



M'Rukaria (Suing as the Personal representative of the Estate of the Late Judah Mbiyiwe M'Rukaria) v Equity Bank (Kenya) Limited (Civil Suit 4A of 2020) [2025] KEHC 6381 (KLR) (15 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6381 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL SUIT 4A OF 2020
EM MURIITHI, J
MAY 15, 2025**

BETWEEN

KIMAITA MBIJIWE M'RUKARIA PLAINTIFF

AND

EQUITY BANK (KENYA) LIMITED DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff commenced this suit by a Plaint dated 18th November 2020, which was amended on 15th November 2022, seeking the following orders:
 1. A declaration that the proposed sale of land parcel numbers L.R Ngusishi Settlement Scheme/319, L.R Ex-Lewa Settlement Scheme/745, L.R Ex-Lewa Settlement Scheme/703, and L.R Ex-Lewa Settlement Scheme/758 is illegal and unlawful.
 2. A declaration that the charge documents registered against land parcel numbers L.R Ngusishi Settlement Scheme/319, L.R Ex-Lewa Settlement Scheme/745, L.R Ex-Lewa Settlement Scheme/703, and L.R Ex-Lewa Settlement Scheme/758 are defective in form and substance as they are based on forgeries.
 3. A declaration that the charge instruments registered against land parcel numbers L.R Ngusishi Settlement Scheme/319, L.R Ex-Lewa Settlement Scheme/745, L.R Ex-Lewa Settlement Scheme/703, L.R Ex-Lewa Settlement Scheme/574 and L.R Ex-Lewa Settlement Scheme/758 are null and void.
 - 4.. Costs of the suit with interest thereof at court rates.
 5. Any other or further relief that this Honourable Court may deem just to grant.



2. In the Amended Plaintiff, the Plaintiff, who is the son of the deceased borrower, asserts that the properties in question are matrimonial property. He argues that his mother, Lucy Kirumba Mbijiwe, never gave spousal consent for the creation of the charges on these properties. Additionally, he alleges that the consent documents were forged and denies that Mercy Gacheru, who signed one of the consent forms, is or was the wife of the deceased. He further claims the deceased had not disclosed the loans to the family and that due process was not followed in the charging and advertisement of the suit properties for sale. Consequently, he seeks declarations that the charges are null and void, that the proposed sale is illegal, and prays that the Defendant be restrained from proceeding with any sale or auction of the properties.
3. In response, the Defendant, Equity Bank (Kenya) Limited, filed an Amended Defence dated 21st June 2023. The Defendant asserts that the deceased borrower lawfully applied for and was granted a loan facility of Kshs 10 million, offering as security five parcels of land, including L.R Ngushishi Settlement Scheme/319, L.R Ex-Lewa Settlement Scheme/745, L.R Ex-Lewa Settlement Scheme/703, L.R Ex-Lewa Settlement Scheme/574 and L.R Ex-Lewa Settlement Scheme/758.
4. The Defendant avers that the purpose of the loan facility was to consolidate existing loans, with repayment scheduled to be made directly from the deceased's current account over 36 months. This included both principal and interest, with semi-annual installments of Kshs 2,097,958 due every October and April, starting from 15th October 2017.
5. The Defendant states that on 20th February 2018, it modified the loan agreement terms, as outlined in the letter of offer dated 31st March 2017, by adding an insurance clause and related conditions. Both the deceased and the bank executed the revised terms on that date. The Defendant claims that the deceased defaulted on his obligation to service the loan, resulting in arrears of Kshs 6,445,853.75 as of 9th January 2019. Consequently, the bank served the deceased with a demand to pay these arrears dated 9th January 2019. The Defendant insists that it complied fully with legal requirements before taking steps to realize the securities associated with the properties registered in the name of the deceased.
6. The Defendant further claims that on 4th August 2020, it instructed Nile Real Appraisers (EA) Limited to conduct a valuation of the deceased's charged properties. On the same day, it also instructed Viewline Auctioneers to advertise and sell the charged properties in order to recover the outstanding loan balance and interest. Nile Real Appraisers conducted the valuation on 14th August 2020, asserting that the deceased was in default on the loan, and thus the bank was within its rights to exercise its power of sale after the deceased failed to respond to the notices.

