



African Banking Corporation Limited & another v Maina & another (Civil Appeal 1B of 2022) [2023] KEHC 19937 (KLR) (14 July 2023) (Judgment)

Neutral citation: [2023] KEHC 19937 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 1B OF 2022
JRA WANANDA, J
JULY 14, 2023**

BETWEEN

AFRICAN BANKING CORPORATION LIMITED 1ST APPELLANT

MARGARET ANINDO T/A IGARE AUCTIONEERS 2ND APPELLANT

AND

FAITH WANGARE MAINA 1ST RESPONDENT

ROBERT MURIUKI 2ND RESPONDENT

(Arising from the Ruling delivered on 4/10/2019 in Eldoret Chief Magistrate's Court Environment & Land Case No. 249 of 2018.)

JUDGMENT

1. This Appeal arises from the Ruling delivered on 4/10/2019 in Eldoret Chief Magistrate's Court Environment & Land Case No. 249 of 2018. The Ruling issued an interlocutory injunction to bar or restrain the Appellant from exercising its statutory power of sale by auctioning the 1st Respondent's property.
2. I took over this matter after the parties had already taken directions and the Appellant had already filed its written Submissions. The parties moved me to take over from my predecessor and proceed to receive Submissions and write the Ruling. I accepted the challenge. However, when I began to "write" the Judgment, I noticed that the Appeal emanates from the Chief Magistrate's Court sitting as a Land Court. Ordinarily, therefore, the Appeal would have been filed at the Environment & Land Court. None of the parties addressed me on this issue of jurisdiction. However, upon further perusal of the file, I noted that indeed the Appeal had initially been filed before the Environment & Land Court and it is that Court that transferred the Appeal to this present Court for hearing and determination. I note that the basis of the transfer was that the dispute was commercial in nature. Since the parties seem to



be in unison that this Court proceeds to determine the Appeal, and since the dispute is basically over the exercise of a Lender's statutory power to sale vis a vis a Chargor's right to redemption of a security, I confirm my jurisdiction and shall proceed to determine it on merits (see *Co-operative Bank of Kenya Ltd and Patrick Kangethe Njuguna and five Others* (2017) eKLR.

3. The 1st Respondent filed the said suit at the Chief Magistrates' Court on 4/10/2018 and together with the Plaintiff, she also filed the Application the subject of this Appeal, namely, the Notice of Motion dated 4/10/2018. The Application made the following prayers:
 - i. [.....] Spent
 - ii. [.....] Spent
 - iii. That this Court be pleased to grant a temporary injunction restraining the defendant/respondents, their servants, agents and/or its officers from are restrained from selling, alienating, transferring and or doing any other thing to dispose of the interest and property known as Eldoret Municipality/Block 14/284 in purported exercise of the chargee's power of sale pending the hearing and determination of this suit.
 - iv. That costs of this application be provided for.
4. The Application was filed through Messrs G. O. Obudho & Co. Advocates and is stated to be brought under Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Order 40 Rules 1 and 2 of the *Civil Procedure Rules*.
5. The grounds of the Application were that the 1st Appellant is the chargee of the parcel of land known as Eldoret Municipality/Block 14/284 (suit property), the 1st Respondent is the only spouse and wife of the 2nd Respondent, spousal consent was not obtained as provided by the *Land Registration Act*, the charge is null and void for want of spousal consent, the 1st Respondent has immense interest on the suit property, any lapse and/or deficiency of notice renders the intended sale irregular, illegal, null and void, the 1st Respondent stands to suffer irreparable loss and/or damages should the Appellants proceed with the intended sale, the Application has been brought timeously, promptly and without undue delay, the Application tilts in favour of the injunctive reliefs sought.

1st Respondent's Supporting Affidavit

6. The Application was supported by the Affidavit of the 1st Respondent. She deponed that she is the wife of the 2nd Respondent (Robert Muriuki) who is the registered owner of the suit property, she was married to the 2nd Respondent under Kikuyu customary law, they have two issues out of the marriage, she financially contributed to the purchase of the suit property and therefore the same forms part of their matrimonial property, the Certificate of Lease was issued to the deceased and he has remained the custodian of the same ever since, she only came to know that the 2nd Respondent deposited the certificate of lease for an advancement of a loan on behalf of Landmark Concepts Company Limited, she has no knowledge of a spousal consent, she ought to have been involved since spousal consent is mandatory as provided by law, the 1st Appellant did not follow due process and diligence hence the charge is null and void, on 3/10/2018 is when she came to learn of the above when friends called and told her of the sale of the suit property land as had appeared in a newspaper advertisement, the sale was fixed for 8/10/2018, sale of the suit property which is the matrimonial property shall highly prejudice her interest and that of her children who may be rendered destitute, upon realizing the sale she approached the 1st Appellant to stop the same to no avail, she does market gardening on the suit land and sale thereof shall highly prejudice her family.



