



**Kamau v Commodities Fund & 2 others (Commercial Case  
3 of 2022) [2023] KEHC 21560 (KLR) (3 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21560 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
COMMERCIAL CASE 3 OF 2022  
PM MULWA, J  
AUGUST 3, 2023  
FORMERLY THIKA ELC NO. 42 OF 2022**

**BETWEEN**

**GRACE WAMBUI KAMAU ..... PLAINTIFF**

**AND**

**COMMODITIES FUND ..... 1<sup>ST</sup> DEFENDANT**

**JAMES KAMAU NGÉTHE ..... 2<sup>ND</sup> DEFENDANT**

**MARGARET LUCY NJERI ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The court has been called upon to determine the Notice of Motion dated April 6, 2022 brought by the plaintiff under Order 40 Rules 1 & 2, Order 51 Rule 1 of the *Civil Procedure Rules*, sections 1A & 3A of the *Civil Procedure Act*. The application seeks a temporary injunction restraining the 1<sup>st</sup> Defendant, its agents, servants, auctioneers or agents from selling, offering for sale or otherwise disposing of or alienating the suit premises known as Kiambaa/Kihara/1205 whether by public auction or private treaty pending the hearing and determination of the application and the suit. And the costs of the application to be in the cause.
2. The application is premised on the grounds that the suit property Kiambaa/Kihara/1205 constitutes the matrimonial home of the Applicant and the 2<sup>nd</sup> respondent which is registered in the name of the 2<sup>nd</sup> respondent; that the 2<sup>nd</sup> respondent executed a charge of Kshs. 14,500,000/= with the 1<sup>st</sup> respondent advanced to the 3<sup>rd</sup> respondent without the written consent of the applicant; that the 1<sup>st</sup> respondent has threatened to sell the matrimonial property. The suit was first filed in the Chief Magistrate's but withdrawn for lack of jurisdiction.



3. The application is supported by the annexed affidavit of Grace Wambui Kamau sworn on April 6, 2022 and whose averments mirror the grounds of the application. She avers that she is the wife of the 2<sup>nd</sup> defendant/respondent and has attached a copy marriage certificate, a copy of the land search dated March 31, 2022, a legal charge in respect to the property and a copy of the statutory notice by Commodities Fund.
4. In opposing the application, the 1<sup>st</sup> defendant/respondent filed a replying affidavit sworn on May 10, 2022 by Nesline Gechuki Okiko the legal manager. He deponed that the application is defective, incompetent, unsupported, and unmeritorious and urged the court to dismiss the same. Further that the 3<sup>rd</sup> Respondent approached the 1<sup>st</sup> Respondent for financial accommodation of KShs 14,500,000/= vide a letter dated July 21, 2014 payable in 36 months with monthly instalments of KShs. 200,000/= and semi and annual instalments of KShs. 1,500,000/=. That before executing the loan agreement, the 3<sup>rd</sup> Respondent was to offer collateral for the loan facility which she offered the title deed to Kiambaa/Kihara/1205.
5. According to 1<sup>st</sup> respondent before the perfection and registration due diligence was conducted and established the property was registered in the name of the 2<sup>nd</sup> respondent. that the 3<sup>rd</sup> respondent fell into arrears due to irregular servicing of the loan and this prompted the 1<sup>st</sup> respondent to exercise its rights in demanding its monies and issued a 90-day statutory notice. That the 3<sup>rd</sup> respondent is indebted to the 1<sup>st</sup> respondent to the tune of KShs. 21,943,717.93/=. That the property is not matrimonial property and therefore spousal consent was not necessary.
6. When the matter came up on December 15, 2022 the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, through their respective counsel, informed the court they did not wish to participate in the application. The application was canvassed by way of written submissions which both the applicant and the 1<sup>st</sup> respondent filed.

#### **Plaintiff/Applicant's submissions**

7. It was submitted that applicant's rights under article 50 (1) of the Constitutional have been infringed. The charge was illegally obtained as her consent was not sought as per the provisions of section 79(3) of the *Land Act* 2012. That the applicant had established the threshold as enshrined in the *Giella v Cassman Brown* Case.
8. It was further submitted that the applicant had established a prima facie case with a probability of success, that she is the wife of the 2<sup>nd</sup> defendant and did not file a spousal consent to charge the suit property and that the balance of convenience tilted in her favour.
9. In conclusion counsel submitted there were no statutory notices sent out to the 2<sup>nd</sup> defendant and that if the orders sought were not allowed the applicant will suffer loss which may not be compensated by way of damages.

#### **1<sup>st</sup> Defendant/Respondent's submissions**

10. Counsel for the 1<sup>st</sup> Respondent submitted that the applicant has failed to meet the threshold for granting interim injunctions as set in the case of *Giella v Cassman Brown* (1973) EA 358.
11. The applicant has failed to demonstrate a prima facie case and also failed to prove the suit property was matrimonial property, as per sections 107 and 109 of the *Evidence Act*. It was not enough for the applicant to state the property is a matrimonial property without any proof of the same.
12. According to counsel, the applicant failed to demonstrate that the 2<sup>nd</sup> defendant was not the absolute and indefeasible owner of the suit property as stipulated in section 26(1) of the *Land Registration Act*



which provides that: "the certificate of Title issued by the Registrar upon the registrar upon registration ....shall be taken by all courts, as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the tile of that proprietor shall not be subject to challenge except-

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party or
  - b. Where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme".
13. Counsel submitted that the court at this interlocutory stage should not be concerned about the merits of the suit. That the suit property became a commodity for sale when it was offered as collateral for the loan and the applicant had failed to demonstrate she will suffer irreparable loss if the orders are not issued.
14. It was contended that the balance of the rights of equity tilts towards the settlement of the debt owed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants/respondents. that this application is aimed at prolonging litigation as the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have not made any efforts to repay the loan.

