



REPUBLIC OF KENYA



**SBM Bank Kenya Limited & another v Khanaka & another (Environment and Land Appeal 6 of 2023) [2025] KEELC 4464 (KLR) (11 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4464 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT AND LAND APPEAL 6 OF 2023**

**CK NZILI, J  
JUNE 11, 2025**

**BETWEEN**

**SBM BANK KENYA LIMITED ..... 1<sup>ST</sup> APPELLANT**

**INTEGRA AUCTIONEERING (K) LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JACQUELINE KHANAKA ..... 1<sup>ST</sup> RESPONDENT**

**SILA SHILUNGU OKONGO ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Judgment delivered from CM Court at Kitale by Hon. S.K. Mutai (SPM) dated 28/08/2023 in Land Case No.40 of 2021)*

**JUDGMENT**

1. The appellants who were the 1<sup>st</sup> and 2<sup>nd</sup> defendants at the lower court, had been sued by the 1<sup>st</sup> respondent, as the plaintiff alongside the 2<sup>nd</sup> respondent, through a plaint dated 27/4/2021. The 1<sup>st</sup> respondent had sought for:
  - (a) Declaration that the charge against Title No. Butso/5826 was null and void for lack of a spousal consent and that the acts of the appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to exercise the statutory power of sale were unlawful, the charge be set aside and the land discharged.
  - (b) Permanent injunction restraining the appellants and the 2<sup>nd</sup> respondent from alienating, advertising for sale, offering for sale, selling, taking possession, leasing, transferring or otherwise disposing of the suit land.
  - (c) Costs.
2. The 1<sup>st</sup> respondent's contention was that while the suit land was registered under the name of the 2<sup>nd</sup> respondent, who guaranteed and charged the land for a loan facility with the 1<sup>st</sup> appellant, and there was



default in payment. The 1<sup>st</sup> appellant instructed the 2<sup>nd</sup> appellant to sell by way of public auction the suit land on 4/5/2021 to recover the outstanding loan arrears of Kshs. 1,522,801/= as of 16/2/2021. The 1<sup>st</sup> appellant averred that she was not privy to the whole transaction and had not given her spousal consent by dint of Section 93(3) of the Land Registration Act 2012, for the matrimonial property to be used as a collateral in servicing the loan.

3. The appellants opposed the suit by way of a way of a statement of defence dated 25/5/2022. In terming the suit as lacking merits since a legal charge was registered in favour of the 1<sup>st</sup> appellant on 7/10/2015 over Title No. Butso/so/Shikoti/5826, in the name of the 2<sup>nd</sup> respondent, who guaranteed a loan facility of Kshs. 3,000,000/=, advanced by the 1<sup>st</sup> appellant to Central Division Youth Committee that they were required to pay in 24 months at monthly instalment of Kshs. 177,500/=.
4. Further, the 1<sup>st</sup> and 2<sup>nd</sup> appellants averred that on 22/5/2017, a further charge was registered in favour of the 1<sup>st</sup> appellant over the same title and the 2<sup>nd</sup> respondent guaranteed another loan of Kshs. 5,000,000/=, to the committee payable in 24 monthly instalments of Kshs. 240,065/=. The appellants averred that the 2<sup>nd</sup> respondent was the chairperson of the borrowers. The appellants denied that there was any collusion with the 2<sup>nd</sup> respondent for he was made aware of the spousal consent as a legal and mandatory requirement before the charge could be registered but swore an affidavit dated 7/10/2015, that he was a bachelor, had never married and that the suit property was not matrimonial property. The appellant averred that it was not true that the 1<sup>st</sup> appellant was aware of the respondent's marital status. In any event, the appellants averred that the charge and the further charge were registered before the date of marriage on 14/10/2017, hence the 1<sup>st</sup> respondent had no overriding rights in which Section 92(3) of the Land Registration Act could apply. The appellants averred that after the loan default, requisite legal notices were sent to the 2<sup>nd</sup> respondent who declined or neglected to remedy the default, followed by the 45 days' redemption notice. The appellants averred that the 1<sup>st</sup> respondent had no recognizable proprietary interest over the suit property, enforceable before the court.
5. From the records of appeal, it is not clear if the 2<sup>nd</sup> respondent filed any statement of defence to the suit. At the trial Jackline Khanaka testified as PW1. She relied on a witness statement dated 7/4/2021 as her evidence-in-chief. PW1 told the court that she married the 2<sup>nd</sup> respondent under Luhya customary law in 2004 and solemnized their marriage in church in 2017, which marriage has been blessed with three children born on 20/5/2005, 24/10/2007 and 24/4/2018. PW1 said that after she discovered the total loan of Kshs. 8,000,000/=, it came to her knowledge also that the collateral used is the matrimonial property, where she lives with her children and her constructed house as the only source of their income for subsistence.
6. Again, PW1 said that she was never involved in the transaction and that the 1<sup>st</sup> appellant and the 2<sup>nd</sup> respondent must have colluded for the 2<sup>nd</sup> respondent to allege that he was a bachelor, the bank knew her marital status but proceeded to charge the land without her spousal consent. PW1 said that, they have had marital conflicts hence perhaps the reason that the 2<sup>nd</sup> respondent did not disclose her existence. PW1 said that she was not served with the requisite notices as alleged by the bank or auctioneers. PW1 produced a copy of the marriage agreement, affidavit of marriage dated 6/3/2009, marriage certificate dated 14/10/2027 and birth certificates, redemption notice, advertisement for sale and valuation report as P. Exhibit Nos. 1, 2, 3, 4(a-c), 5(a) and (b), 6 respectively. PW1 said that she was still occupying the land and that the principal debtors were still repaying the loan.
7. Janet Adamba Mulanda testified as DW1. She relied on a witness statement dated 17/11/2022 as her evidence-in-chief. DW1 told the court that on 7/10/2015, a legal charge was registered in favour of the 1<sup>st</sup> appellant over the suit land in the name of the 2<sup>nd</sup> respondent as guarantor by a loan advanced to Central Division Youth Committee, where the guarantor was the 3<sup>rd</sup> defendant. Repayment was in