2nd Respondent's Affidavit

7. The 2nd Respondent (husband to the 1st Respondent) swore his own Affidavit filed in Court on 4/12/2018 through Messrs Onkangi & Onkangi & Associates Advocates. He deponed that it is not true that he had colluded with the 1st Respondent, at the time of entering into the loan agreement, it was not brought to his attention that that he ought to have all his spouses sign as well, the issue that had been raised is want of spousal consent which is a fundamental question and should not be disregarded, processing of the charge was solely undertaken by the 1st Appellant and it was its duty to comply with all aspects of law, it is in the interest of justice that the 1st Respondent is heard and orders sought granted at this stage, it would be highly prejudicial should the 1st Appellant proceed with the sale before the issues raised are heard and determined.

Appellants' Replying Affidavit

8. The Appellant opposed the Application and through Messrs Mulondo Oundo Muriuki & Co. Advocates, filed the Replying Affidavit sworn by one Sharon Mukami who described herself as a Legal Officer at the 1st Appellant bank. She deponed that the Application is an afterthought concocted by the 1st and 2nd Respondents to scuttle the Appellant's recovery efforts and to defeat the Ruling of the Court in Eldoret CM E&L Suit No. 63 of 2018 – Landmark Concepts Limited vs African Banking Corporation Ltd where an Application seeking similar orders was dismissed after adjudication on merits on 6/09/2018, the sole issue raised in the instant Application to support the prayer for injunctive relief is alleged want of spousal consent before registration of the charge, the allegation lacks merit as the 1st Respondent's contention that she is the sole spouse of the 2nd Respondent is not backed by any proof, the Affidavit produced is not proof of marriage as the *Marriage Act* is instructive that evidence of marriage can only be by a Certificate or entry in a marriage register, as a matter of fact, spousal consent was indeed obtained from the 2nd Respondent's wife, Janeffer Wairimu Muriuki, it is therefore in the interest of justice that the Appellant be allowed to actualize its statutory remedy of sale.

Ruling of the Magistrate's Court

9. After hearing the matter, the trial Magistrate delivered her Ruling on 4/10/2019. She allowed the Application and thus granted the injunction restraining the Appellants from selling, alienating or transferring the suit property pending hearing and determination of the suit.

Appeal

10. Being dissatisfied with the decision, the Appellant instituted this Appeal vide the Memorandum of Appeal filed on 1/11/2019. The grounds thereof are as follows;
- i. The learned trial magistrate erred in law and in fact in finding that that the 1st Respondent had demonstrated that her spousal consent was required to create the charge over the suit property without proof of her being married to the chargor.
 - ii. The the learned trial Magistrate erred in law and in fact in finding that the 1st Respondent had established a *prima facie* case without evidence of existence of marriage between the 1st Respondent and the 3rd Respondent.
 - iii. The learned trial Magistrate erred in law and in fact in considering the second and third limbs of the rule in *Giella vs Cassman Brown* when the first limb had not been satisfied.



- iv. The learned trial Magistrate erred in law and in fact in failing to find that the 1st Respondent was forum shopping and the Application and suit were an abuse of Court process meant to defeat the Ruling in Eldoret CM EL 63 of 2018.
 - v. The learned trial Magistrate erred in allowing the Notice of Motion Application dated 4/10/2018 as prayed.
11. Pursuant to the directions given, the Appeal was canvassed by way of written submissions. The Appellant filed its Submissions on 19/09/2022 while the 2nd Respondent filed his Submissions on 5/05/2023.
 12. On the part of the 1st Respondent, despite being given an opportunity on several occasions, no Submissions were filed on her behalf. When it was brought to my attention that her Advocates may have “closed shop”, I directed the Appellant to serve her directly with the Court directions via Registered Post since it was alleged that her physical address was unknown to the Appellant. Subsequently, an Affidavit Service was submitted to the Court demonstrating that the Registered Post service had now been effected. Since still no Submissions were filed on behalf of the 1st Respondent, I had no choice but to proceed to “write” this Judgment without receiving her Submissions.