Evidence of the Parties

7. The Plaintiff's mother, Lucy Kirumba Mbijiwe (PW1), testified that she had no knowledge of the loan transactions and never signed any spousal consent documents. She denied any association with the ID number and signature used in the spousal consent and stated that the purported consent documents were forged. She also denied knowing Mercy Gacheru and maintained that she was the only wife of the deceased.
8. She testified that she never signed the variation of the insurance, asserting that the procedure for securing the loan was a forgery. After discovering the forgery, she reported it at Meru Police Station and was issued OB number 13/15/11/23, with investigations currently ongoing in Criminal Application No. E186 of 2023 in the Chief Magistrate's Court of Meru. She stated that if the bank sells the property, she will lose her home, rental property, and family land. She maintained that she never used any of the loans. During cross-examination, she stated that she had no agreement with Equity Bank and was unaware that her late husband had taken out a loan that he was unable to repay.



9. PW2, the plaintiff and son of the deceased, corroborated his mother's testimony. He explained that the family only became aware of the loans and the impending auction after the death of their father. He asserted that the documents used by the bank were fraudulent and that the deceased did not have the education needed to fully understand the loan agreements. He proposed that the bank should seek recovery through the relevant credit life insurance.
10. The Defendant's witness (DW1), a banker from the Defendant's Meru branch, testified that the bank followed proper procedures and obtained the spousal consent from advocates who it had instructed to prepare the charge documents. He acknowledged discrepancies in the ID number and signature in Lucy Mbijiwe's purported spousal consent and admitted that some notices were addressed to Mercy Gacheru.
11. He explained that normally, spousal consents are signed by a third-party lawyer acting on behalf of the bank. The bank instructs an advocate from its panel to prepare the charge and spousal consent, and once completed, the advocate must ensure the spousal consent is executed. He maintained that the deceased borrower's spouse gave spousal consent and that the completed documents were submitted to the bank. Regarding the insurance clause, he testified that if the borrower dies, the Credit Life Insurance will cover the entire loan if the loan is performing. In this instance, he said, the borrower defaulted at the time of his death, so the bank could not invoke credit life insurance.
12. During cross-examination, he stated that the bank provided the correct instructions to the advocate, and any mistakes in the documents were not the bank's responsibility. He indicated that there were five charged parcels in total, but two did not have spousal consent because the bank only instructs the advocate to obtain spousal consent for three parcels. He admitted that Lucy Mbijiwe's signature and National Identification number on the spousal consent did not match what appeared on her Identification Card. He also admitted that the Defendant did not have any evidence that Mercy Gacheru was married to J.K Mbijiwe and also that the Defendant had not brought the said Mercy Gacheru as a witness.
13. He testified that the bank sent a demand notice dated 9th January 2019, to the deceased borrower, but there was no evidence that the spouse was notified in writing. Regarding the letter dated 18th September 2019, he stated that the spouse still had not been notified or served. Further, concerning the notice dated 25th January 2020, DW1 admitted that the spouse had not been served either. Regarding the notice dated 3rd June 2020, he mentioned that it was copied to Mercy Gacheru, not to Lucy Kirumba M'Mbijiwe. He explained that the notices dated 18th September 2019, 29th January 2020, and 3rd June 2020, were copied to Lucy Kirumba M'Mbijiwe, but they were sent to different post office addresses.
14. Additionally, he stated that the bank had secured two motor vehicles, KTCB 1X9R and KBY 4X9J, which were sold through auction/private sale. Upon repossession, the vehicles were retained and stored at Autospin Garage; however, the auctioneer did not advertise the sale since it was a private transaction conducted by the borrower. He stated that he had no evidence that the deceased borrower sold the said motor vehicles by way of private sale.
15. DW1 stated in cross-examination that spousal consent is a requirement that came into effect in 2013, and it was not a requirement prior to that. He noted that some of the charges were made in 2011, 2012, and one in 2015. He reported that at the time of filing this case, the loan balance, including interest, was Kshs 6,445,853.75.75.
16. On re-examination, he stated that all charges were registered at the Land Registrar's Office at the various years applicable and that all notices and demands were served on the borrower before the Defendant instructed the auctioneer.