- 24 equal monthly instalments of Kshs. 177,500/=. DW1 said that another facility was advanced for Kshs. 5,000,000/=:, and a further charge registered on 22/5/2017. DW1 denied any alleged collusion or illegality for the 2<sup>nd</sup> respondent was aware of the mandatory legal requirement before a charge for a spousal consent but swore an affidavit that he was a bachelor and that the property was not matrimonial.
8. DW1 said that the Bank was not aware of the marital status of the 1<sup>st</sup> respondent. The witness denied supplying the valuation report before court to the 1<sup>st</sup> respondent. DW1 insisted that the two charge were registered before the respondent got married in 2017, hence she has no recognizable rights in law. DW1 also said that after the default in loan repayments, the requisite notices were sent to the defaulters including the 2<sup>nd</sup> respondent, hence due process was followed to realize the security and also before the charge was registered.
  9. The appellants relied on copy of a letter of offer dated 29/8/2015, copy of charge dated 3/4/2017, copy of letter of offer dated 3/4/2017, affidavit sworn on 7/10/2017, letter dated 5/12/2018, statutory notice dated 10/9/2019, redemption notice, advertisement dated 19/4/2021 as D. Exhibit Nos. 1-8 respectively.
  10. In cross-examination, DW1 said that the borrower was Central Division Committee, who were still repaying the loan. She said that the loan stood at Kshs. 1,200,000/=:, at the filing of the suit. PW1 said that indeed at the issuance of the loan, they required both a valuation report and a spousal consent. DW1 said that the certificate of postage was missing. DW1 confirmed that P. Exhibit No. 6 was a valuation report. DW1 said that they engaged the area chief on the arrears before they issued a final demand notice against the borrower, who has not been made a party to the suit.
  11. After considering the submissions by the parties, alongside the evidence and the law, the trial court rendered its judgment on 28/5/2023, triggered this appeal.
  12. The appellants fault the trial court for:
    - (1) Invalidating the charge for lack of spousal consent despite the existence of an affidavit by the 2<sup>nd</sup> respondent that he was a bachelor.
    - (2) Issuing a permanent injunction when the land is lawfully charged.
    - (3) Relying on contents of a valuation report, yet marriage between the respondents was a matter of law.
    - (4) Ignoring that the marriage certificate availed to court was registered in 2017, after the charge and further charge came into existence.
    - (5) Giving a judgment against the weight of the evidence tendered.
  13. The appeal was canvassed by way of written submissions. The appellants rely on written submission dated 21/8/2024. It is submitted that on the strength of the affidavit by the 2<sup>nd</sup> respondent sworn on oath, the bank proceeded and encumbered the suit property for the loan, otherwise going by the evidence of the 1<sup>st</sup> respondent, the marriage was contracted 2 years, 7 days, 3 months and 3 weeks after the registration of the charge and the further charge, hence the suit property did not qualify as matrimonial at the time and the spousal consent was not necessary or interest had not accrued as at 14/10/2017. Reliance was placed on Section 3(1) of *Marriage Act*, *Stella Mokeria Matara v Thaddues Mose Manyenga & Family Bank Ltd* [2016] KECA 746 [KLR], *EWM v MOM, ANM & Another Civil Appeal 261 of 2019* [2022] KECA 769 [KLR]