Appellant’s Submissions

13. Counsel for the Appellant submitted that the first finding of the trial Court was that the 1st Respondent had demonstrated that the 1st Appellant had violated her rights by failing to obtain her consent, in other words, the trial Court was convinced that the 1st Respondent had led a *prima facie* case that she was the spouse to the 2nd Respondent and that her consent was required to charge the suit property. She cited the case of *Mrao Limited v First American Bank of Kenya Limited & 2 Others* [2003] eKLR and submitted that the 1st Respondent annexed an Affidavit of Marriage which, without more, could not form the basis of *prima facie* proof of marriage. He cited Section 59 of the *Marriage Act* and submitted that the Section is an exhaustive regime of proof of marriage and none of the items listed therein were adduced by the Respondents, the *Marriage Act* came into force on 20/05/2014 and the transitional clauses of the Act speak to regularization of existing customary marriages at Section 96(2) upon lapse of 3 years from 20/05/2014, the existence of a marriage can only be proved as per the requirements of Section 59 of the *Marriage Act* and an Affidavit is not one of the ways of proving marriage.
14. Counsel then cited the case of *Elyjoy Kagani v Bank of Africa (K) Limited & 3 Others* [2017] eKLR and submitted that the trial Court erred in finding that the 1st Respondent had proved, *prima facie*, that she was married to the 2nd Respondent and that her consent was necessary to register the charge. He further submitted that the 1st Respondent also claimed that she has two issues with the 2nd Respondent to buttress her claim of marriage, this allegation was not supported by any *prima facie* evidence as the Certificates of Birth were not produced, in any case, having issues with someone is not proof of marriage to them. He again cited the case of *Elyjoy Kagani* (*supra*) and referred to the case of *EWN vs EMK HCCC No. 33 of 2010* which was cited therein.
15. He further submitted that more fundamentally, the 2nd Respondent swore an Affidavit where he deponed that he is married to one Janeffer Wairimu Muriuki under customary law and therefore the charged property forms part of their matrimonial property, the 2nd Respondent also deponed that he obtained the consent of the disclosed spouse or family or community members in order to charge the property, in the Affidavit there is no mention of any other spouse whom the 2nd Respondent now wants this Court to believe existed. He added that the spouse mentioned in the 2nd Respondent’s Affidavit Janeffer Wairimu Muriuki swore an Affidavit in which she gave her consent to the creation



of the charge, the collective action of the Respondents was to defeat the 1st Appellant's right of sale by summoning all tricks including inventing spouses to attempt to invalidate a charge having fallen in arrears and the sale being nigh. Counsel again cited the case of *Elyjoy Kageni* (*supra*) in which the case of *Stella Mokeira Matara versus Thadeus Mose Mangenya and Another* – ELC No. 209 of 2012 (Kisii) HCCC No. 33 of 2010 was cited and submitted that the 1st Respondent did not allude to the fact that her matrimonial home was situated on the suit property so as to bring it within the meaning of Section 2 of the Matrimonial Properties Act, for this reason alone, this Appeal is merited. Counsel submitted further that absent a *prima facie* case, an injunction cannot be granted and there is no need to consider the second and third limbs in *Giella* case. He cited the Court of Appeal case of *Nguruman Limited v Jan Bonde & 2 Others* [2014] eKLR.

16. Counsel also submitted that the trial Magistrate failed to consider the Appellant's submission that there was an endeavour at "forum shopping", the 2nd Respondent filed a similar Application in Eldoret CM E&L Suit No. 63 of 2018 – Landmark Concepts Company Limited vs African Banking Corporation Ltd seeking to stop the 1st Appellant from selling the property which Application was dismissed on 6/09/2018, the property had already been advertised for sale before the filing of the said suit, if it was indeed true that the 1st Respondent was married to the 2nd Respondent and that the suit land is their matrimonial property, then she knew of the first scheduled sale and also about the filing of Eldoret CM E&L Suit No. 63 of 2018, the fact that the 1st Respondent waited until the said Application in Eldoret CM E&L Suit No. 63 of 2018 was dismissed for her to file the Application the subject of this Appeal with the support of the 2nd Respondent is a clear testimony that the Respondents were "forum shopping" and working in cahoots to defeat the Court's Ruling in Eldoret CM E&L Suit No. 63 of 2018, the suit is a blatant abuse of Court process. He then cited the case of *Joyce Minayo Keya v Keya Kigaga & 3 Others* [2017] eKLR, if indeed the 1st Respondent lived on the charge property then she ought to have filed an Application when the property was first advertised for sale, no explanation was proffered before the trial Magistrate for the belated filing of the Application which was evidently an afterthought.

