I find that these are not consequential to injunctive and/or release orders that were expressly sought in the 1st Respondent's Application dated 18/6/2025. It was rather unusual for the trial court to order the parties to engage in court annexed mediation without listening to their opinion on whether the parties were willing to engage in an out of court settlement. Even though the language of Article 159(2)(c) of the Constitution mandates courts to promote use of alternative dispute resolution mechanisms, the same was not to be used to coerce parties to engage in the same. It is instructive that in the pending matter before the lower court, neither party expressed any intentions to engage in ADR. Further, the court did not seek the parties' input before making an order for parties to engage in the same. It was the view of counsel for the Appellant that obliging unwilling parties to engage in ADR is unacceptable obstruction on their right to access justice under Article 48 of the Constitution as it

unnecessarily increases the costs of the dispute and contravenes the parties' right to have their dispute heard and determined expeditiously. The trial court ought to wait for the main suit when directions in that regard could be discussed. This was still early. This reasoning rhymes with that of the English Court of Appeal in **Halsey v Milton Keynes General NHS Trust EWCA Civ 576** where it was held thus:

"It is one thing to encourage the parties to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court... If the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process. If a judge takes the

view that the case is suitable for ADR, then he or she is not, of course, obliged to take at face value the expressed opposition of the parties. In such a case, the judge should explore the reasons for any resistance to ADR. But if the parties (or at least one of them) remain intransigently opposed to ADR, then it would be wrong for the court to compel them to embrace it.''

44. Learned counsel for the Appellant has contended that the learned trial Magistrate descended into the arena of litigation and stepped into the 1st Respondent's shoes and converted the 1st Respondent's Application into a fishing expedition for evidence when he ordered the Appellant to furnish the 1st Respondent's Counsel with upto date statements of accounts within 15 days of the ruling despite the trite fact that the 1st Respondent's Counsel had not sought for such an order. Further, the 1st Respondent's Counsel had not made the appropriate application to the trial court to compel the Appellant to produce the said documents. It was contended that it is trite law that

whenever an applicant requires the Respondent to furnish them with any piece of evidence for their reliance, they should make an application under Section 22 of the Civil Procedure Rules and have the same determined by the court on merits and thus the impugned ruling did not arise from such an application. By making the impugned order, the learned Magistrate made the said application, argued it himself and made a determination by himself. That is a perfect example of violation to the right to a fair trial that requires hearing by an impartial tribunal as enshrined in Articles 25(c) and 50(1) of the Constitution of Kenya, 2010.

45. In **Ogai v Revoko Highway Service Station [2024] KECA 1499 (KLR),** the Court of Appeal observed thus:

"The court cannot go into a fishing expedition looking for evidence...the court should not be seen to be assisting either side in the dispute... As was observed by Sir Barclay Nihill, P in Jashbhai C Patel vs. BD Joshi 19 EACA 42: 'A trial judge should not descend into the arena where his vision may become clouded by dust of the conflict... Where the parties are represented by

counsel, it is preferable that ordinarily the conduct of the case should remain in their hands.' The trial judge must be cautious of how it exercises the said powers under the Civil Procedure Act and Evidence Act so that the exercise does not negatively affect the perception of a fair trial.''

46. Also in **Atek Otech Richard & 11 others v Stelco Properties; M-Oriental Bank Limited (Interested Party) [2022] KEELC 1596 (KLR), AW Mwangi J** held as follows:

"I agree with the Plaintiffs' observations that the court may be perceived to be collecting evidence for the applicants... We must never lose sight of the fact that ours is an adversarial system. The Black's Law Dictionary (10th Edition), defines such a system as a legal system, 'involving active and unhindered parties contesting with each other to put forth a case before an independent decision-maker.' The decision maker, in this case, the court must remain impartial. Sir Barclay Nihill put it thus, "a trial Judge should not descend into

the arena where his vision may become clouded by the dust of the conflict." (Jashbhai C Patel vs BD Joshi).''

47. The Appellant has faulted the trial court for granting the interim injunctions in favour of the 1st Respondent yet the 1st Respondent had not met the required threshold for grant of interlocutory injunction since the 1st Respondent had not shown that her case had a prima facie case with a high probability of success. It was contended that the learned magistrate fundamentally erred in law by failing, ignoring and/or refusing to peruse, consider and assess the Appellant's watertight evidence which, on a balance of probabilities, showed that the 1st Respondent was in default of her loan obligations as explained in the replying affidavit of the Appellant's branch manager which gave a detailed account of how the contract was entered into and how the 1st Respondent defaulted in the loan repayments. Further, it was contended that at the time, the suit vehicle was in the possession of the Appellant.