Parties Written Submissions

17. The Plaintiff filed his written submissions dated 29th November 2024 and submitted that the suit properties were matrimonial property and that spousal consent was a statutory requirement under the *Land Act* and *Matrimonial Property Act*. He argued that his mother, the only legal wife of the deceased, did not give any such consent, and her alleged signatures and ID number were forgeries. He also pointed to the failure by the Defendant to comply with an order requiring the production of original charge documents for forensic analysis. The Plaintiff further submitted that the sale of the properties would deprive his family of their home and livelihood and that the Defendant should seek recovery from Credit Life Insurance, which it failed to pursue. He maintained that the burden to establish valid consents and proper notice service lay on the Defendant.
18. The Plaintiff filed Further Submissions dated 14th January 2025, arguing that he never admitted that Meru culture endorses polygamy. He noted that the Defendant failed to prove that Mercy Gacheru was a wife of the deceased. Additionally, he mentioned that he could not present a handwriting expert in court because the Defendant refused to comply with orders to produce the original charge documents for forensic examination.
19. The Defendant filed its written submissions on 7th January 2025. In these submissions, the Defendant maintained that all proper procedures were followed and that the deceased's spouses, Lucy Mbijiwe and Mercy Gacheru, had executed valid spousal consents. The Defendant contended that the Plaintiff failed to provide expert evidence to substantiate claims of forgery and argued that the bank could not reasonably be expected to investigate the authenticity of a spouse presented by a borrower. Additionally, the Defendant stated that the deceased was in default at the time of his death, which rendered the Credit Life Insurance inapplicable.

Analysis and Determination

20. Having considered the Amended Plaint, the Amended Statement of Defence, the evidence presented by the parties, and their written submissions, the issues that arise for determination are as follows:
 1. Whether the charge instruments registered against the suit land were invalid for lack of valid spousal consent.
 2. Whether the Defendant complied with statutory notice requirements.
 3. Whether the Defendant could enforce its statutory power of sale.
 4. Whether the Defendant acted reasonably in its handling of Insurance cover alleged in this matter.

Validity of the Charge and Spousal Consent

21. The Plaintiff produced a marriage certificate establishing Lucy Kirumba Mbijiwe as the lawful wife of the deceased. Her oral testimony, consistent and corroborated, was that she never gave spousal consent and did not sign any of the affidavits of consent relied upon by the Defendant.
22. However, the charge documents reflect spousal consents allegedly signed by Lucy Mbijiwe and another woman, Mercy Gacheru.
23. The requirement that consent of the spouse be provided before matrimonial property may be charged was not provided for under the *Land Act* of 2012, which came into effect on 2 May 2012. Before that no law required spousal consent before a charge could be created, and spousal rights were not recognized



as overriding interests. The Court of Appeal addressed this point in the case of Stella Mokeira Matara vs Thaddeus Mose Mangenya & Another Court of Appeal at Kisumu, Civil Appeal No. 63 of 2014 (2016) eKLR. In the case, the plaintiff, who was the wife of the first defendant, filed a suit to prevent a sale by the chargee. She argued that the property in question was matrimonial property, and she had not consented to the creation of a charge on it. The trial court (Okong'o, J.) ruled that spousal consent was not a requirement before the enactment of the Land Act of 2012 and decided not to grant an injunction. On appeal by the plaintiff, the Court of Appeal concluded that the trial court had not exercised its discretion incorrectly and therefore dismissed the appeal, without ruling on the question whether section 78(1) of the Land Act applied retrospectively.

24. The Plaintiff pleaded that the suit parcels are matrimonial property where she and her sons reside, carry out farming and carry on business, a position that the Defendant did not dispute. Section 93 of the Land Registration Act provides as follows:

Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the Matrimonial Property Act.’

