



REPUBLIC OF KENYA



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**Mbugua v ABSA Bank Kenya PLC & 3 others (Civil Suit
E014 of 2025) [2025] KEHC 6582 (KLR) (19 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6582 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL SUIT E014 OF 2025
SM MOHOCHI, J
MAY 19, 2025**

BETWEEN

CAROLINE WAMBUI MBUGUA PLAINTIFF

AND

ABSA BANK KENYA PLC 1ST DEFENDANT

LEGACY AUCTIONEER 2ND DEFENDANT

**WILFRED MWAURA KABUCHO T/A OILTEX SERVICES
STATION 3RD DEFENDANT**

DISTRICT LAND REGISTRAR 4TH DEFENDANT

RULING

1. The Applicant Caroline Wambui Mbugua alleges to be a wife of the 3rd Defendant/Respondent Wilfred Mwaura Kabucho who was advanced a facility by the 1st Respondent a principal sum of Kes. 35, 700, 000/- which sum was secured by a charge upon the parcel commonly known as Nakuru/nakuru Municipality Block: 6/134 dated 21st January 2021 and by 8th May 2024 having been in default was served with the 90 days' notice evenly dated under section 90 of the Land Act.
2. It is interesting that Caroline Wambui Mbugu, the Applicant has sued the alleged Husband not in his personal capacity but as a trader and that there is no claim of separation or divorce hence the assumption that both the Applicant and the 3rd Respondents share a matrimonial home.
3. Nakuru/Nakuru Municipality Block: 6/13 is a Commercial property.
4. Wilfred Mwaura Kabucho moved this Court in Wilfred Mwaura Kabucho T.A Oiltex Services Station Vs Absa Bank Kenya Plc HCC No E007 of 2025 where by he sought to injunct an auction scheduled for the 10th February 2025 on the basis of an offer to restructure the debt through judicial intervention



and the Court declined and on the 7th of February 2025 dismissed the Application for interlocutory relief.

5. The aforesaid acquisition of Nakuru/Nakuru Municipality Block: 6/134 giving rise to the charge was in furtherance of an agreement for sale dated 8th December 2020, between the Wilfred Mwaura Kabucho and Daniel Macua Ndonga and whatever proprietary interest thereon was acquired upon completion and registration of title and thereafter creation of a charge.
6. For all intents and purpose the completion of the sale was facilitated by the availing of significant financial resources by the 1st Respondent without which, no such case would be before Court.
7. On the 13th February 2025 the Applicant moved this Court under certification of urgency, curiously the principal architect herein the 3rd Defendant/Respondent was never served when all other Respondents were served by Kiage Ezra Juma on the 19th February 2025 and on the 6th May 2025. As it remains the 3rd Respondent Defendant is without notice of these proceedings.
8. Curiously is the relief being sought against the 3rd Respondent, as the main relief in the suit and is a declaration being sought that, Nakuru/Nakuru Municipality Block: 6/134 be declared a joint matrimonial property between the Applicant and the 3rd Respondent.
9. This Application triggered my thought on legal concepts such as good faith, bona-fide, and enforcement of contracts to spur development versus an almost national psych of entering into contracts without any in intention of fulfilling the end of the bargain and finally innovative lawyering that is abusive of the process of the Court and not intended to advance the course of justice I find elements and sprinklings of the same herein.

Applicants Case

10. Before me are two Applications the 1st Application being a Notice of Motion dated 13th February 2025 filed Under Section. 3A of the *Civil Procedure Act*, Order 40 Rules 1 and 2 and 51 Rule 1 of the Civil Procedure Rules 2010, for the following orders:
 - i. SPENT;
 - ii. SPENT;
 - iii. SPENT;
 - iv. That, pending the hearing and determination of the substantive suit, this Honorable Court be pleased to issue temporary orders of injunction restraining the 1st, 2nd and 4th Defendant/ Respondents either by themselves, servants, agents and/or proxies from executing any conveyance documents, effecting the transfer of, registering any new interest, disposing of or in any other way interfering with all that parcel of land known as Nakuru Municipality Block 6/134.
 - v. That costs of this application be provided for.
11. The Application is grounded on the following fifteen (15) Grounds;
 - a. That, the Plaintiff Applicant is the legally married wife of Wilfred Mwaara Kabucho T/A Oiltex Services Station, the 3rd defendant herein having gotten married to each other in the year 2009 under Kikuyu Customary Marriage.
 - b. That, on or about the year 2021, the Applicant and the 3 Defendant/ Respondent acquired Nakuru Municipality Block 6/134 through joint contribution.



