



REPUBLIC OF KENYA



KENYA LAW
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**Nyongesa v Onyango (Civil Appeal E1163 of 2024)
[2025] KEHC 11852 (KLR) (Civ) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11852 (KLR)

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

CIVIL

CIVIL APPEAL E1163 OF 2024

LP KASSAN, J

JULY 31, 2025

BETWEEN

LUCY LUSIKE NYONGESA APPLICANT

AND

FREDRICK OLUOCH ONYANGO RESPONDENT

RULING

1. For determination is Lucy Lusike Nyognesa (hereafter the Applicant) motion dated 04.11.2024 seeks inter alia: -
 - a. Spent.
 - b. Spent.
 - c. That pending hearing and determination of this appeal, the honorable Court be pleased to issue an order of temporary injunction restraining the Fredrick Oluoch Onyango (hereafter the Respondent) by himself or his employees, agents, servants, assignees or any person working under his express and or implied instructions or authority from advertising, selling by public auction or private treaty, alienating, disposing or leasing, appointing a receiver or auctioneer, committing any action whatsoever on motor vehicle registration number KDC 002M.
 - d. That the honorable Court be pleased to make such other interlocutory orders as may appear to the Court to be just and convenient.
 - e. Costs of the motion be provided.
2. The applicant's motion is brought pursuant to Section 1B of the *Civil Procedure Act* (CPA) and Order 40 Rule 1 of the Civil Procedure Rules (CPR) and is supported by an affidavit deposed by Applicant



on even date. The kernel of her affidavit is that she lodged an application dated 17.09.2024 before the Small Claims Court in Nairobi SCC No. E2114 of 2022 seeking to injunction the Respondent from selling motor vehicle registration number KDC 002M. She goes on to depose that the aforesaid application was dismissed on 03.10.2024 and upon the lapse of stay orders granted by the Small Claims Court there is a likelihood that the Respondent will be at liberty to dispose of the aforementioned motor vehicle. That it is imperative that the Court does intervene in order to safeguard her interest and protect her right to own property. She goes on to state that should there be an execution, she is bound to suffer immense loss and damage by way of breaching her contractual obligations to third party's over the said motor vehicle. In conclusion she deposes that it is in the interest of justice that orders sought are granted.

3. The Respondent opposes the motion by way of a lengthy replying affidavit dated 21.11.2024. He assails the motion as having not met the threshold for grant of orders under Order 40 Rule 1 of the CPR and that the application has not been made in good faith and is merely a delaying tactic. He states that granting the Applicant motion would only serve to prejudice his interests thereby detrimental towards his right of enjoying the fruits of successful litigation. He goes on to contend that the Applicant is not deserving of the orders sought as she has failed to comply with the interim orders issued by this Court on deposit of the decretal amount in a joint interest earning account. In summation he urges the Court to dismiss the Applicant's motion in order to allow for finalization of the execution process.
4. Directions were taken on disposal of the motion by way of written submissions, to wit, the parties duly complied. That said, the Court has duly considered the respective parties' affidavit material alongside the filed submissions.
5. In presenting the instant motion side from Section 1B of the CPA the Applicant has relied on Order 40 Rule 1 of the CPR. It may be useful to note that what is before this Court in an appeal, to wit, the Applicant has obviously sought an injunctive relief pending determination of the appeal in order to avert execution. Therefore, alongside Order 40 an adjunct appropriate provision would have been Order 42 Rule 6(1) & 6(6) of the CPR.
6. However, at the outset it would be pertinent to note that the respective parties largely digressed from the grain of this Court jurisdiction as may be invoked pursuant to Order 42 Rule 6(1) & 6(6) of the CPR. Vide the respective affidavit material, heavy weather was made on issues that were either a preserve of the appellate proceedings or issues that ought to have been canvassed before the lower. Nevertheless, having scrutinized affidavit material this Court deliberately confines itself to the real issues in controversy, concerning whether an injunctive order ought to issue pending determination of the Applicant's appeal.
7. Having set out the above, Order 42 Rule 6(1) & 6(6) of the CPR specifically provides that-;

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside...



(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

8. Regarding the nature of an injunction, the Court of Appeal in *Charter House Investments Ltd. V Simon K. Sang & 3 Others* (2010) eKLR observed that an injunction is an equitable and discretionary remedy, given when the subject matter of the case before the Court requires protection and maintenance of the status quo. Further, in *Madhupaper International Limited v Kerr* [1985] KLR 840 the Court of Appeal exhorted that:-

“The Court of Appeal’s jurisdiction to grant an injunction pending an appeal is discretionary and is to be exercised judicially and not arbitrarily. It would be wrong to grant the injunction where the appeal is frivolous or where to grant it would inflict greater hardship than it would avoid. In this case, to grant an injunction pending appeal would be wrong as it would probably inflict greater hardship than it would avoid.”

9. Towards the afore captioned end, Visram, J. (as he then was), distilled the applicable principles guiding the grant of an injunction pending appeal in *Patricia Njeri & 3 Others v National Museum of Kenya* [2004] KEHC 1614 (KLR). The learned Judge stated: -

“The Appellants did, however, pray (in the alternative) for an order of injunction pending appeal. There was no dispute that the court can, in a proper case grant an injunction pending appeal. What are the principles that guide the court in dealing with such an application”

In the *Venture Capital* case (*Venture Capital and Credit Ltd –Vs- Consolidated Bank of Kenya Ltd Civil Application No. Nairobi 349 of 2003 (UR)*) the Court of Appeal said that an order for injunction pending appeal is a discretionary matter. The discretion must, however, be “exercised judicially and not in a whimsical or arbitrary fashion.” This discretion is guided by certain principles some of which are as follows:

- a) The discretion will be exercised against an Applicant whose appeal is frivolous (See *Madhupaper International Limited –Vs- Kerr* [1985] KLR 840 which cited *Venture Capital*). The Applicant must state that a reasonable argument can be put forward in support of his appeal (*J. K. Industries –Vs-KCB* (1982 – 88) KLR 1088 (also cited in *Venture Capital*)
- b) The discretion should be refused where it would inflict greater hardship that it would avoid (See *Madhupaper supra*).
- c) The Applicant must show that to refuse the injunction would render his appeal nugatory (See *Butt –Vs- Rent Restriction Tribunal* [1982] KLR 417 (cited also in *Venture Capital*).
- d) The Court should also be guided by the principles in *Giella –Vs- Cassman Brown & Company Ltd* [1973] EA 358 as set out in the case of *Shitukha Mwamodo & Others* (1986) KLR 445 (also cited in *Venture Capital*.” See also *Mukoma –Vs Abuoga* [1988] KLR 645.”



10. I would propose to start with the well settled principles in *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 as reiterated in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] KECA 606 (KLR) the latter which is particularly illuminating as to the principles applicable to applications for interlocutory injunctions. The Court described the role of the judge in such applications to be merely to consider whether the tripartite requirements of establishing prima facie case, demonstrating irreparable injury if a temporary injunction is not granted and allaying any doubts as to latter by showing that the balance of convenience tilts in the Applicant's favour, have all been sequentially met. The Court further emphasized that where no prima facie case is established, the court need not consider irreparable injury or balance of convenience. The Court of Appeal emphasized that the standard of proof is to a prima facie standard.
11. Regarding the definition of a "prima facie case" the Court cited the decision in *Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 wherein it was observed that-; a "prima facie case"
 - “A prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the appellant's case upon trial. That is clearly a standard, which is higher than an arguable case.
12. Concerning the condition requiring the successful applicant to demonstrate a prima facie case which condition also ties in with the requirement on the applicant demonstrating that he has an arguable appeal. As deposed from the rival affidavit material and as can be garnered for the material attached thereto, it is not in dispute that suit (Nairobi SCC No. E2114 of 2022) was filed before the Small Claims Court as against the Applicant wherein it appears that the same proceeded exparte as against her resulting in a decree dated 31.10.2022. In execution of the said decree, the Respondent took out warrants of attachment as against the Applicant, to wit, the Applicant's motor vehicle KDC 002M was attached in execution. Aggrieved with the said attachment, the Applicant filed an application dated 18.09.2024, to wit, interim injunctive orders were granted in the Applicant's favour forestalling the advertising, selling by public auction or private treaty, alienating, disposing or leasing, appointing a receiver or auctioneer, committing any action whatsoever with respect to motor vehicle registration number KDC 002M. On 03.10.2024, the lower Court dismissed the Applicant's motion vide an ephemeral ruling on grounds that it lacked jurisdiction to entertain the motion. Concurrently, it would seem that the motor vehicle KDC 002M was equally the subject of litigation before the Magistrates Court in CMCC No. E1384 of 2023.
13. The Respondent has vehemently assailed the motion on grounds that allowing the motion would only serve to prejudice him further meanwhile the Applicant is not deserving to the orders sought as it has never complied with this Court interim orders granted pending determination of this Applicant. A perfunctory perusal of the record, it would seem that the latter is true however this Court has since been gracious enough to entertain the Applicant notwithstanding its orders. Equally having perused the Applicant's memorandum of appeal alongside the impugned ruling, the appeal does not appear to be frivolous however it warrants mentioning that this Court did not have the benefit of reviewing the substantive relief sought in the Applicant's motion dated 18.09.2024. Further, this Court is at a disadvantage with respect to proceedings and or suit in CMCC No. E1384 of 2023 wherein a temporary injunction seems to have already been granted in respect of motor vehicle KDC 002M. Though the latter suit cannot clearly be discerned from the Applicant's annexure it may well be that



there is another party that has interest in the motor vehicle going by the order in Nairobi CMCC Misc. App. No. E2104 of 2024 attached the Respondent's affidavit material. The Applicant has not evinced whether the suit in CMCC No. E1384 of 2023 has been determined to finality, to wit, it would be reasonably presumed the interim orders granted by the lower Court have since been exhausted and or lapsed.

14. Concerning the adjunct ingredient of an arguable appeal, in *Stanley Kang'ethe Kinyanjui V Tony Keter & 5 Others* [2013] eKLR the Court observed that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous, a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable. Earlier, in *Denis Mogambi Mong'are V. Attorney General & 3 Others* Civil Appeal No. Nairobi 265 of 2011 (UR 175/2011) it was stated that an arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court's consideration. Ex facie while it may be that the Applicant demonstrated a prima facie case by way of an arguable appeal the Court is not convinced of irreparable injury likely to be visited on the Applicant if a temporary injunction is not granted. As is, it may well be that the injunctive order in respect of motor vehicle KDC 002M in CMCC No. E1384 of 2023 still subsists whereas if this Court were to allow the application it may only serve to embarrass other proceedings before the lower Court with respect to the said motor vehicle.
15. As earlier noted the ingredient in *Giella* (supra) have to be sequentially met and here the Applicant has failed to demonstrate irreparable injury while failing to allay any doubts as of the latter by showing that the balance of convenience tilts in her favour. Consequently, upon reviewing all the material placed before me, I am not persuaded that this is a proper case for granting a temporary injunction pending appeal. The Court will therefore dismiss the Applicant's motion with attendant costs.

Order Accordingly!

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31ST DAY OF JULY 2025

LINUS P. KASSAN

JUDGE

In the presence of:-

No appearance for Applicant

Wanyingi holding brief Ndegwa for Respondent

Carol – Court Assistant