25. The Matrimonial Property Act came into effect on 16/1/2014. Prior to the implementation of this Act, the legal position was as held by the Court of Appeal in Mugo Muiru Investments Limited v. E.W.B & 2 Others [2017] eKLR:

“Even before the Land Registration Act came into force on 2nd May 2012, the equitable beneficial interest of a spouse in a matrimonial home occupied by such spouse was an overriding interest and therefore transfer of the title to the matrimonial home was subject to such overriding interest. It is immaterial that there was not at the time statutory provision expressly declaring it an overriding interest. Under common law, overriding interests are interests to which a registered title is subject, even though they do not appear in the register. They are binding both on the registered proprietor and on a person who acquires an interest in the property”.

26. The Defendant argued that some of the charges were executed before the law came into effect and, therefore, the Land Act cannot be applied retroactively. However, it is noted that the three charges were executed after 2nd May 2012, when the Land Act became effective and included spousal consents. As a result, the issue of the Act being applied retroactively does not arise.
27. The Defendant did not dispute the presence of multiple purported spouses giving consent over the same borrower's properties. In fact, the Defendant indicated that the deceased borrower introduced two spouses to them. This should have raised concerns, especially because PW1 produced a marriage certificate. The bank's failure to investigate this inconsistency suggests a lack of due diligence. It is not enough for a borrower to present a woman claiming to be a wife. The bank must reasonably verify that the person is, in fact, the legal spouse by requirement of marriage certificate, affidavit of marriage other evidence of marriage. In this case, the bank neither sought nor obtained confirmation of marital status, nor did it reconcile inconsistent identities in the consents.
28. Another issue raised by the Plaintiff was that the ID number and signature on the affidavit she allegedly signed did not belong to her, and that the signature was forged. The Defendant acknowledged that the ID number and signature on Lucy's consent form differ from those on her National Identification Card.



29. The discrepancy in the ID number and signature on the alleged consent by Lucy Mbijiwe is not a minor clerical issue — it strikes at the core of the document’s authenticity. The Defendant’s witness admitted these inconsistencies, and the bank failed to comply with a court order to produce the original documents for forensic analysis. This failure to submit the documents for scrutiny creates an adverse inference. Forgery, once raised and supported by such irregularities and corroborated testimony, shifts the evidentiary burden in the circumstances of this case where the documents indicating alleged forgery were in possession of the defendant. In the absence of a credible explanation, and considering the active steps taken by the Plaintiff to initiate criminal investigations, The Court is satisfied that the consent documents were indeed forgeries.
30. This Court must then address whether the spousal consent given when taking out the charges invalidates those respective charges entirely.
31. The Kenyan courts have repeatedly affirmed that spousal consent is a substantive legal requirement. In *Springboard Capital Limited v Njenga & another (Civil Appeal 14 of 2024)* [2024] KEHC 7013 (KLR) (14 June 2024) (Judgment), the Court (Muchemi, J.) observed:
- “The evidence of the 1st respondent was supported by that of PW2, the document examiner to the effect that he never executed the loan application form, the charge or the application for consent. The signatures of the 1st respondent were forged in all the relevant documents as confirmed by the document examiner. As such, the said loan transaction between the 2nd respondent and the appellant was indeed fraudulent.”
32. Similarly, in *Margaret Muthoni Njoroge v Housing Finance Company Limited & Another* [2020] eKLR, the Court reiterated that:
- “The failure to obtain valid spousal consent prior to charging matrimonial property is not a mere procedural lapse but a fatal defect that renders the charge void.”
33. However, in the absence of determination as to retrospectivity of the requirement, an exception for pre-2012 charges. In the instant case, the contested charges were executed after the *Land Act* came into force. Consequently, the legal requirement for valid spousal consent applied fully. The Defendant had evidential burden on the question of the spousal consent to show that the deceased spouse(s) had given consent to the charge. The forgery Lucy Mbijiwe’s signature; the failure to prove that Mercy Gacheru was the Deceased’s spouse and the lack of proper identity verification by the bank of the persons purportedly granting the consents must be taken to invalidate the charges in question.