- c. That, pursuant to the Applicant's consent, the property was registered in the name of the 3 Defendant and subsequently a Certificate of Title issued in the 3 Defendants name.
- d. That, for all intent and purposes the said property constitutes matrimonial property and the 3 Defendant is holding the same in his behalf as well as on behalf of the Plaintiff Applicant and they had agreed to use the parcel for business ventures.
- e. That, the Plaintiff Applicant is in awe that the 3 Defendant took out a loan and used the property as security yet she has never been contacted by the financier or served with any notices or statements pursuant to the loan facility.
- f. That, the 3rd Defendant secured a loan using the said matrimonial property as security from the 1st Defendant. The 3rd Defendant consequently defaulted on the loan obligations under the facility advanced by the 1st Defendant. The property was illegally sold on the 10th February, 2025 by way of public auction for default of payment of the loan.
- g. That, the Plaintiff/Applicant did not give her consent as a spouse for the acquisition of any loan which consent is mandatory to protect her overriding interest in the property as a spouse.
- h. That, the 1st and 2nd defendants did not issue the requisite mandatory Notice to the Plaintiff Applicant as a spouse before exercising the statutory power of sale.
- i. That, due process of the law was not followed while charging the matrimonial property and advertising the same for sale by way of Public auction by the 1 and 2 Defendants. The subsequent sale is therefore neither here nor there. The same is an absolute illegal enterprise.
- j. That, the Plaintiff Applicant is on the verge of losing matrimonial property and her marriage is on the verge of collapse due to the business decisions made by her spouse without her consent or knowledge.
- k. That, the actions of the 1st and 2nd Defendant/Respondents are unlawful and unjustified and unless this Honorable Court intervenes to collapse their charade by estopping the 4th Defendant/ Respondent from effecting transfer of the said parcel of land and properties thereon, the Plaintiff Applicant stands to suffer loss that is unjustifiable in law and in logic.
- l. That, the said intended transfer is marred by fundamental breach of preliminary processes, a general lack of respect for matrimonial property, complacency on the part of the 1 and 2 Defendant/Respondents and which travesty, if countenanced by this Court, will set bad precedence capable of overturning the foundation of matrimonial law and attendant property rights.
- m. That, the sale by auction of the Plaintiffs' property is in total breach of the provisions of the Land Act since the 1st and 2nd Defendant/ Respondents failed to issue necessary notices under the Land Act which is a mandatory legal requirement.
- n. That, as pointed out in ELCLC E009 OF 2025 CAROLINE WAMBUI MBUGUA Vs ABSA BANK KENYA PLC 2 OTHERS with reference to the case of Cooperative Bank of Kenya v Patrick Kang'ethe Njuguna & Others (2017) eKLR, this matter is properly before this Honorable Court for its determination.

