



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muriungi v Mwebia & 2 others (Civil Appeal E086 of 2024)  
[2025] KEHC 1642 (KLR) (18 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1642 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E086 OF 2024  
HM NYAGA, J  
FEBRUARY 18, 2025**

**BETWEEN**

**HELLEN K MURIUNGI ..... APPELLANT**

**AND**

**HENRY MWEBIA ..... 1<sup>ST</sup> RESPONDENT**

**CAPITAL SACCO SOCIETY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**EDWARD MURIUNGI MIRIGO ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The matter for determination is the Notice of Motion dated 24<sup>th</sup> April, 2024 which seeks the following orders:-
  - a. Spent.
  - b. Spent.
  - c. That the Honourable court be pleased to issue a temporary injunction restraining the 2<sup>nd</sup> Respondent, their servant and/or agents on anyone acting on their behalf from selling, leasing and/or auctioning land parcel No. Abogeta/U-Kiungone/4509 pending the hearing and determination of the intended appeal.
  - d. That the costs of the application be provided for.
2. The application propped by the grounds set out on its face and is supported by the affidavit of the Applicant sworn on even date.
3. In a nutshell, it is the Applicant's case that she is the wife of the 3<sup>rd</sup> Respondent as evidenced by the annexed certificate of marriage issued under the African Christian Marriage and Divorce Act (now repealed).



4. The Applicant further averred that the 3<sup>rd</sup> Respondent, without her consent, guaranteed the 1<sup>st</sup> Respondent for a loan of Kshs. 1.6 Million obtained from the 2<sup>nd</sup> Respondent upon which the 2<sup>nd</sup> Respondent exercised a legal charge over the property.
5. The Appellant/Applicant states that she never gave her spousal consent as required. That she was never served with any statutory notice. That the 2<sup>nd</sup> Respondent has illegally advertised the suit land for sale through public auction. That her application for injunction in the lower court vide CMELC Case No. E137 of 2023 was dismissed on 25<sup>th</sup> March, 2024.
6. The Applicant avers that the appeal is arguable and will be rendered nugatory if the injunction is not granted.
7. In response, the 2<sup>nd</sup> Respondent filed an affidavit sworn by Nathaniel Kithinji Ikiugu, the credit manager sworn on 8<sup>th</sup> May, 2024.
8. The said Deponent avers that the 3<sup>rd</sup> Respondent accepted to charge his property over a loan disbursed to the 1<sup>st</sup> Respondent. That the 3<sup>rd</sup> Respondent swore an affidavit in which he averred that he was not married and he did not require any spousal consent. That it is upon this deposition that the 2<sup>nd</sup> Respondent proceeded to disburse the loan to the 1<sup>st</sup> Respondent and exercised a legal charge and the property in question.
9. It is averred that the loan has never been repaid and as a consequence of the default, the 2<sup>nd</sup> Respondent issued the requisite statutory notice and thereafter a 40 day sale notice under Section 96 of the Land Act. That later, a 45 day redemption notice was issued.
10. It is further deponed that the outstanding loan stood at Kshs. 3,008,410/- at the time of swearing the affidavit and it continues to accrue more charges and interest.
11. It is averred that the Applicant has come to court with dirty hands and is colluding with the 1<sup>st</sup> and 3<sup>rd</sup> Respondents to deny the 2<sup>nd</sup> Respondent its right to recover the loan.
12. It is further deponed that the Applicant should deposit the entire outstanding loan before any order can issue in her favour.
13. The 2<sup>nd</sup> Respondent further avers that it is a banking institution holding money coming from members of the public and the failure to repay the loan coupled with the present application will greatly hurt its business.
14. It is further averred that the appeal is hopeless and has no chance of success.