2nd Respondent's Submissions

17. On his part, the 2nd Respondent's Counsel submitted that the Court did not err in holding that a *prima facie* case had been established by the 1st Respondent, the trial Court was guided by the principles set out in the case of *Giella Cassman Brown & Co. Ltd* (1972) E.A. 358, the Court held that status quo prevailing needs to be maintained by way of interlocutory injunction pending further evidence to be adduced at the hearing and determination of the main suit, the 1st Respondent demonstrated that her rights were violated by dint of failure to obtain her spousal consent as required by Sections 28 and 93 of the *Land Registration Act* No. 3 of 2012, the 2nd Respondent was not informed of the legal requirement of a spousal consent before charging the parcel of land in question, the Appellants are disputing the customary law marriage between the Respondents whilst the Appellant created the charge based on customary law marriage, the 1st Respondent averred that she was in occupancy of the suit land, undertook market gardening, resided with two issues out of the marriage and that she contributed in the purchase of the suit land, these are weighty issues which need to be heard and determined since they meet the two limbs of the principles as set out in *Giella vs Cassman Brown* (1973) EA 358, this is what the Ruling delivered by the trial Court intended in that pertinent issues surrounding the suit land forming part of the matrimonial property need to be addressed at the hearing of the main suit by according each of the parties a chance to prosecute their case, averments made by the 1st Respondent fall under the legal requirement of Section 2 of the *Matrimonial Properties Act*. He cited the case of *Julius Mainye Anyenga v Eco Bank Limited*.



18. Counsel submitted further that the 1st Respondent stood to be prejudiced should the auction have proceeded thus the filing of her Application to halt the intended auction, the 1st Respondent demonstrated the eminent danger that she would suffer irreparably by dint of loss of her source of income and matrimonial home for her family which would have rendered her family destitute, this is a matter that needs also to be heard and determined by the trial Court to conclusion thus the present Appeal is premature and would render the finding on this matter nugatory. He cited the case of *Sewankabo Dickson v Ziwa Abby* HTC-00-CC MA 0178/2005 and submitted that the trial Court factored the loss that would befall the 1st Respondent by applying the quantitative test and thus offered to stay the status quo till the hearing and determination of the 1st Respondent's main suit, the 1st Respondent is entitled to equal protection and benefit of the law.
19. Counsel further submitted that 1st Respondent's Application was without delay, the suit land is matrimonial property and the 1st Respondent's consent was required as was held by the trial Court, the status on the marriage as between the Respondents has not sufficiently been disputed. He cited the case of *Joseis Wanjiru alias Joseis Wairimu v Kabui Ndegwa Kabui & Another* (2014) eKLR and submitted that the existence of a marriage is a question of fact, Section 3(2) of the *Judicature Act* provides for the Application of customary law in certain circumstances, presumption of marriage is not only a presumption of fact but it is also a concept that has its roots in Section 119 of the *Evidence Act*, the Appellant's basis of challenging the marriage is only on point of law yet a *prima facie* proof of marriage is premised on grounds of facts and law, the Appellants have failed to discharge their duty of proof as required by virtue of Section 107 of the *Evidence Act*.
20. Regarding the allegation that the 1st Respondent was "forum shopping" in light of the Ruling made in Eldoret CM EL No. 63 of 2018, Counsel averred that the Appellants did not adduce evidence to show a nexus between the 1st Respondent and the proceedings in the said suit, the 2nd Respondent disputes the allegation that he was working in conjunction with the 1st Respondent to defeat the Ruling in the said suit, no sufficient evidence has been adduced thus it only amounts to general bare allegations.

Analysis & Determination

21. The duty of an appellate Court was set out in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, where the Court stated as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
22. Further, an appellate Court will only interfere with the decision of the lower Court if the same is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkuba v Nyamuro* [1983] LLR at 403, where it was stated as follows:

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.
23. It is also evident that this Appeal relates to the exercise of judicial discretion, particularly, whether the trial Magistrate properly exercised her discretion in granting the interim injunction. The circumstances under which this Court can interfere with the exercise of such judicial discretion were articulated by the Court of Appeal in the case of *Mbogo & Another vs. Shah* [1968] EA 93 where it was stated that



before an Appellate Court can interfere with the exercise of discretion, it must be satisfied that the trial Court misdirected itself in some matter and as a result arrived at a wrong decision; or that it was manifest from the case as a whole that the trial Court Judge was clearly wrong in the exercise of his discretion and an injustice has arisen.