12. The Caroline Wambui Mbugua depones under oath that;



- a. She is the wife of Wilfred Mwaura Kabucho T/A OILTEX SERVICES STATION, the 3rd defendant, herein having gotten married to each other in the year 2009 under Kikuyu Customary Marriage.
 - b. During the subsistence of other union, they have been blessed with 3 issues.
 - c. Sometimes in 2021 during the subsistence of their marriage, with the 3rd Defendant/ Respondent they jointly acquired the property known as NAKURU MUNICIPALITY BLOCK 6/1349.
 - d. The 1st and 2nd Defendants/ Respondents did not issue the requisite mandatory Notice to Caroline Wambui Mbugua as a spouse before exercising the Statutory Power of sale.
 - e. Due process of the law was not followed while charging the matrimonial property and advertising the same for sale by way of Public Auction by the 1st and 2nd Defendants. The subsequent sale on 10th February, 2025 is surely nothing but an illegal enterprise that this Court ought to collapse.
 - f. No notice, an option to restructure the loan or offer an alternative security and renegotiate the terms of repayment was not made available to Caroline Wambui Mbugua.
 - g. The actions of the 1st and 2nd Defendant/ Respondents are unlawful and unjustified and unless this Honorable Court intervenes to collapse their charade by estopping the 4th Defendant/ Respondent from effecting transfer of the said parcel of land and properties thereon, Caroline Wambui Mbugua stands to suffer loss that is unjustifiable in law and in logic.
 - h. The Applicant is informed by her advocate on record which information she verily believes to be true that, the sale by Public Auction of the suit property is in total breach of the provisions of the Land Act since the 1st and 2nd Defendants/ Respondents failed to issue her with necessary notices and failure to procure spousal consent.
 - i. Unless the suit property is preserved and the 4th Defendant/ Respondent is estopped from registering the intended transfer, Caroline Wambui Mbugua and her children stand to lose a great investment, her marriage will strain /will be on the verge of collapse, and she will suffer irreparable and substantial loss.
 - j. The actions of the 1st and 2nd Defendant/ Respondents are unlawful and unjustified and unless this Honorable Court intervenes to collapse their charade by estopping the 4th Defendant/ Respondent from effecting transfer of the said parcel of land and properties thereon, Caroline Wambui Mbugua stands to suffer loss that is unjustifiable in law and in logic.
 - k. The said intended transfer is marred by fundamental breach of preliminary processes, a general lack of respect for matrimonial property, complacency on the part of the 1st and 2nd Defendant/ Respondents and which travesty, if countenanced by this Court, will set bad precedence capable of overturning the foundation of matrimonial law and attendant property rights.
 - l. The sale by auction of the Applicant's property is in total breach of the provisions of the Land Act since the 1st and 2nd Defendant/ Respondents failed to issue necessary notices under the Land Act which is a mandatory legal requirement.
13. The Court on the 18th February 2025 allowed a temporary injunction and directed the matter be transferred to High Court Number three (3) for hearing and determination. The underlying basis was



the same Court that was seized over HCC No E007 of 2025 (Wilfred Mwaura Kabucho T.A Oiltex Services Station Vs Absa Bank Kenya Plc).

14. On the 20th March 2025 during a mention before Court for directions, Mr. Kiage Advocate for the Applicant indicated the Presence of Mr. Kiplagat for the 1st and 2nd Respondent, the absence of the 3rd and 4th Respondent, Mr. Kiplangat indicated having responded to the Application dated 13th February 2025 and sought to urgently and orally argue the Application and was overruled with directions on filing of written submissions the Ruling was reserved for the 8th of May 2025
15. On the 3rd of May 2025 the Applicant having caught a glimpse of the 1st and 2nd Respondents pleadings and submission on the question of proof of marriage she hurriedly moved the Court and filed the 2nd Application urging that new evidence has come into her possession and is critical in the determination of the 1st Application.
16. In the 2nd Application dated 3rd May 2025 filed pursuant to Article 159 of *the Constitution*, Section IA, IB and 34 of the *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules, the Applicant sought inter alia the following relief(s);
 - i. SPENT
 - ii. That, this Honourable Court be pleased to grant leave to the Plaintiff/Applicant to file and serve a further affidavit.
 - iii. That, IN THE ALTERNATIVE, this Honourable Court be pleased to order that the further affidavit of the Applicant, Caroline Wambui Mbugua annexed to the instant application dated 28th April, 2025 be deemed to have been properly filed and duly served.
 - iv. That, the Honorable Court be and is hereby pleased to arrest delivery of the ruling scheduled for 8th May, 2025 to allow the Respondents to respond to the instant application.
 - v. That, costs of this application be in the cause.
17. The 2nd Application is premised on the following Twelve (12) grounds;
 - I. That, the matter is scheduled for delivery of ruling on the application for injunction dated 13th February, 2025 on 8th May 2025.
 - II. That, new evidence came to the attention of the Applicant after the Court set the date for ruling during the last mention in Court on 20th March, 2025.
 - III. That, the Defendants allege that the Applicant is not married to the 3 Defendant/Respondent, which allegation is not true.
 - IV. That, contrary to the aforestated assertion, the Applicant has been married to the 3rd Respondent for over 15 years, which marriage is founded upon the Kikuyu Customary Law.
 - V. That, the Applicant is therefore apprehensive that it is important to adduce evidence to disprove the errant allegation by the Respondents advanced on the basis of an affidavit that is strange to her.
 - VI. That, the Applicant and the 3rd Respondent went through a customary ceremony to mark their traditional customary marriage which has borne three issues.
 - VII. That, all the prerequisite requirements were complied with including but not limited to the delivery of dowry and other preliminary rites of the Kikuyu Customary Law,