### **Analysis and determination**

15. In due consideration of the pleadings on record and the submissions of parties, the issues for determination by the court are whether the proposed sale of Kiambaa/Kihara/1205 should or should not be stopped by way of an injunction, secondly is whether the suit property comprises of matrimonial land.
16. In making its determination this court will be guided by the test for granting a temporary injunction as laid down in the case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358.
17. On the issue of whether the land is matrimonial property, the court is guided by the finding of the court in the case of [Julius Mainye Anyega v Eco Bank Limited](#) [2014] eKLR:

“The suit property may be a matrimonial home. But what is startling is the applicant’s argument which, properly understood, suggests that matrimonial homes should never be sold under the Mortgagee’s Statutory Power of sale. These statements have become quite common in applications for an injunction to restrain a mortgagee from exercising the statutory power of sale. I want to disabuse mortgagors from what seems to be a misplaced posture, especially by defaulters. The true position of the law on matrimonial properties is that a mortgage will not be created on such property without first obtaining the consent of the spouse. Similarly, no sale of the matrimonial property will be carried through without giving the necessary notices to the spouse or spouses of the mortgagor. These protections once availed will not prevent the sale of a matrimonial home where the necessary consents have been obtained and all notices given to all parties with an interest in the matrimonial home, which is given as security for a loan or credit facility. “

18. Equally, in [Jimmy Wafula Simiyu v Fidelity Bank Ltd](#) [2014] eKLR the court held as follows:

“It is quite arrogant for the applicant to think that conversion of a Mortgaged property into a matrimonial home will provide some form of indomitable shield from the realization of a security given in a Mortgage under the law. The law on creating a Mortgage on and sale of a matrimonial home only aims at ensuring the consent of the spouse or spouses is sought before such property is Mortgaged, and relevant notices are served on the spouse who had



given consent to the Mortgage before the exercise of Mortgagee's statutory power of sale. The protection of a matrimonial home within the set-up of the law on mortgages and the Land Act is not, therefore, to be used as the spear by a defaulter on or as absolution of contractual obligations under a Mortgage. On this, see PART VII and specifically sections 79 and 96 of the Land Act. The argument by the Applicant that the suit property is a matrimonial home, has been used improperly and totally misplaced in this application and the less I say about it the better."

19. It is trite that where the right of a Chargee has lawfully accrued, it won't be postponed because the security is matrimonial property. Therefore, the assertion that the property is matrimonial property and the security was obtained without material disclosure to the applicant does not persuade this court to interfere with the 1<sup>st</sup> defendant's right of statutory sale by granting an injunction.
20. The 1<sup>st</sup> defendant/respondent advanced a loan facility to the 3<sup>rd</sup> defendant/ respondent where the 2<sup>nd</sup> respondent offered security as the title to Kiambaa/Kihara/1205. The 3<sup>rd</sup> respondent defaulted in the repayment of the loan facility which prompted the 1<sup>st</sup> defendant/respondent to realize its money by public auction of the security deposited by the 2<sup>nd</sup> defendant/respondent. The necessary statutory notices were served upon the 2<sup>nd</sup> and 3<sup>rd</sup> defendant by the 1<sup>st</sup> defendant/respondent.
21. The assertion that the property is matrimonial property alone is not sufficient to warrant this court issue a temporary injunction restraining the 1<sup>st</sup> Respondent to exercise its right of statutory sale.
22. However, the applicant alleged she was not served with statutory notices yet the property is matrimonial property. She also alleged that spousal consent was not obtained at the time of charging the property and that she will suffer irreparable loss if the sale of the suit property proceeds through public auction or private treaty.
23. It is the court's considered view that ventilating on the issue of whether or not spousal consent was obtained from the applicant ought to be addressed during the hearing of the entire suit. In the meantime, the applicant has demonstrated that she stands to suffer irreparable harm and the balance of convenience tilts in her favour. The court considers that it is in the interest of justice that a temporary injunction restraining the sale of the suit property do issue pending the hearing of the suit.
24. In the upshot, it is the finding of the court that the Notice of Motion application dated April 6, 2022 is merited and the same is allowed as follows:
  - i. A temporary injunction do issue restraining the 1<sup>st</sup> defendant, its agents, servants, auctioneers or agents from selling, offering for sale or otherwise disposing of or alienating the suit premises known as Kiambaa/Kihara/1205 whether by public auction or private treaty pending the hearing and determination suit.
  - ii. Costs be in the cause.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 3<sup>RD</sup> DAY OF AUGUST 2023.**

.....

**P.M. MULWA**

**JUDGE**

**In the presence of:**



Duale – court assistant

Mr. Muthugu h/b for Ms. Kimathi - for the plaintiff/applicant

N/A - for the 1<sup>st</sup> defendant/respondent

Mr. Muriithi - for the 2<sup>nd</sup> defendant/respondent

Mr. Amuyunza - for the 3<sup>rd</sup> defendant/respondent