## **Background**

15. The Appellant moved the trial court vide CMELC case No. 137 of 2023 seeking inter alia an injunction against the 2<sup>nd</sup> Respondent restraining it from selling/alienating parcel No. Abogeta/U-Kiungone/4509.
16. The Appellant averred that she is the wife of the 3<sup>rd</sup> Respondent herein who is the registered proprietor of the suit land. That the 3<sup>rd</sup> Respondent, without her consent guaranteed the 1<sup>st</sup> Respondent for a loan of Kshs. 1.6 Million. That the said property was her matrimonial home.
17. In a ruling delivered on 25<sup>th</sup> March 2024, the learned magistrate dismissed the application.
18. Aggrieved by the said ruling the Appellant filed a memorandum of appeal dated 24<sup>th</sup> April, 2024 in which she laid the following grounds:-



- i. That the learned trial magistrate erred in fact and law in ruling that the 3<sup>rd</sup> Respondent was discharged from obtaining spousal consent by the fact that the 2<sup>nd</sup> Respondent attached an affidavit sworn by the 3<sup>rd</sup> Respondent stating that he is not married and hence would not require any spousal consent.
  - ii. That the learned trial magistrate erred in fact and law in relying on the false affidavit sworn by the 3<sup>rd</sup> Respondent, a clear contravention of Section 114 of the Penal Code and determining the spousal consent was not necessary in charging of the suit property.
  - iii. That the learned trial magistrate erred in fact and law in completely disregarding the marriage certificate produced as exhibit by the Plaintiff to prove that she is married to the 3<sup>rd</sup> Defendant and therefore her spousal consent was mandatory before the charge could be registered and the lack thereof of her spousal consent made the charge null and void.
  - iv. That the learned trial magistrate erred in fact and law in holding that the suit land (Abogeta/ U-kiungone/4509) was not matrimonial property yet the property was acquired during the subsistence of the marriage. This holding contravenes Section 6 as read with Section 14(a) of the Matrimonial Property Act which defines Matrimonial Property to include any other immovable and movable property jointly owned and acquired during the subsistence of the marriage and that where matrimonial property is acquired during marriage in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse.
  - v. That the learned trial magistrate erred in law and fact in disregarding the weighty evidence and issues in law raised by the Appellant and failing to find that the subject property is a matrimonial property as provided for under Section 6(1) (c) of the Matrimonial Property Act.
  - vi. That the learned trial magistrate erred in law and fact in failing to rule on the issue of the requirements for statutory notices to be served upon the Appellant before the 2<sup>nd</sup> Respondent could exercise its statutory power of sale despite the appellant submitting extensively on that issue.
  - vii. That the trial magistrate failed in law and fact in disregarding the submissions by the Appellant and solely relying on the 2<sup>nd</sup> Respondent's submissions and therefore came to a wrong finding and ruling.
  - viii. That the learned trial magistrate erred in law and fact in completely misapprehending the law relating to spousal consents.
  - ix. That the learned trial magistrate erred in law and fact in disregarding the evidence presented by the Appellant and failing to find that the Appellant had demonstrated that there is a prima facie case and that she would suffer irreparable loss which cannot be compensated by way of damages in the event she succeeds in the main suit.
  - x. That the entire finding and ruling of the learned magistrate is bad and is against the law and also against the evidence on record.
19. Initially, the appeal was lodged with the ELC at Meru and in a ruling delivered on 6<sup>th</sup> June 2024, the said court transferred the suit to this court, after a finding that the dominant issue herein was the spousal consent or lack thereof and therefore it did not fall within the jurisdiction of that court.



20. When the appeal came up for directions, the court directed that the same be argued vide written submissions. I will not rehash them herein. It suffices to state that I have duly considered them and I will, where necessary, refer to them.

### **Analysis and determination**

21. The issues for determination are as follows:-
- a. Whether the matter fall within the ambit of the Co-operatives Tribunal by virtue of Section 76 of the Cooperatives Act.
  - b. Whether the Appellant/Applicant has surmounted the threshold of grant of an injunction.
22. It is important to note that the issue of jurisdiction was not raised during the hearing of the application in the lower court.
23. Nevertheless, it is well settled law that the question jurisdiction can be raised an appeal, even if it was not raised in the lower court. This was the portion set out in *Floriculture International Ltd Vs Central Kenya Ltd and 3 Others* (1995) eKLR where it was held as follows;

“As I see is the issue of jurisdiction can be argued at any time. I am not deciding here whether the court below had jurisdiction. That is not within my province in this application. It has been held in the case of *Kenindia Assurance company Ltd. Vs Otiende* (1989) 2 K A R 162 that the normal rule that a party could not raise for the first time on appeal a point he had failed to raise in the High Court, did not, and could not, (underlining mine) apply when the issue of sought to be raised de novo on appeal went to jurisdiction.”