- VIII. That, the Applicant had not traced evidence of the same by the time the Application and Plaint herein were filed.
- IX. That, the Applicant now wishes to adduce the evidence of part of the traditional customary marriage rites to crystallize her averment that she was indeed married to the 3rd Respondent in accordance with the Kikuyu Customary law.
- X. That, the admission of the new evidence is crucial for the proper and effectual determination of this case.
- XI. That, the Respondents will not suffer any prejudice if the evidence is allowed.
- XII. That, it is in the interest of justice that the further affidavit be admitted.
18. The 2nd Application is Supported by a sworn Affidavit by the Applicant, Caroline Wambui Mbugua she depones that;
- i. She has have read and understood the 1st and 2nd Respondents' Replying Affidavit and is apprehensive that the Respondents have opposed her Application dated 13th February 2025 on account that the 3rd Respondent and her are not in a marital relationship.
 - ii. She is advised by her advocates on record, advice she verily believe to be true, that there is an impending need for her to adduce evidence to address the concern raised by the Respondents in order to shed light on the basis of her relationship with the 3rd Respondent and hence the foundation of the instant suit.
 - iii. In the year 2009, she got married to the 3rd Defendant under customary law in the Kikuyu culture.
 - iv. The traditional ceremony conducted was characterized by the purchase and consumption of the fundamental ingredients of a traditional ceremony.
 - v. She has recently come across an extract of the tabulated expenses for the said ceremony.
 - vi. Incidental to any other future evidence that may be adduced, she is of the opinion that the said extract will lay the groundwork for her firm belief that, this Honorable Court ought to delve deeper into the issue of her valid marriage before adversely issuing a ruling to her detriment.
19. The Court directed that, the same be served upon the Respondents and Parties to orally argue the same inter-parte on the 8th May 2025. On the said date the 1st and 2nd Respondent sought to file a response to the Application dated 3rd May 2025, the 4th Respondent was unaware and sought for time to respond, the Court arrested the Ruling directing parties to file further written submissions and responses reserving the Ruling on both Applications for the 19th May 2025.
20. The 3rd Respondent never participated and there is no proof of service by Kiage Advocate who has religiously effected service. The fact that the 3rd defendant was never served would lead one to conclude either that the same was gross negligence by an advocate, or a manifestation of collusion and a second "bite at the cherry" by the 3rd Defendant who now introduces the Applicant as the Spouse.
21. The Applications are opposed vehemently by the 1st and 2nd Respondents and the 4th Respondent has elected not to defend the Application but file its defense on the 17th of April 2025 arguing misjoinder of parties, want of cause of action thereby preying that the suit be struck-out.