Statutory Notice Requirement

34. The Defendant claims to have served the required statutory notices pursuant to Section 90 and Section 96 of the *Land Act*, 2012, upon the borrower. However, scrutiny of the evidence reveals substantial procedural defaults.
35. Section 96 of the *Land Act* sets out the notices required to be issued as follows :-
- “96. Chargee’s power of sale
- (1) Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90(1), a chargee may exercise the power to sell the charged land.



- (2) Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.
- (3) A copy of the notice to sell served in accordance with subsection (2) shall be served on—
 - (a) the Commission, if the charged land is public land;
 - (b) the holder of the land out of which the lease has been granted, if the charged land is a lease;
 - (c) a spouse of the chargor who had given the consent;
 - (e) any lessee and sublessee of the charged land or of any buildings on the charged land;
 - (f) any person who is a co-owner with the chargor;
 - (g) any other chargee of money secured by a charge on the charged land of whom the chargee proposing to exercise the power of sale has actual notice;
 - (h) any guarantor of the money advanced under the charge;
 - (i) any other person known to have a right to enter on and use the land or the natural resources in, on, or under the charged land by affixing a notice at the property; and
 - (j) any other persons as may be prescribed by regulations, and shall be posted in a prominent place at or as near as may be to the charged land. A chargee who has withdrawn from possession of charged land may not again enter into possession of that land, otherwise than by complying with the provisions of section 94 if the chargor is in a fresh default under the charge.

36. In the present case, the statutory notices were not served on Lucy Kirumba Mbijiwe, who was the only lawful spouse and who, as found earlier, had not validly given her consent. Instead, the Defendant's notices were variously addressed to the deceased borrower and to one Mercy Gacheru, whose status as spouse has not been established.

37. Moreover, even in instances where notices were purportedly addressed to Lucy, they were sent to incorrect or unverifiable addresses. DW1 admitted in cross-examination that no direct service was effected on Lucy, and no acknowledgement or proof of service was produced.

38. As the Court of Appeal held in *Nyangilo Ochieng & Another v Kenya Commercial Bank Limited* [1996] eKLR, held:

“It is not sufficient for the chargee to merely aver that statutory notices were sent. The chargee must show that the notices were properly served.”



39. Accordingly, the Court finds that the Defendant failed to comply with Section 96 of the Land Act, thereby rendering any intended exercise of the statutory power of sale premature, unlawful and void for want of proper notice.

