



REPUBLIC OF KENYA



**Bashy African Credit Limited & another v Mutemi (Civil Appeal
E751 of 2022) [2025] KEHC 671 (KLR) (Civ) (29 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 671 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E751 OF 2022

AM MUTETI, J

JANUARY 29, 2025

BETWEEN

BASHY AFRICAN CREDIT LIMITED 1ST APPELLANT

LAAR AUCTIONEERS 2ND APPELLANT

AND

PAUL MUTEMI RESPONDENT

*(Being an Appeal from the Orders of the Chief Magistrate's Court at Nairobi of the Hon.
E. M KAGONI (Mr.) issued on 21st September 2022 in CMCOMMSU No. E1085 of 2021)*

JUDGMENT

Introduction

1. The appellants in this matter are aggrieved by a decision of the learned Honorable magistrate issued on 21st September 2022 directing the motor vehicle registration No. KCQ 514 Q be taken to Central Police Station for safe custody.
2. The appellants have raised several grounds of appeal as set out below:-
 - a. The Learned Magistrate erred in Law and in fact in issuing mandatory injunctive orders for the Motor Vehicle Registration Number KCQ 514Q to be taken to Central Police Station that is not in the custody of the appellants.
 - b. The Learned Magistrate erred in Law and in fact in issuing orders against a third party who is not a party to the suit in the subordinate court.
 - c. The Learned Magistrate erred in Law and in fact in failing to appreciate that the interlocutory orders of mandatory injunction out to be determined on substantial justice to all the parties.



- d. The Learned Magistrate erred in law and in fact in failing to appreciate that the intended 2nd Interested party, Joseph Chege Muchiri, the purchaser of the Motor Vehicle Registration Number KCQ 514Q has never been enjoined in the subordinate court proceedings hence no orders can be issued against him.
 - e. The Learned Magistrate erred in law and in fact in relying on extraneous matters other than evidence adduced in court.
3. The issues that arise are:-
- i. Whether the Honorable court could issue orders directed to the appellants who was not in physical custody of the Motor Vehicle.
 - ii. Whether a court can legally issue orders against a person who is not a party to as suit.
 - iii. Whether an order in the nature of a mandatory injunction could issue in the circumstances of this matter
4. The appeal came up for hearing on 6th November 2024 and there was no appearance by counsel for the respondent. Ms. Maina for the appellant indicated to the court that the appellant had filed submissions dated 21st February 2024 which she adopted and requested the court to reserve the matter for judgment.
5. The record reflects that on 5th of June 2024 Mr. Omuyoma appeared as holding brief for Mr. Wachira whom he said had been instructed to take over the matter from BM Musyoki Advocates. At the time counsel requested for 14 days in order to file submissions on behalf of the respondent. However, he did not do so .
6. The court therefore proceeded to write judgment based on the record of appeal before it and submissions by the appellant

Analysis And Determination

4. The record shows that on 10th August 2021 the respondent filed an application seeking to restrain the appellants from repossessing the suit Motor vehicle registration number KCQ 514Q
5. The learned Honorable magistrate dismissed Prayer C in the said application which read as follows:- “ There be an order of temporary injunction restraining the defendants from repossessing motor vehicle registration number KCQ 514Q either by themselves, servants, agents, employees or any other persons acting on the instructions pending the hearing and determination of the suit herein.
6. The ruling by the learned Honorable effectively left the appellants at liberty to repossess the motor vehicle in the event of default in the repayment of the loan by the respondent.
7. The respondent filed a subsequent application dated 21st June 2022 and added the 2nd appellant as an interested party in the application. In the application dated 21st June the applicant sought the following orders :-
 - a. That this Honourable Court be pleased to certify this Application urgent and service of the same be dispensed with at the first instance.
 - b. That the proposed Interested Party Laar Auctioneers be and are hereby enjoined in the suit.
 - c. That this Honourable court be pleased to issue an order of mandatory injunction ordering the Defendant/Respondent and the Interested Party to return the motor vehicle registration



Number KCQ 514Q to the Plaintiff/Applicant possession pending inter-parte hearing and determination of this Application.