1st and 2nd Respondents Case

22. The 1st and 2nd Respondents oppose both Applications vide the Replying Affidavits Sworn by Samwel Njuguna the Secured Lending Team Leader for the 1st Respondent dated 5th March 2025, 15th May 2025 and its written submissions dated 23rd April 2025.
23. It is the 1st and 2nd Respondents case having produced exhibit marked "SN-1" to "SN-6" with regard to the 1st Application that the application is frivolous, vexatious and an egregious abuse of Court process.
24. With regard to the 2nd Application, the 1st and 2nd Respondent take issue contending that the instant application is an attempt by the Plaintiff to fill gaps in her case that have been exposed by the 1st and 2nd Respondent's response.
25. That the Applicants application sought orders to halt the transfer of the property already sold by auction on grounds that the Plaintiff is married to the 3rd Respondent and that the property is matrimonial property.
26. That since the alleged new evidence is now part of the record, there is still no basis for the Plaintiff to claim spousal interest in the property.
27. That, the alleged new evidence of marriage are two pieces of paper with writings in longhand in a language foreign to this Court contravening the provisions of Section 35 of the [High Court \(Organization and Administration\) Act](#), the language of this Court is English or Kiswahili. Therefore, in absence of a certified translation, this alleged new evidence cannot form the basis of a finding that a marriage exists between the Plaintiff and the 3rd Respondent. Even if there was a translation, it will still not be evidence of marriage as provided under Section 59 of the [Marriage Act](#).
28. That the contention that the Applicant has been listed a defaulter with the credit reference bureau because she is a spouse of the 3rd Respondent is extremely strange. The Credit Reference Report annexed to the Further Affidavit shows that the Applicant is listed as a defaulter because of a non-performing overdraft facility of Kes. 1, 191, 040.25. this is distinct from the term loan facility advanced to the 3rd Defendant and that a credit report cannot be evidence of marriage.
29. It is also worth noting that in the Further Affidavit sought to be introduced, the Applicant now admits that the suit property is not their matrimonial home but she continues to posture that it is matrimonial property. That by dint of this admission, the application should collapse since Section 79(3) of the [Land Act](#) only requires spousal consent to charge a matrimonial home and not matrimonial property.
30. By dint of Section 6(1) of the suit property is not matrimonial property since it is not jointly owned and acquired. The Sale Agreement confirms that the property was acquired solely by the 3rd Defendant and the purchase price was financed by the 1st Defendant. The Further Affidavit does not controvert this fact.
31. Since the suit property is admittedly purely for commercial use, damages will be a sufficient remedy in the event that the Plaintiff succeed in the main suit.
32. That, the Court attention's is drawn to a crucial fact concealed by the Plaintiff that the borrower/chargor of property Title Number NAKURU MUNICIPALITY BLOCK 6/134; the 3rd Defendant in this case filed Nakuru HCCC No. E007/2025 Wilfred Mwaura Kabucho T/A Oiltex Service Station v Absa Bank Kenya Plc which application was heard and determined on merit in the ruling by this Court on 7th February 2025 dismissing the application with costs.



33. There being no order stopping the auction, the property was sold on 10th February 2025 to Jackson Kiplimo Chebet.
34. That under Section 99 of the *Land Act*, the sale cannot be reversed upon the fall of the auctioneer's hammer. Only a claim for damages can be made but cancellation of the sale.
35. That, the 1st and 2nd Defendants contends that if the Plaintiff had any claim to the property, she would have contested the charge together with the chargor in Nakuru HCCC No. E007/2025 Wilfred Mwaura Kabucho T/A Oiltex Service Station v Absa Bank Kenya Plc.
36. That the timing of this suit is also suspect. The auction was advertised on the 3rd February 2025.
37. That present application and suit are an afterthought and amount to judicial lottery that is common among many borrowers who, having lost on merits, they invent spouses in an attempt to defeat recovery efforts by lenders.
38. That the Plaintiff failed to disclose existence of a suit by the chargor and a ruling on merits on the same matter. The ex-parte orders were therefore obtained through non-disclosure of material facts and should therefore be set aside under Order 40 Rule 7 of the Civil Procedure Rules.
39. Turning to the merits, that, the suit stands on quicksand and it collapses on its own weight when considered against settled principles of law on validity of charges that have been impugned for lack of spousal consent.
40. The contention that the Plaintiff is married to the chargor is untenable at law. Marriage is a legal construct to be proved by a marriage certificate and not bearing of children. There is no evidence of the kind required under Section 59 of the *Marriage Act* to support a finding that prima facie, the Plaintiff is married to the 3rd Defendant.
41. To the contrary, the chargor did swear an Affidavit at the point the charge was registered in which he confirmed unequivocally that he is not married and there was no need for spousal consent to charge the property.
42. In light of the chargor's affidavit confirming that he is not married and in absence of proof of marriage by the Plaintiff, it cannot be said that the Plaintiff is a spouse to the Defendant.
43. That a "spouse" means a husband or wife married under a recognized law in Kenya. No law recognizes a spouse for the sole reason that two parties have children together.
44. That spousal rights over matrimonial property are no longer overriding interest on land by dint of the Land Laws (Amendment) *Act No. 28 of 2016*.
45. That the existing legal framework on the subject are the Matrimonial Properties Act and *Land Registration Act*.
46. That Section 12 (5) of the Matrimonial Properties Act and Section 29(3) of the *Land Act* only require consent to charge the matrimonial home and not matrimonial property generally.
47. That a key ingredient in the definition of a matrimonial home is that the property must be occupied and used as the family home.
48. That in the present case, the suit property is a service station. There is no material that has been presented to demonstrate that the suit property, service station; is occupied by the Plaintiff and the 3rd Defendant as their family home.