14. Similarly, the appellants submitted that neither an agreement of marriage, an affidavit, nor certificate of birth of the minors constitute marriage under the circumstances. That despite being sued, the 2<sup>nd</sup> respondent did not participate in the matter to deny or confirm his marital status at the time of creation of the charges or at the very least challenge the validity of the charge if the 1<sup>st</sup> respondent allegation is something to go by, otherwise the suit was a ploy by the respondents to frustrate the bank from realizing the security. The appellants submitted that the 1<sup>st</sup> respondent after commencing the process of realizing the security prompted the filing of the suit, as the indebtedness is still acknowledged and since the property did not fall under matrimonial property. The trial court went in error in restricting the public auction especially where indebtedness is admitted by both the borrower and the respondents, hence permanent injunction should not have issued. Reliance is placed on *George W. Omondi v Guilders International Bank Ltd* [2015] KECA 229 [KLR], *Mechanical Engineering Plant Ltd & Others v Standard Chartered Bank Ltd* HCC No. 92 of 2007 and *John Nduati Karandi T/A Johester Merchants v National Bank of Kenya Ltd* [2006] 1 EA 96.
15. The appellants faulted the trial court for holding that it disregarded P. Exhibit No. 6 in issuing the loan and charging the suit property without a spousal consent. On the contrary, the appellants sought that the bank's interests were limited to offering the loan to the borrower and therefore the bank was not and has never been party to the family wrangles between the respondents and was neither interested in colluding with the charger or any other party to allegedly, unlawfully charge the suit property.
16. The 1<sup>st</sup> respondent relies on written submissions dated 28/2/2025. It is submitted that evidence was tendered at the lower court that the suit property was matrimonial which fact the appellants knew about going by their own valuation report from Highland Valuers at page 7, which DW1 did not dispute to have been done before the charge being entered and which they ignored. The respondent submitted that certificates of postage to prove statutory notices were sent were missing and the on measures taken to recover the monies from the borrower apart from the guarantor. Reliance is placed on Section 6(1) of *Matrimonial Property Act*, Sections 28 and 93 (3)(b) of the *Land Act*, *MWK v 5 Others* [2018] eKLR, and *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 124 cited with approval in *Barnabas Biwott v Thomas Kipkorir Bundotich* [2018] eKLR.
17. The rule of this court as a first appellate court is to rehearse, review and reappraise the record of the lower court, come up with independent finding on the facts and the law, mindful that the trial court had occasion to hear and see the witnesses testify first hand. See *Peter v Sunday Post Ltd* [1958] EA 424, *Kenya Port Authority v Kuston (K) Ltd* [2009] 2EA 212, *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123.
18. In *Arthi Highway Developments Ltd v West End Butchery Ltd & Others* [2015] eKLR, the court cited *Selle & Another* (supra), that the appellant court is not necessarily bound to follow the trial court's finding of fact if it appears that he has clearly failed on some point to take account of particular circumstances or probabilities, materially based on the demeanor of a witness which is inconsistent with the evidence in the case generally.
19. Having considered submissions by the rival parties, case law cited, and the law, the issue for my consideration are:
  - (1) If the 1<sup>st</sup> respondent discharged the burden of proof that the charge and the further charge on the property were subject to her overriding interests as a spouse of the 2<sup>nd</sup> respondent.
  - (2) If the appellants proved their statement of defence that they had undertaken due diligence before registering the charge and the further charge.