24. Upon considering the Memorandum of Appeal, the Record and the parties' submissions, I find the following to be the issues that arise for determination herein:
- i. Whether the 1st Respondent established a *prima facie* case that her spousal consent was required to create the charge over the suit property.
 - ii. Whether therefore, the trial Court should have granted an interlocutory injunction.
25. I now proceed to analyze and answer the issues.

Whether the 1st Respondent established a *prima facie* case that her spousal consent was required to create the charge over the suit property

26. The law governing the grant or refusal of interlocutory injunctions is set out under Order 40(1) (a) and (b) of the [Civil Procedure Rules 2010](#) which provides that:

“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.”

27. The conditions for consideration in applications for injunctions were settled in the celebrated case of [Giella v Cassman Brown & Company Limited](#) (1973) E A 358, where the Court expressed itself on the conditions that a party must satisfy for the Court to grant an interlocutory injunction as follows:

“Firstly, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

28. The test applicable in cases of injunction was also considered in the case of [American Cyanamid Co. v Ethicon Limited](#) (1975) AC 135 where three elements were noted to be of great importance, namely that:

- i. There must be a serious/fair issue to be tried,
- ii. Damages are not an adequate remedy,
- iii. The balance of convenience lies in favour of granting or refusing the application.



29. It is also settled that in interim applications, such as in this case, the Court should avoid making final determinations on matters of fact 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.”

30. There are various statutory provisions which require that a spousal consent be obtained when “matrimonial home” is intended to be used as security for a loan.

31. Section 79(3) of the *Land Act* provides as follows:

(3) 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.

32. Similarly, Section 12(5) of the *Matrimonial Property Act* provides as follows:

“(5) The matrimonial home shall not be mortgaged or leased without the written and informed consent of both spouses.”

33. Further, Section 93(3) and 4 of the *Land Registration Act* provides as follows:

(3) Where a spouse who holds land or a dwelling house in his or her name individually undertakes a disposition of that land or dwelling house—

(a) the lender shall, if that disposition is a charge, be under a duty to inquire of the borrower on whether the spouse has or spouses have, as the case may be, have consented to that charge; or

(b) the assignee or transferee shall, if that disposition is an assignment or a transfer of land, be under a duty to inquire of the assignor or transferor on whether the spouse or spouses have consented to that assignment.

(4) If the spouse undertaking the disposition deliberately misleads the lender or, the assignee or transferee by the answers to the inquiries made in accordance with subsection (3)(a) or (3)(b), the disposition shall be void at the option of the spouse or spouses who have not consented to the disposition.”

34. The Appellants do not dispute that to validate the charge, a Spousal Consent was required. Indeed, there is a Spousal Consent attached to it. However, the same is given by one Janneffer Wairimu Muriuki who describes herself as the 2nd Respondent’s spouse”. There is also an Affidavit attached to the Charge and sworn by the 2nd Respondent in which deponed that he is married to the said Janneffer Wairimu Muriuki under customary law and that therefore the suit property forms part of their matrimonial property. He further deponed that “I have obtained the consent of the disclosed spouse or family members or communal members”.



35. The bone of contention is that while the 2nd Respondent disclosed only the said Janneffer Wairimu Muriuki as his “spouse” and obtained her consent, the 1st Respondent, whom the 2nd Respondent never mentioned as being his spouse, subsequently came forward to claim that she was the spouse and that her consent was not obtained.
36. Although as aforesaid, I should not be delving into determining substantive matters on the interlocutory Application, to make a determination whether a *prima facie* case was established, I must examine the matters deponed in the rival Affidavits and apply them to the law.
37. The first thing I note is that despite not disclosing the 1st Respondent as his “spouse” when applying for the loan, the 2nd Respondent promptly supported the 1st Respondent’s Application and in doing so, swore an Affidavit in which he curiously readily supported the allegations that the 1st Respondent’s was his “spouse” and that her consent was not obtained. He does not however convincingly explain why he never disclosed the 1st Respondent as his “spouse” and why it is only now that he has found fit and convenient to make such important disclosure.
38. The 2nd Respondent deponed that

“I am married to the Applicant as my 1st wife and at the time of entering into a guarantee loan agreement, it was not brought to my attention that I ought to have all my spouses sign as well”.