49. That the contention that the Plaintiff contributed to the purchase of the property is also not supported by any evidence.
50. That the bank financed the purchase of the property and the Plaintiff did not make any contribution at any time.
51. That, the Plaintiff therefore lacks locus to seek protection of spousal interest in the suit property.
52. That, since the Plaintiff is not the spouse, the contention that the sale is improper because she was not served with the statutory notices falls by the wayside.
53. That, the lamentation that the 1st Defendant declined to consider a restructure or alternative security affirms that the Plaintiff and the 3rd Defendant are in cahoots since similar arguments were raised in Nakuru.
54. As disclosed above, the property was sold to Jackson Kiplimo Chebet. He is a necessary party to the suit and any orders issued without his input amounts to an unfair hearing.
55. That it cannot, therefore, be said that the Plaintiff has brought for a prima facie case with probability of success at trial. Similarly, it cannot be said that she risks suffering irreparable loss that cannot be compensated in damages. She does not occupy the suit property. Secondly, the Plaintiff has made reference to an alternative security for the loan. This affirms that there are other assets at her disposal and she is only keen at frustrating recovery by the 1st Defendant in this case.
56. That, in any case, the 1st Defendant is a going concern and is able to defray an award of damages that may be made by the Court.
57. That a balance of convenience tilts in favour of dismissing the application since the loan secured by the property remains in arrears even after the sale.
58. That, it is therefore in the interest of justice that the 1st Defendant is allowed to realize its security.

Analysis & Determination

59. Upon considering the pleadings, response thereto and the respective submissions filed, I find the following to be the two broad issues that arises for determination:

“Firstly, whether there is new evidence that was not with due diligence within the knowledge of the Applicant which fresh evidence should be admitted without prejudice?

Secondly, whether an interim injunction should issue, temporary orders of injunction restraining the 1st, 2nd and 4th Defendant/Respondents either by themselves, servants, agents and/or proxies from executing any conveyance documents, effecting the transfer of, registering any new interest, disposing of or in any other way interfering with all that parcel of land known as NAKURU MUNICIPALITY BLOCK 6/134.”

60. On the invitation to grant leave to file additional evidence, I am persuaded in holding that the Applicant is expected to demonstrate that new evidence which was not within her knowledge even with due diligence on her part and has come to her attention and that the same is crucial for a just adjudication of the dispute at hand.
61. In this instance the Applicant admits that she read and understood the 1st and 2nd Respondents' Replying affidavit and became apprehensive that, the Respondents had opposed her Application dated



13th February 2025 on account that the 3rd Respondent and her are not in a marital relationship, that new evidence came to her attention after the Court set the date for ruling on the 20th of March 2025.

62. It is therefore bare and naked that, in this instance the realization and need to demonstrate marriage by any means crystalized after the 1st and 2nd Defendants filed their defence and opposed the Application for leave to adduce New and additional evidence.

63. Parties to a civil litigation expected to adhere strictly, to the provisions of the Civil Procedure Rules as to pre-trial disclosure; including Order 3 Rule 2 of the Civil Procedure Rules, which states: -

“All suits filed under rule 1(1) including suits against the government, except small claims, shall be accompanied by—

- a. the affidavit referred to under Order 4 rule1(2);
- b. a list of witnesses to be called at the trial;
- c. written statements signed by the witnesses excluding expert witnesses; and
- d. copies of documents to be relied on at the trial including a demand letter before action:

Provided that statement under sub rule (c) may with leave of Court be furnished at least fifteen days prior to the trial conference under Order 11.”

64. However, where a justifiable cause has been demonstrated, the Court retains the discretion to grant leave for the filing of additional statements and documents even after directions and timelines for filing written submissions and a ruling date has been reserved.

65. Seeking leave to adduce fresh evidence after close of pleadings in an interlocutory Application must meet the principles set in the Supreme Court case of *Cyrus Shakhala Khwa Jirongo v Soy Developers Ltd. & 9 others* (2020) eKLR at paragraph 42 where the Supreme Court stated as follows”

“ 42) Having shown that the Petitioner did not exercise any diligence in obtaining the evidence that he now seeks to adduce before this Court, and that he had prior knowledge to or actual possession of such evidence, this Court would be restrained to continue in examining the other grounds of the application, to wit, whether the evidence would have any relevance to the matter, or indeed of probative value, and that such an exercise would indeed be a frittering of this Court’s judicial time. Once it has been established that the Petitioner failed in demonstrating that he was unable, with due diligence to obtain the evidence, or that it was in his possession, as pronounced in the principles in *Wajir*, then the Court would be left with no other option but to dismiss his application. In stating so as above, our findings are limited to the application before us and not the pending appeal which would ultimately be determined on its merits.”