24. The principle was reiterated by the Court of Appeal in *Kenya Ports Authority vs Modern Holding [EA] Limited* [2017] eKLR where it held as follows:-

“We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the court itself provided that where the court raises it suo motu parties are to be accorded the opportunity to be heard. The 2<sup>nd</sup> Respondent’s case is that this matter ought to have been handled by the co-operative Tribunal.”

25. With the above in mind I will now deal with the preliminary objection raise. Section 76 of the Co-operative Act provides as follows:-

#### Disputes

- (1) If any dispute concerning the business of a co-operative society arises—
  - (a) among members, past members and persons claiming through members, past members and deceased members; or
  - (b) between members, past members or deceased members, and the society, its committee or any officer of the society; or
  - (c) between the society and any other co-operative society,  
it shall be referred to the Tribunal.
- (2) A dispute for the purpose of this section shall include—



- (a) a claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not; or
- (b) a claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not;
- (c) a claim by a Sacco society against a refusal to grant or a revocation of licence or any other due, from the Authority.”

26. The Appellant/Applicant moved the court as a spouse to the 3<sup>rd</sup> Respondent. It is not clear from the pleadings if the Applicant, 1<sup>st</sup> Respondent and 3<sup>rd</sup> Respondents are members of the 2<sup>nd</sup> Respondent.
27. The Appellant/Applicant has not come to court as a member, former member, or as representative of any member or former member of the Sacco. She has come by her own right as a spouse to the 3<sup>rd</sup> respondent. Thus, in my opinion, the dispute falls outside the realm of the Co-operatives Tribunal.
28. Further there is a ruling delivered by the ELC. Thus the question of which court between this one and the ELC, was settled when the case was transferred to this court.
29. I will now deal with the next issue, whether the Applicant has laid out sufficient grounds to warrant the orders sought.
30. In order to succeed the applicant ought to satisfy the court that her application meets the threshold of the grant of an injunction as set out in *Giella vs Cassman Brown*(1973) EA 358.
31. The Application and the suit in the lower court is based on the purported lack of spousal consent. The 2<sup>nd</sup> Respondent was categorical that the 3<sup>rd</sup> Respondent had deposed that he was not married and that did not require spousal consent.
32. The issue raised by the Applicant is not novel. It is now a common occurrence for spouses or alleged spouses to move the court for orders like the ones sought by the Applicant. There has been no dispute that the Applicant is a ‘wife’ to the 3<sup>rd</sup> Respondent, as evidenced by the marriage certificate. The Applicant claims that the land in question is matrimonial property. As such any property to qualify as matrimonial home must be such as is contemplated under Section 2 of the [Land Act](#) which states as follows;
- “matrimonial home means any property that owned or leased by one on both spouses and occupied by the spouses as their family home.”
33. Once there is evidence that a property is matrimonial home there are other pieces of legislation that protect such property. I will recite them hereunder.
34. Section 79(3) of the [Land Act](#) then provides that;
- “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.”



35. Section 28 of the *Land Registration Act* provides as follows;
- “Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register— (a) spousal rights over matrimonial property.”
36. Sections 2 and 12 of the *Matrimonial Property Act* state that;
2. “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;
- ‘12(1) An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.’
37. As can be seen, the need for spousal consent when it comes to matrimonial property cannot be overemphasized.
38. But how is 3<sup>rd</sup> party to ensure that such a consent is obtained?
39. A 3<sup>rd</sup> party such as the 2<sup>nd</sup> Respondent is not privy to the details of 3<sup>rd</sup> Respondent’s personal life. It is thus a requirement that it carries out enquiries about his marital status. This was the case in *Rajab Kipkoech Magut Vs Sidian Bank Ltd (2019) eKLR*, cited by the 2<sup>nd</sup> Respondent. The court held that;
- “The applicant swore affidavits on 4 occasions deponing that he was a widower. He went to the extent of annexing his alleged widows’ death certificate at pgs. 40, 68, 128 and 155 of the replying affidavit. In the application he now states that he is married. The applicant is bound by his averments in the affidavits. The lender carried out their duty to enquire about his marital status for the purpose of spousal consent and he repeatedly affirmed he was a widower.”
40. As I stated earlier, it has become common for spouses and alleged spouses to run to court to seek injunctive orders on account of lack of spousal consent. The situation was well expressed by the court in *Eljoy Kageni Vs Bank of Africa Kenya Ltd (2018) eKLR* where it was stated as follows;
- “Without insinuating that this is the case in this matter, I opine that the existence of multiple spouses, real or contrived, is an area that can be misused by unscrupulous people to defraud financial institutions. This is why it is necessary for courts to obtain prove that multiple spouses are real spouses. It is also necessary for such spouses to prove that there existed a matrimonial house on the suit land.”
41. Even though the Elyjoy Kageni case was in reference to multiple wives, the same argument can be made when it comes to a single spouse in a monogamous marriage.
42. In the instant case, the 2<sup>nd</sup> Respondent states that it carried out due diligence by having a valuer visit the suit land and the 3<sup>rd</sup> Respondent making a statutory declaration that he was not married and so did not require spousal consent.
43. The valuation report that was presented before the lower court shows that the land in question was agricultural land and had no development on it.