Granted, he may not have been informed that all his spouses were to sign but did he even disclose to the Appellant that he had more than one spouse? He never revealed to the Court whether he did so. My belief is that the 2nd Respondent’s polygamous status, if true, was a crucial fact whose disclosure would have most probably caused the 1st Appellant to give further instructions on the issue since consent by only one spouse, where there is or are more than one spouse, had the potential to void the charge. Non-disclosure that one is polygamous and that the consent of only one wife has been obtained, would therefore, in my view, amount to concealment of a material fact. Since the 2nd Respondent never revealed to the Court whether he disclosed this fact to the 1st Appellant, I treat the contents of his Affidavit as deliberately evasive and vague. I therefore take the Affidavit “with a pinch of salt”.

39. It is also evident that in his Affidavit sworn while applying for the loan, the emphatic language used by the 2nd Respondent was that

“..... I have obtained the consent of the disclosed spouse or family members or community members”.

Notice that he refers to “spouse” in singular form and not “spouses” in plural.

40. On her part, I also note that in her Affidavit before the Court, the 1st Respondent also never disclosed whether she even knew or was familiar with the said Janneffer Wairimu Muriuki, whether it is true that the two of them were in a polygamous marriage with the 2nd Respondent and neither did she make any comments on her view upon the discovery that that the 2nd Respondent never disclosed her (1st Respondent) as his “spouse” and only chose to disclose the said Janneffer Wairimu Muriuki. Her comments on this issue would have assisted the Court to determine whether the 2nd Respondent acted fraudulently, whether there should be suspicion of collusion between the 1st and 2nd Respondents or whether the 2nd Respondent was genuinely an innocent victim of a scheming husband.
41. The Appellant has also alleged that the 1st Respondent’s suit was filed with the sole intention of frustrating the Ruling already delivered in an earlier suit, namely, Eldoret Chief Magistrates’ Court



Civil Suit No. 63 of 2018 – Landmark Concepts Company Limited vs African Banking Corporation Ltd & Margaret Anindo t/a Igare Auctioneers delivered on 6/09/2018.

42. The 1st Respondent did not in her Application, make any mention about this earlier filed suit. On its part, the Appellant did not exhibit copies of the Pleadings filed in the said earlier suit but exhibited a copy of the Ruling. A reading of the Ruling reveals that in that earlier suit, the said Landmark Concepts Company Limited sought an injunction to restrain the Appellant herein from auctioning the same suit property as herein. The basis of the intended auction was the default in repayment of a loan advanced by the Appellant to the said company on the security and/or charge of the suit property. The Charge is stated to be dated 9/04/2014, the amount advanced is stated to have been Kshs 6,950,000/- and the person who swore the Supporting Affidavit in the earlier suit is one Robert Muriuki (apparently the same 2nd Respondent as herein). All indication therefore is that the loan, suit property and charge the subject in the earlier suit are exactly the same as those in issue in the suit herein. More importantly, neither of the Respondents has denied that the loan and charge in both suits are the same. The 2nd Respondent is therefore the central figure in both suits.
43. The grounds of the Application for injunction in the earlier suit were, inter alia, that the said company had fully settled the loan, the Appellant had imposed “hidden charges”, the suit property is the only parcel of land that he (Robert Muriuki) and his family has and that the company was not served with the mandatory statutory notices. The Court in the earlier suit was not satisfied with all the grounds preferred by the company and accordingly dismissed the Application on 6/09/2018.
44. I notice that the date of the dismissal of the Application was only about one month before the 1st Respondent subsequently filed the suit herein on 4/10/2018. The timing and proximity of these dates to each other “raises eyebrows” over the 1st Respondent’s statement alluding that she was not aware of the intended sale of the suit property and the existence of the said suit. Is it really possible that the 1st Respondent was not aware of these facts yet she maintains that she lives in the suit property?
45. Although the 2nd Respondent alleges that no nexus has been demonstrated to show a link as between the 1st Respondent and the proceedings in the said earlier suit and that it has not been demonstrated that he was working in collusion with the 1st Respondent to defeat the Ruling in the said suit, it is not lost on me that in the Charge document, the borrower was named as “Landmark Concepts Company Limited” and the 2nd Respondent was the Chargor and the people who signed the Charge document in their capacity as directors of the borrower company were the 2nd Respondent and the said Janeffer Wairimu Muriuki. Since the 1st and 2nd Respondents allege that they were husband and wife, a clear nexus was therefore established between them. In other words, the 2nd Respondent was convincingly established to have direct relationship with the company as its director on one hand and also direct relationship with the 1st Respondent as his “spouse” on the other hand. In light of the above, the Appellant’s allegation that the Respondents are engaged in “forum shopping” is not far-fetched.
46. The 1st Respondent’s silence on these crucial facts similarly pushes me to infer that, just like the 2nd Respondent, she, too, was being deliberately economical with the truth.
47. I also find it curious that the 1st Respondent – although the successful party in the lower Court – chose not to file any Submissions before this Court to oppose the Appeal challenging her “victory” before the trial Court. Instead, it is the 2nd Respondent who appears to have taken over the arguing of the 1st Respondent’s case. This is apparent from the manner in which the 2nd Respondent’s Submissions have been drafted. Although stated to be drawn for and on behalf of the 2nd Respondent, the Submissions seem to intensively articulate the 1st Respondent’s case more than the 2nd Respondent’s. Reading the same, one would be forgiven to assume that the same was being argued on behalf of the 1st Respondent.