48. It was also contended by the Appellant that the 1st Respondent was not at the risk of suffering any harm that

could be compensated by way of damages since the value of the motor vehicle was ascertainable at KES. 650,000 and that the same could be adequately compensated by way of damages in the event that her suit succeeds. This was aptly held by the High Court in **Kaarichel Traders Limited v Mayfair CIB Bank Limited [2023] KEHC 24609 (KLR),** where it was opined thus:

“On the issue of whether the Plaintiff stands to suffer irreparable injury that cannot be adequately compensated by an award of damages in the event the orders sought are not granted, I am persuaded that this is not the case. This is because the value of the suit motor vehicles is ascertainable from the various valuations carried out on them as correctly submitted by the Defendant’s Counsel hence if this Court finds that the said repossession and subsequent sale was illegal, damages would be an adequate remedy.’’

49. The Appellant also faulted the trial Court for holding that the balance of convenience tilts in favour of the Appellant

and then proceeding to grant interim orders in favour of the 1st Respondent. Again, it was contended that Courts are barred from granting interlocutory injunctions where damages are recoverable in law and where the defendant would be in a financial position to pay the said damages. This was aptly held in by **Lord Diplock in American Cyanamid Co v Ethicon Ltd[1975] AC 396** as quoted with approval by the Court of Appeal in **Nanji & 2 others v Exobi (Finance House) Limited[2025] KECA 1119 (KLR)** where it was held thus:

"The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial... if damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be

granted, however strong the plaintiff's claim appeared at that stage.''

50. Still on the issue of balance of convenience, the Appellant has contended that the 1st Respondent's account statement reveals that she has been incurring late payment charges throughout the loan duration and as such the balance of convenience should tilt in favour of granting orders on the side of the non-defaulting party. This is because the loan agreement binds upon all the parties and the courts ought not to allow litigants to use them in escaping from their binding contractual obligations. This court in **Ochiel v Okoth [2026] KEHC 106 (KLR),** while dealing with a similar situation held that:

"Even though the Appellant has lamented that the amounts demanded by the Respondent are exorbitant as it exceeds the cost of a new ultra sound machine, it is trite that the courts must respect the terms and the conduct of the parties. It is unfortunate that the Appellant now wants the court to intervene in the matter of the contract yet he and the Respondent

had...entered into the contract of their own free will and volition. It is trite law that courts will not interfere with contracts entered into by two consenting parties unless it is shown that on the face of it, it is illegal, unconscionable, oppressive and fraudulent."

51. Also, the Court of Appeal's reasoning in **Nyutu Agrovet Limited v Airtel Networks Kenya Ltd [2024] KECA 523 (KLR)** still holds true that parties are bound by their contracts when it held thus:

"If there is a signed contract as in this case, its binding nature will be difficult to assail. In the absence of fraud, misrepresentation or error, a party is bound by a document to which he has penned his signature, whether he has read the contents or not."

52. It is clear from the foregoing observations that the trial court did not restrict itself to the clear principles while determining the interlocutory application seeking orders of injunction pending determination of the main suit. The trial

court ought to have only issued preservation orders on the status quo pending the main suit. However, it went beyond its limit and purported to determine the matter at the interlocutory stage thereby denying the Appellant its right to ventilate its case. As it came out clearly that the suit vehicle was already in the hands of the Appellant, an order directing it to release it to the 1st Respondent before the main suit was heard was clearly erroneous. I find that the trial court could in the least could have even granted certain conditions of release pending determination of the main suit. Again, it is noted that the suit property was quantifiable and that once the Appellant had averred that it was in a position to compensate the 1st Respondent in the event the order sought was not granted. It is quite clear that the orders made by the trial court were not in consonance with the principles set out in the Giella case (supra). I find that the balance of convenience tilted in favour of the Appellant.

53. In the result, it is my finding that the Appellant's appeal has merit. The same is allowed. The trial court's orders dated 18/7/2025 are hereby set aside and substituted with an

order dismissing the 1st Respondent's application dated 18/6/2025 with costs. The Appellant is awarded the costs of the appeal.

Dated and delivered at Siaya this.....15th .....day

of.....May 2026

D.KEMEI

JUDGE

In the presence of :

Maina .....for Appellant

Ms. Ojwang for Oluoch .....for 1st Respondent

NA .....2nd Respondent

Maureen.....Court Assistant