Defendant's Reliance on Credit Life Insurance

40. The deceased, Judah K. M'bijiwe M'Rukaria, and the Defendant entered into a subsequent agreement. They agreed to modify the terms outlined in the offer letter dated 31st March 2017, to include several additional conditions. Of particular significance to this case is the insurance clause, which stated: "the borrower hereby undertakes to insure the security (ies) pledged under clause 3 of this facility in the joint names of the Lender and the borrower against all peril, loss of damage by fire, accident, third party risks and riot risks (whichever applicable) with an insurance company licensed under the Insurance Act and the borrower further undertakes to pay punctually the premiums and all the monies payable in respect of such insurance and to constantly ensure the lender is named in such policy as first loss payee at all the times when this facility shall become outstanding. The borrower has a right to select an insurance underwriter and/or insurance broker from a list of insurance underwriters or brokers licensed by the Insurance Regulatory Authority which shall be subject to the lenders approval. The borrower further has an option to forfeit his/her/their rights under schedule A of this facility on execution of schedule A of this facility letter." They listed the securities as being the existing charges over the suit land and over motor vehicles registration numbers KTCB 1X9R & KBY 4X9J.
41. The agreement dated 31st March 2017 between the defendant and the deceased states that the total credit life insurance was assessed at Kshs. 187,703. The Court has reviewed all the documents submitted by the parties, and has not found any policy document. The lack of policy documents makes it difficult to determine the specific terms agreed upon by both parties. This raises several important questions. Was the payment of Kshs.187,703 a one-time transaction? When and how was the deceased supposed to pay the premiums? Were the lists of insurance underwriters provided to the borrower as agreed? Did the borrower select any underwriters? Addressing these questions is vital for the court to establish whether both the deceased and the defendant were insured at the time of the deceased's passing. Furthermore, it will clarify whether the Defendant has a stronger claim to recover funds from the deceased's estate or directly from the insurance company. Without the necessary documentation, finding these answers becomes impossible.
42. The Plaintiff urged that the Defendant should have sought to recover the loan amount from the applicable insurance cover. Defendant argued that the deceased's loan was not eligible for insurance payment because the deceased borrower was in default at the time of death.
43. While the Plaintiff shouldered the general burden of proof under section 107 and 108 of the Evidence Act on the existence of an insurance policy cover over the loan amount, the Defendant had under section 109 of the Act the burden of Proof of the particular fact that the insurance money was unrecoverable on account of the default of the borrower. Therefore, the burden of proving both the terms of the insurance policy and the borrower's default status rests with the Defendant. In this case, both Plaintiff and the Defendant respectively failed to produce a copy of the applicable policy document; to demonstrate that a claim was submitted to the insurer and evidence of a formal denial of the claim.
44. A Credit Life Insurance is designed to repay outstanding loan obligations in case of a borrower's death, where the loan is secured. However, the liability under such policies must be shown through proper documentation, including a copy of the insurance contract and clear records showing the default status



of the borrower. DW1 testified that the loan was in default, and the recovery under the insurance policy was not possible.

45. The Court is aware of decision of the Court of Appeal in *Housing Finance Company Ltd v Mary Wambui Muturi* (2018) eKLR on insurance cover over loan amount and arrears thereof, that:-

“We now advert to the vexed issue as to whether the insurance cover is meant to cover loan arrears. In the *Nizar Virani T/a Kisumu Beach Resort vs Phoenix of East Africa Assurance Company Limited*, Civil Appeal No. 88 of 2002, [2004] KLR 269 this Court expressed the view that there is a general rule to the effect that a policy of Insurance remains valid once issued and liability attaches despite non-payment of a premium due. The court, however, went on to state:-

The only qualification to that general proposition of law is that the policy itself may provide that the failure to pay the premium would avoid liability for the insurer or the failure to pay the premium amounts in the circumstances to a repudiation of the contract.”

46. Without having seen the Insurance Policy in this case, which, in any event from the agreement that “the borrower hereby undertakes to insure the security (ies) pledged under clause 3 of this facility in the joint names of the Lender and the borrower” appeared to be an insurance over the securities or the charged properties rather than on the loan amount and or arrears thereof, the Court is not able to find that the Defendant failed diligently or transparently to act towards the recovery under the insurance Policy.

Conclusion

47. In conclusion, the Court finds that the spousal consents relied upon by the Defendant were not validly executed; and the charges created over the suit parcels are, consequently, null and void. The Defendant has failed to comply with statutory notice requirements under the *Land Act* 2012. The Court does not make any finding as to the validity of, or recoverability of the loan amounts under, any relevant insurance. The advancement of money by the Bank to the Deceased borrower/original Plaintiff is not denied, and, therefore, in the interests of justice each party should bear its own costs.

Orders

48. Accordingly, for the reasons set out above, the Court finds merit in the Plaintiff’s suit and makes the following final orders:
1. A declaration is hereby issued that the charge documents registered against land parcels L.R Ngusishi Settlement Scheme/319, Ex-Lewa Settlement Scheme/745, 703, 574, and 758 are invalid, null and void.
 2. A permanent injunction is granted restraining the Defendant from selling or otherwise disposing of the said parcels pursuant to the impugned charges.
49. There shall be no order as to costs.

Order accordingly.

DATED AND DELIVERED THIS 15TH DAY OF MAY, 2025.

EDWARD M. MURIITHI

JUDGE



Appearances:

Mr. Sandi for Plaintiff.

Ms. Anguche for the Respondent.