Granted, not much may turn on this, but noting that the Appellant has all along argued that the 1st and 2nd Respondents were engaged in a game of collusion and use of “all tricks” to defeat the Ruling of the Court in the earlier suit, the manner in which the 2nd Respondent’s Submissions have been drafted raises substantial doubt over the bona fides of the Respondents

48. I believe that I have said enough to demonstrate that, in my view, the evidence before the trial Magistrate fell short of the threshold required to establish a finding of the existence of a *prima facie* case by the 1st Respondent. It is therefore the finding of this Court that no *prima facie* was established by the 1st Respondent.

Whether the trial Court should have granted an interlocutory injunction

49. Having found that no *prima facie* case was established, it is no longer necessary for me to consider the second and third limbs of the rule in *Giella vs Cassman Brown*. For this view, I refer to the case of *In Nguruman Limited v Jane Bonde Nielsen and 2 Others* NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR, where the Court of Appeal reiterated as follows:

“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 *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.”

50. Nevertheless, suffice to mention that even on these other limbs, I still rule against the 1st Respondent. She argued that she will be greatly prejudiced by the auction and stands to suffer irreparably as she and her children may be rendered destitute. However, Courts have on numerous occasions expressed their positions regarding mortgages over family/matrimonial property. For instance, in the case of *Maltex Commercial Supplies Limited & Another v Euro Bank Limited (In Liquidation)*, HCCC No. 82 of 2006, Hon. Warsame (as he then was) observed as follows:

“..... Any property whether it is a matrimonial or spiritual house, which is offered as security for loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured”.

51. In the instant suit, the trial Court will be entitled to order the Appellant to compensate the 1st Respondent should she prove her claims and succeed at the trial. In my view, the Appellant is capable of compensating the 1st Respondent for any eventual loss or injury.
52. On the balance of convenience, my view is that the fact that a property is matrimonial in nature or has a sentimental value does not stop it from being auctioned if the requisite procedures have been followed according to the law. When charging such property, the borrower is fully aware of the consequences of default. In the circumstances, I find that the balance of convenience, too, tilts towards allowing the Appellant to proceed with enforcing the default clause in the loan contract, namely, the charge document.
53. For the above reasons, I find that had the learned trial Magistrate applied the correct principles to the matter, she would have found that the 1st Respondent did not satisfy the principles guiding the grant of interlocutory injunctions. I am satisfied that she misdirected herself and as a result arrived at a wrong decision, it is manifest from the case as a whole that she wrongly exercised her discretion thus resulting into an injustice against the Appellant.



Final Orders

54. In the premises, the Appeal succeeds. Accordingly, I issue the following orders:

- i. The Ruling dated and delivered on 4/10/2019 by Hon. N. Wairimu (PM) in Eldoret Chief Magistrate’s Court E&L Suit No. 249 of 2018 is hereby set aside.
- ii. The said Ruling is hereby substituted with an order dismissing the 1st Respondent’s Notice of Motion dated 4/10/2018 filed in the said suit.
- iii. The lower Court file is forthwith to be returned to the lower Court for hearing and determination.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 14TH DAY OF JULY 2023

.....

WANANDA J. R. ANURO

JUDGE