- (3) Whether the appeal has merits.
- (4) What is the order as to costs.
20. It is trite law that parties are bound by their pleadings and issues for determination arise from the pleadings with the trial court having no business to determine issues not pleaded as placed before it by the parties to determine. See *Stephen Mutinda Mule v IEBC* (2013) eKLR. The 1<sup>st</sup> respondent had pleaded that she was a spouse of the 2<sup>nd</sup> respondent since 2004, was living, occupying, and relying on the houses at the suit land with her children for sustenance and subsistence income, hence in charging the suit land, the appellant ignored, neglected and overlooked her overriding interests or rights, hence violating and rendering the charge and the further charge null and void and any other subsequent acts to realise the security upon default to service the loan by the borrower through the 2<sup>nd</sup> appellant.
21. The 1<sup>st</sup> appellant defence was that the legal charge and further charge dated 7/10/2015 and 22/5/2017 were based solely on the affidavit on oath sworn by the 2<sup>nd</sup> respondent that he was a bachelor, neither married and the property was not matrimonial in nature, thus was outside the parameters of Section 93(3) of the *Land Registration Act*. Further the appellant averred that the 2<sup>nd</sup> respondent was also a chairperson of the borrower, the borrower had defaulted in its loan obligations, they were notified in law to remedy the default, there was an outstanding balance of the loan, the right to realize the security had accrued and that the process leading to the advertisement for public auction was in line with the law, there was no collusion or illegality and lastly, the 1<sup>st</sup> respondent, if she had any rights or interests, the same had not accrued as on the dates of the registration of the 1<sup>st</sup> charge in 2015 and the further charge and May 2017.
22. Section 2 of the *Land Act* defines matrimonial home as any property that is owned or leased by one or both spouses and accepted by the spouses as their family home. Section 19(3) of the *Land Act* provides that a charge of a matrimonial home would be valid only if the 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 house, or there is evidence from the document that it has been assented to by all such person.
23. Section 28 of the *Land Registration Act* provides that spousal right over matrimonial home are overriding interest that may subsist and affect the same, without being noted in the register. Sections 2 and 12 of the *Matrimonial Property Act*, provides that matrimonial home is any property owned or leased by one or the both spouses as their family home and includes any attached property and that an estate or interest in any matrimonial property shall not, during the subsistence of a monogamist marriage and without the consent of both spouses, be alienated in any form whether by sale, gift or lease mortgage or otherwise.
24. The appellants in this appeal insist that they were not privy to the rights or interests of the 1<sup>st</sup> respondent, otherwise they relied on what the 2<sup>nd</sup> respondent disclosed to them. Due diligence has been expanded in the case of *Dina Management Limited v County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) and *Torino Enterprises Limited v Attorney General* (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR), in relation to what is on the ground. In *Rajab Kipkorir Magut v Sidian Bank Ltd* [2019] eKLR, the court held that the lender had carried out mere duty to enquire about the marital status for the purpose of spousal consent. In *Eljoy Kageni v Bank of African (K) Ltd* [2018] eKLR, the court warned that this spousal clause is prove to misuse by unscrupulous people out to defraud financial institutions and it is necessary for the spouse to prove that there existed a matrimonial house on the suit land.