44. In my opinion, the 2<sup>nd</sup> Respondent exercised due diligence before it charged the property. It cannot be made to suffer due to an act of dishonesty by the 3<sup>rd</sup> Respondent who conveniently failed to appear in this appeal.
45. While it is appreciated that the law concerning matrimonial property was meant to protect spouses to a marriage, that law cannot be used to literally trick financial institutions into disbursing bad loans.
46. In this case, not a single coin was paid, leading to a reasonable conclusion that there was the intention to defraud the 2<sup>nd</sup> Respondent from the word go. The status of the 3<sup>rd</sup> Respondent was only known to him. There is no way that the 2<sup>nd</sup> Respondent would have been able to know of the Applicant in light of the declaration by the 3<sup>rd</sup> Respondent that he had no spouse.
47. From the lower court record, it is also clear that the property in question does not hold any development in the form of a home, which would fall under the definition of matrimonial home, under Section 2 of the Land Act.
48. Therefore, in my opinion, it would not be proper to extend the definition to land which does not hold the 'matrimonial home', which in my view was the primary concern of the law as enacted. I don't think that the law was intended to include every other property belonging to a spouse. That interpretation would lead to absurd situations.
49. To put it bluntly, this was a case of fraud orchestrated by the 1<sup>st</sup> and 3<sup>rd</sup> respondents against the 2<sup>nd</sup> respondent. After the loan was disbursed, not a single payment was done by the borrower or the guarantor. The absence of the 1<sup>st</sup> and 2<sup>nd</sup> respondent in this appeal, despite service, buttresses my finding that there was scheme to defraud the 2<sup>nd</sup> respondent.
50. This court is hesitant to use the law to prejudice an institution that has conducted itself above board. If the Applicant has any claim, then it should be against her 'husband' who declared to the 2<sup>nd</sup> Respondent that he was not married, hence leading the 2<sup>nd</sup> Respondent to disburse the loan.
51. On the question of damages, I would state that having asked that the property be valued, for the purpose of obtaining the loan, then it cannot be that its sale will cause irreparable damage to the Applicant. In the event that her suit in the lower court succeeds, there is no doubt that the 2<sup>nd</sup> Respondent can compensate her for rightful share of the value of the property in question.
52. Even if this court was to determine the matter on a balance of convenience, I would still be hesitant to grant the injunction sought since there has been no effort to repay the loan. The Applicant ought to lay her claim against the 3<sup>rd</sup> Respondent.
53. As regards to the statutory notices, the 2<sup>nd</sup> Respondent has shown that it served the same on the 1<sup>st</sup> and 3<sup>rd</sup> Respondents, who did not take any action to service the loan.
54. Despite service of the notices, the 3<sup>rd</sup> respondent did not act to redeem his property. There was no reason to serve the Applicant as she had not been declared as a spouse. That ground cannot succeed.
55. Looking at the grounds of appeal, I am in doubt as to whether the Applicant's appeal has threshold of success. Just like the trial court, I find that the Applicant's case fails the threshold set out in *Giella Vs Cassman Brown* (supra) on the grant of an injunction.
56. That being the case, I find that the application lacks merit and it is hereby dismissed with costs.

**SIGNED, DATED AND DELIVERED AT MERU THIS 18<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**H. M. NYAGA**



**JUDGE**

