



REPUBLIC OF KENYA



**Kuria v Kenya Commercial Bank Ltd & 2 others (Civil Case  
35 of 2018) [2022] KEHC 11032 (KLR) (27 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 11032 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL CASE 35 OF 2018  
MM KASANGO, J  
JULY 27, 2022**

**BETWEEN**

**MAGDARINE NJERI KURIA ..... PLAINTIFF**

**AND**

**KENYA COMMERCIAL BANK LTD ..... 1<sup>ST</sup> DEFENDANT**

**INTEGRA AUCTIONEERING (K) COMPANY ..... 2<sup>ND</sup> DEFENDANT**

**GEORGE NJOROGE MURINGU ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. Magdarine Njeri Kuria, is the plaintiff hereof. She initially filed this suit against Kenya Commercial Bank Limited (herein KCB) and Integra Auctioneering (K) Company. Subsequently, the plaintiff applied by her application dated September 27, 2018 to amend her plaint to include George Njoroge Miringu (herein George), as the 3<sup>rd</sup> defendant. The amended plaint was filed on February 26, 2019.
2. Background of this case is that KCB offered a loan facility, in the year 2014, to an entity called Braintrust International Limited (herein the borrower). The borrower's Board Resolution to obtain that loan was signed by George as a director alongside the secretary of the borrower. The security for that land was title number Thika Municipality Block20/1182 (hereinafter the subject property). In the documents before court is an affidavit sworn by George confirming he is the registered owner of that property and also confirming he was not married.
3. Another loan was granted by KCB to the borrower in January, 2016. The subject property was once again used as security for the second borrowing. This time round, George sworn an affidavit and stated that the plaintiff was his wife. KCB has produced an affidavit of spousal consent in the plaintiff's name for that second borrowing.



4. The borrower defaulted in the repayment of the loan and on KCB seeking to exercise its statutory power of sale over the subject property was met by this case. The plaintiff's claim hereof is that the charge over the subject property which she pleaded was matrimonial home failed to comply with the provisions of the Land Act on requirement of spousal consent. The plaintiff therefore prays for permanent injunction restraining KCB and/or its servants or agents from selling or disposing the subject property.
5. KCB by its defence denied the subject property was matrimonial property and contended that the plaintiff had signed a spousal consent.

### **Analysis**

6. The issues for determination from the evidence adduced by the parties is whether:-
  - (a) The subject property is matrimonial property.
  - (b) Whether the plaintiff gave spousal consent to the charge of the subject property.
7. Although George was joined in this action as a 3<sup>rd</sup> defendant, he did not file a defence nor did he attend the hearing of this case.
8. The plaintiff relied on her witness statement January 15, 2018. That statement simply confirmed the plaintiff was served while at home on behalf of George with redemption notice of KCB. She stated she was unaware that the subject property had been entered as security for a loan. She later learn that the law required a spousal consent when matrimonial property was used a security. In her oral evidence, the plaintiff stated that her husband George had not disclosed to her he had obtained a loan facility from KCB.
9. On being cross examined, the plaintiff stated she was married to George through the Kikuyu Customary Law in the year 2003. She confirmed that they are still married but on being asked George's whereabouts, she stated she last saw him a week before when he went to pick their children to take them to school. On being re-examined about George, she replied:-

“I don't see George every day. I cannot tell you where he stays. He does not come home often.”

On being questioned about spousal consent before court, the plaintiff replied:-

“I was not aware. That is not my signature. We want the court to know it is not my signature.”
10. The plaintiff confirmed she had not filed a complaint with police of her allegation of forgery of her signature, on that spousal consent.
11. The plaintiff's evidence was supported by Chief Inspector of police Susan Wambugu. This witness produced her forensic report dated October 12, 2020. The report is on the letterhead of National Police Service, Directorate of Criminal Investigations. The Police Officer, after outlining her qualification as a forensic document examiner, she stated she was requested to examine the spousal report, comparing the signature on it with sample of series of signatures provided to this police officer. In the police officer's opinion the peculiar characteristics in the signature on the spousal consent and the sample signatures provided forensic evidence of different authorship.
12. KCB evidence was offered by Peter Sawe, an employee of KCB. He, at the material period, worked as credit administrator at KCB Thika branch. He confirmed plaintiff provided a spousal consent in a form of an affidavit and her signature was witnessed by a commissioner of oaths. This witness was



familiar with both the plaintiff and George and attended to both of them when the loan repayment went into default.