4. The standard may be lower where no judgment has been delivered. However, difference is considering in the adducing of evidence. The new evidence should not be such that it is meant to seal loopholes the defence created in re-examination. The nature of the evidence sought to be adduced is not new. It is evidence that plaintiff had all along. It should not be such that it amounts to having a totally different case before the Court.”



66. In the case of *Wabwire & another v Origi* (Environment & Land Case 112 of 2017) [2024] KEELC 5894 (KLR) Justice B Olao Cites with Approval the case of *Rose Kaiza -v- Angelo Mpanju Kaiza C.a.* Civil Appeal No 225 of 2008 [2009 eKLR], where the Court of Appeal while discussing the ground of new and important matter or evidence as a basis of review cited with approval the following passage from Mulla’s Civil Procedure Code 15Th Edition at page 2726 thus:

“Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the discovery of new evidence, it must be established that the Applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the Petitioner had not acted with due diligence, it is not open to the Court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of new and important matter which was not within the knowledge of the party when the decree was made.” Emphasis added.

67. Further, in the case of *D. J. Lowe & Company Ltd -v- Banque Indosuez, C.a.* Civil Application No 217 of 1988, the Court of Appeal sounded a caution in such applications based on that ground. It said:

“Where such a review application is based on fact of the discovery of fresh evidence, the Court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed that party must show that there was no remissness on his party in adducing all possible evidence at the hearing.” Emphasis added.

68. This Court is further of the view that proof of customary marriage by presumption is only permissible under the *Law of Succession Act* that imports customary law in succession and in any other litigation a party alleging marriage shall be expected to produce a marriage registration certificate in line with the *Marriage Act* 2014 and in the absence of such registration there can be no other construct.

69. This Court concurs with the 1st and 2nd Respondent that the latest venture constitutes an attempt at filling the gaps upon glimpse of the opposition and in otherworld, stealing a match to the detriment of the opposition.

70. A unique feature here being that the evidence sought to be introduced has not been demonstrated having not been within the knowledge of the Applicant but rather she had been looking for the same.

71. All in all, proof of marriage is by certification in line with the *Marriage Act* 2014.

72. This Court is unable to exercise its discretion to allow leave to file additional evidence.

73. Determination on whether to grant interim injunctions is governed by Order 40 Rule 1 of the Civil Procedure Rules which provides as follows;

“Where in any suit it is proved by affidavit or otherwise —

- a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or



- b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders.

74. The principles that guides this Court in dealing with applications for injunctions were well settled in the celebrated case of *Giella –vs-Cassman Brown and company Limited* Civil appeal No.51 of 1972 where it was held as follows:

- i. The Applicant must establish a prima facie case with a probability of success.
- ii. Applicant has to demonstrate that it will suffer irreparable injury which cannot be compensated by damages.
- iii. Applicant has to demonstrate that balance of convenience tilts in its favour.

75. Further, in *Nguruman Limited v Jane Bonde Nielsen and 2 Others* NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR, the Court of Appeal reiterated the above principles and gave the following guidelines:

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. (See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86).

If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the Court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”

76. It is also settled law, that in interim applications, such as in this case, the Court should avoid making final determinations on matters of fact made on the basis of the conflicting Affidavit evidence. In connection thereto, in *Mbuthia vs Jimba Credit Finance Corporation & Another* [1988] KLR 1, the Court of Appeal guided as follows:

“...the correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side’s propositions.”



77. Before I venture into determination of this matter, I may mention that the reliefs sought are equitable in nature where this Court is invited to exercise its discretion and that he who seeks equity must be with bonafide and good faith which I am afraid appears lacking by dint of discriminate service of process.
78. In order to determine whether the application meets the required threshold the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR where the Court held that: -

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the Court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.

As to whether the Applicant has established a prima facie case?