25. The onus in this appeal was on the appellants to prove that they carried out due diligence to establish if there was a matrimonial home on the suit land. In *Daniel Kipruto Metto v Chase Bank (I) Ltd* [2018] KEELC 616 [KLR], the court said that the defendants had done due diligence and obtained the history of the land not just from the Land Registry but also from the neighbours. The court said that banks should innovate way to guard unforeseen and foreseeable compromise of their system by also being extra vigilant when dealing with property to be charged or mortgaged.
26. In *Nyangilo Ochieng & another v Fanuel B. Ochieng & 2 others* [1996] eKLR, the court observed that posting of statutory notices must be proved and upon production of such proof the, burden of proving non-receipt of such notice or notices shifts to the addressee as contemplated in Section 3(5) of the *Interpretation and General Provisions Act*. Section 97(2) of the *Land Act* provides that the charger has to obtain a valuation report before the sale to secure the best price.
27. In this appeal, the appellants are blaming the trial court for relying on the evidence of PW1, and her exhibits. From the court record there is nowhere that the appellants objected to the production of the 1<sup>st</sup> respondent's exhibits on account of veracity, authenticity and legality. The appellants never insisted on the makers of the documents to appear and to produce them. The 1<sup>st</sup> appellant did not disown the valuation report which was a statutory requirement before the land could be charged and the loan was disbursed. A site visit to the proposed land including an official search certificate and photographs of the suit land are some of the documents to show that there was adequate due diligence to rule out the possibility of the bank being duped to charge non-existent land or which had other occupants on it apart from the alleged owner.
28. In *M'Ibari v Kanana ELC E058 of 2022* [2023] KEELC 22080 [KLR] (7<sup>TH</sup> December 2023) (Judgment), the court cited *Mugo Muiro Investment Ltd v EWB & Others* [2017] eKLR, that even before the *Matrimonial Property Act*, property held in the name of one spouse was held in trust for the other spouse as an inexorable inference, for both to live in for the foreseeable future, since at that stage the couple does not have in mind a sale, nor division of proceeds of sale. In *Mugo Muriu* (supra), the court held that Elizabeth's interest in the matrimonial home was an overriding, equitable interest allowing her to remain in the property and as a purchaser without notice to her could take the land subject to her interest.
29. In this appeal, the appellants other than insisting on the dates of the 1<sup>st</sup> respondent's exhibits on when the marriage was solemnized, did not dispute or challenge that there was an earlier customary marriage that took place in 2004, long before October 2015 and 2017, when the suit property was charged. Above all, and more critical is when the 1<sup>st</sup> appellant challenges the valuation report, its own document and to say that marriage is a matter of law. African Customary Law marriage was also recognized by law before the *Marriage Act* 2014 was enacted. Indeed, what the 1<sup>st</sup> respondent pleaded and proved is that she was in occupation and possession of the suit land by 2004 to date.
30. There is no single evidence where the appellants challenged that assertion and the existence of the matrimonial home on the suit land by 2015 and 2017 and at the filing of the suit. The easiest thing for the 1<sup>st</sup> appellant would have been to provide a pre-loan site visit reports by its officers to ascertain the locality and the status of the suit land. The valuation report in my view contains clear information that the suit land was matrimonial property in the eyes and the assessment of the 1<sup>st</sup> appellant's own experts in as at the inspection date of 8/4/2017. Improvements on the land were found by the valuer as per the photographs attached at page 7, indicates that the same was a matrimonial home, partly let out to tenants. The report attached a copy of an official search dated 13/4/2017 and a sketch map. The owner is described as the 2<sup>nd</sup> respondent herein.



31. The appellants have submitted that the respondents colluded to file the suit to defeat the bank's rights to realize the security. Further, the appellants have submitted that the court should not have issued a permanent injunction since the outstanding loan had been acknowledged by the borrower, the guarantor and the 1<sup>st</sup> respondent. Parties as indicated above are bound by their pleadings. New issues cannot be introduced on appeal without leave. The issues of indebtedness, collusion between the respondents, complicity of the 2<sup>nd</sup> respondent and or concealment of marriage by the 2<sup>nd</sup> respondent to procure the loan and the outstanding loan as at the filing of the suit were not pleaded by the appellants.
32. The 1<sup>st</sup> respondent pleaded that the 1<sup>st</sup> appellant knew of the 2<sup>nd</sup> respondent's marital status but charged the land without her consent. The valuation report was filed alongside the plaint dated 27/4/2021. It was addressed to the Branch Manager of the 1<sup>st</sup> appellant. The 1<sup>st</sup> appellant did not avail an earlier valuation report before the charge was registered to back its assertion that the 1<sup>st</sup> respondent was not a spouse or in occupation of the suit land in 2014.
33. Section 93 of the *Matrimonial Property Act* refers to presumption of holding land as joint tenants by spouses. The burden and the duty under Section 93(2) thereof, was on the lender to inquire from the borrower on whether the spouse had consented to the charge. Section 93(4) thereof relates to where the lender is misled. It makes the disposition void at the option of the spouse who has not consented to the disposition. Section 6 of the *Matrimonial Property Act* defines matrimonial home to include household goods and effects jointly owned or acquired during subsistence of the marriage. Section 6(2) thereof allow parties intending to marry to enter into an agreement before their marriage to determine their property rights. Section 14(a) of the *Matrimonial Property Act* provides that where property is acquired during marriage, there is a rebuttable presumption that the property is held in trust.
34. In my considered view therefore, the 1<sup>st</sup> appellant had a duty to inquire, look for and establish who was on the suit land or had developed it apart from the 2<sup>nd</sup> respondent to rule out, the need for spousal consent. There is no evidence that the 1<sup>st</sup> appellant reported the 2<sup>nd</sup> respondent to the police to rule out fraud or concealment of facts.
35. The upshot is that I find no merits in the appeal. It is dismissed with costs.

**JUDGMENT DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 11<sup>TH</sup> DAY OF JUNE 2025.**

In the presence of:

Court Assistant - Dennis

Miseko for Appellant present

Mukabane for Respondent present

**HON. C.K. NZILI**

**JUDGE, ELC KITALE.**