- d. That this Honourable Court be pleased to issue an order of injunction restraining the Defendant/Respondent and the Interested Party either by themselves, their agents, servants and or their officials from selling and or in any way interfering with the Plaintiff's/Applicant's ownership and use of the said motor vehicle registration number KCQ 514Q pending inter-parte hearing and determination of this Application.
 - e. That this Honourable court be pleased to issue an order of injunction restraining the Defendant/Respondent and the Interested Party either by themselves, their agents, servants and/or their officials from selling and or in any way interfering with the Plaintiff's/Applicant's ownership and use of the said motor vehicle registration number KCQ 514Q pending the final determination of this Suit.
 - f. That this Honourable court be pleased to issue an order of mandatory injunction ordering the Defendant/Respondent and the Interested Party to return the motor vehicle registration Number KCQ 514Q to the Plaintiff/Applicant possession pending hearing and determination of this suit.
 - g. That this Honourable court be pleased to issue a permanent injunction restraining the Defendant/Respondent from repossessing, immobilizing, grounding and or in any way interfering with the Plaintiff's possession, ownership and use of the said motor vehicle registration number KCQ 514Q.
 - h. That the cost of this Application be provided for.
8. On 21st September 2022 the matter came up for hearing before the learned Honorable magistrate and there was no appearance for the appellants although the respondent was represented by Mr. Nangame Advocate. The proceedings of that date reveal the following:-

Hon. E.M. Kagoni (Mr.)

Principal Magistrate

19/9/2022

21/9/2022

Before Hon. E.M. Kagoni (Mr.) PM

Court assistant - Abdirahim

Ms. Nangame for plaintiff

No appearance for defendant

Nangame

I did serve the counsel for the defendant. They are absent. We pray for another date to compel the defendant and interested party to deliver the motor vehicle to Central Police Station failure to which warrant of arrest to issue.

Court



The defendant and interested party are to deliver the motor vehicle registration number KCQ 514Q to Central Police Station by close of business 23/9/2022. Mention on 26/9/2022 for further directions.

Hon. E.M. Kagoni (Mr.)

Principal Magistrate

21/9/2022

9. It is the order granted by the magistrate at that date that has provoked the instant appeal.
10. The appellant contends that the order is couched in the form of a mandatory injunction which according to the appellants cannot issue at an interim state in any proceedings.
11. The learned honorable magistrate in considering the application by the respondent appears not to have put into consideration his earlier ruling declining to restrain the appellants from repossessing the motor vehicle.
12. Indeed, a look at the order clearly reveals that it is indeed a mandatory injunction which by operation of the law cannot issue in the manner the learned Honorable magistrate did.
13. It is trite law that mandatory injunction orders can only issue at an interlocutory stage where there are special circumstances are demonstrated. In the case of *Nation Media Group & 2 Others- vs- John Harun Mwau (2014) eKLR*, the Court of Appeal stated:-

“It is trite law that for an interlocutory mandatory injunction to issue an applicant must demonstrate existence of special circumstance. A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases”

14. The respondent did not demonstrate any special circumstances that would warrant the issuance of a mandatory injunction at an interlocutory stage. The learned Honorable magistrate therefore erred in issuing the order requiring the appellants to deliver the Motor Vehicle KCQ 514Q to the Central Police Station.
15. Further, in the case of *Attorney General & another ET vs (2012) eKLR* where it was held that;

“The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi s NBK & Others (2001) EA 177* the court held that “parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit”. In that case the court quoted Kuloba J, (as he then was) in the case of *Njanju vs Wambugu and another Nairobi HCC No. 2340 of 1991 (unreported)* where he stated: If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court, then I do not see the use of doctrine of res judicata.....”. 13. In essence therefore, the doctrine implies that for a matter to be res judicata, the matters in issue must be similar to those which were previously in



dispute between the same parties and the same having been determined on merits by a court of competent jurisdiction.”

16. The application dated 21st June 2022 was substantively the same as the application dated 10th August 2021 which the learned Honorable magistrate had dismissed. It was therefore incumbent upon the learned Honorable magistrate to be vigilant in hearing the application to avoid issuing contradictory orders as happened in the case.
17. It is important to highlight that in the application 10th August 2021 the respondent was unable to secure an order restraining the appellants from repossessing the subject Motor vehicle.
18. By his application of 21st June 2022 he sought injunctive orders whose effect would be to reverse the earlier ruling by the learned Honorable magistrate.
19. The court in accepting to hear the second application acted contrary to the law by effectively sitting on appeal against its own orders through an innovative litigants’ craft of presenting a fresh application to achieve that which the court had earlier on declined to grant him.
20. For the above reasons this court finds that the appeal by the appellants has merit, the same is hereby allowed and the order by the learned Honorable magistrate issued on 21st September 2022 requiring the defendant and interested party to deliver Motor Vehicle registration number KCQ 514Q to Central Police Station is hereby quashed.
21. The appellants shall have the costs of the appeal.
22. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29TH DAY OF JANUARY, 2025.

A. M. MUTETI

JUDGE

In the presence of:

Court Assistant: Kiptoo

Thuku for appellant

Musyoki Benson & Co. Advocates absent

Nairobi High Civil Appeal No. E 751 of 2022 Judgment – Bashy African Credit Ltd & Ano. – Vs- Paul Mutemi