79. The case of *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR 123 defined a prima facie case as follows;

“A prima facie case in a civil application includes but not confined to a genuine and arguable case. It 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 as to call for an explanation or rebuttal from the latter.”

80. A close perusal of the affidavit in support of the application the plaint and the Applicant’s submissions reveals the “quicksand” on which this suit is constructed; The Applicant alleges to be a wife of the 3rd Respondent and that they the Applicant and the 3rd Respondent acquired NAKURU MUNICIPALITY BLOCK 6/134 through joint contribution.
81. Firstly, no joint contribution or Applicant’s share in acquisition of NAKURU MUNICIPALITY BLOCK 6/134 is demonstrated and on the contrary the same was acquired through significant financing by the 1st Respondent and a smaller contribution by the 3rd Respondent.
82. The Applicant has gone a mile in attempting to prove marriage and inviting this Court to make declaratory pronouncements on presumption of marriage an issue forming the bedrock of her main suit and of which the Court declines at this juncture.
83. The Applicant who is 3rd Respondent’s wife alludes to a dispute with her husband following the Auction but has deliberately failed to serve him with the pleadings for him to participate. This Court views the Applicants conduct from a mischievous prism concluding that the same was deliberate. All other Respondents were served by Kiage Ezra Juma on the 19th February 2025 and on the 6th May 2025.
84. The Substratum of this case is a property NAKURU MUNICIPALITY BLOCK 6/134 that is commercially classified and the same is not a matrimonial home.



85. There is an unequivocal admission of the debt.
86. The Applicant anchors his suit in a prospective renegotiation of the terms of the agreement to restructure the facility a judicial relief that is clearly untenable.
87. The Court further notes that when the Applicant Applied for the financing facility he made a Sworn Affidavit dated 21st December 2020 where he declared being single and not requiring any spousal consent, therefore its preposterous to have expected the 1st Respondent to undertake a fishing expedition looking for a spouse unknown.
88. A Plaintiff/Applicant must demonstrate a legitimate right to sue, rather than merely offering a superficial or illusory claim of cause of action has was held by Telanga Judge in the case of Bajranglal Agarwal v. Smt. Susheela Agarwal and Ors, CCCA.No.62 of 2024.
89. The Court observes the slippery formulation in pleading by the Applicant/Plaintiff that is highly likely constitutes quick-sand foundation without a cause-of-action firstly she claims ownership of the auctioned property without proof.
90. This Court is unpersuaded of there being any substantial prima facie dispute between the Applicant the 3rd Respondent and the 1st, 2nd and 3rd Respondent with a probability of success. The Applicant shall have to demonstrate her locus standi to bring this action which at this moment stands on shaky stilts.
91. The Applicant deliberately ignores the fact that the suit property now already auctioned was acquired by the 1st Respondents resources. The Applicant ignore the fact that we have a 3rd Party successful bidder who was not enjoined and the Applicant has not in any way demonstrated illegality if at all of the auction dated 10th February 2024.
92. In Wilfred Mwaura Kabucho T.A Oiltex Services Station Vs Absa Bank Kenya Plc HCC No E007 of 2025, this Court held that the Respondents are of means to compensate in damages should it emerge that the Auction was unlawful. The same should apply here as the Applicant alleges to have made unspecified contributions and the Auction has exposed her to loss and damage. The Applicant can adequately be compensated in damages.
93. This Court can only deploy the balance of convenience test where a prima facie case exists and not in a vacuum as is in this case. the concept of balance of convenience was defined in the case of Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) eKLR as:

“The meaning of balance of convenience will favor of the Plaintiff’ is that if an injunction is not granted and the Suit is ultimately decided in favor of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer. In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”.
94. In this instance disposal of the Application shall in essence conclude the main suit and that the main suit remains with a relief that may be untenable in law the Applicant shall determine the course of the suit filed.



95. The Upshot is that, the Notice of Motion dated 13th February 2025 and that dated 3rd May 2025 is without any merit and the same are accordingly dismissed with costs to the 1st and 2nd Respondents.
96. Any interlocutory orders herein are vacated.
97. The Applicant shall serve the motion upon the 3rd Respondent and a mention date shall be assigned for pretrial directions.

It is so ordered.

SIGNED, DATED AND DELIVERED ON THIS 19TH DAY OF MAY 2025

MOHOCHI S.M

JUDGE

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