13. In consideration of the first issue, whether the plaintiff proved the subject property was matrimonial home, I must say the plaintiff failed to shift the burden of proof in this regard. There was no independent evidence offered to prove this issue. The plaintiff failed to prove the subject property is matrimonial home as defined in section 2 of the *Matrimonial Property Act* as follows:-

“matrimonial home” means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.”

14. The plaintiff had a legal duty to provide evidence to prove it was matrimonial property. Even George her husband and 3<sup>rd</sup> defendant did not offer support on this issue.
15. The second issue the plaintiff was obligated to prove was that the spousal consent was not her document.
16. It is useful to refer to section 79(3) of the *Land Act* which states:-

“A charge of a matrimonial home, shall be valid only if any document or form used in applying for such a charge, or used to grant the charge, is executed by the chargor and any spouse of the chargor living in that matrimonial home, or there is evidence from the document that it has been assented to by all such persons.”

17. Section 93(3) and (4) of the *Land Registration Act* provides:-

“Where a spouse who holds land or a dwelling house in his or her name individually undertakes a disposition of that land or dwelling house— (a) the lender shall, if that disposition is a charge, be under a duty to inquire of the borrower on whether the spouse has or spouses have, as the case may be, have consented to that charge; or (b) the assignee or transferee shall, if that disposition is an assignment or a transfer of land, be under a duty to inquire of the assignor or transferor on whether the spouse or spouses have consented to that assignment. (4) If the spouse undertaking the disposition deliberately misleads the lender or, the assignee or transferee by the answers to the inquiries made in accordance with subsection (3)(a) or (3)(b), the disposition shall be void at the option of the spouse or spouses who have not consented to the disposition. 94. Partition (1) Any of the tenants in common may, with the consent of all the tenant.”

18. The law is clear that the lender/financier is obligated to obtain spousal consent in case of property that is matrimonial or as seen in the provision of *Land Registration Act* where one spouse holds in his/her name land or dwelling house.
19. KCB presented a detailed spousal consent in an affidavit, in the plaintiff's name and bearing a signature of the maker of that affidavit. That signature is witnessed by an advocate of the High Court. The plaintiff did not call evidence of that Commissioner of Oaths to deny he witnessed her sign the spousal consent.
20. The evidence of the document examiner fails to disprove that the signature appearing on the spousal affidavit is not that of the plaintiff. Despite being highly trained as a document examiner, that police officer compared the signature on the spousal consent with a series of sample signatures supplied to her. She, the documents examiner, did not know who made the sample signatures. On being cross



examined about those sample signatures, which this officer used to compare with the signatures on the spousal consent, she responded:-

“I was not present plaintiff’s exh. No 2(a) (the sample signatures) were made.”

21. That single statement nullified the police officer’s evidence entirely. In other words, this officer was given the spousal consent and sample signatures and was asked to confirm if they were made by the same author. She carried the examination without confirming who made the sample signatures.
22. Needless to say, this court cannot place any reliance on such evidence. It fails to meet the threshold of civil standard of proof.

### **Disposition**

23. For the reasons set out above, this case is dismissed.
24. This file shall henceforth be closed.

**JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 27<sup>TH</sup> JULY, 2022.**

**MARY KASANGO**

**JUDGE**

**In the presence of:-**

**Coram:**

**Court Assistant:- Mourice**

**For Plaintiff:- Mr. P.K. Kamau**

**For 1<sup>st</sup> Defendant:-**

**For 2<sup>nd</sup> Defendant :- Ms. Waigwa**

**For 3<sup>rd</sup> Defendant :-**

**Court**

**Judgment delivered virtually,**

**MARY KASANGO**

**JUDGE**

