



REPUBLIC OF KENYA



KENYA LAW
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**Malinda v Kenya Commercial Bank Limited & another (Environment and Land
Case E020 of 2025) [2025] KEELC 6988 (KLR) (9 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 6988 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND CASE E020 OF 2025
MD MWANGI, J
OCTOBER 9, 2025**

BETWEEN

STELAMARIS MUMBUA MALINDA PLAINTIFF

AND

KENYA COMMERCIAL BANK LIMITED 1ST DEFENDANT

PETER MALINDA MUTHIANI 2ND DEFENDANT

RULING

(In respect of the Plaintiff's Notice of Motion application dated 27th February 2025 seeking a temporary injunction against the Defendants pursuant to Order 40 of the Civil Procedure Rules)

Introduction

1. Before this Court for determination is the Plaintiff/Applicant's Notice of Motion dated 27th February 2025 in which the following orders are sought:
 - a. Spent.
 - b. That a temporary injunction be issued restraining the Defendants/Respondents, their servants and agents from disposing of or causing any transfer of the five parcels of land known as L.R. No. Kajiado/Kaputiei North/121510, 121511, 121512, 121513 and 121514 (hereinafter referred to as 'the suit properties') to any party under any condition of sale whatsoever pending the hearing and determination of this application.
 - c. That a temporary injunction be issued restraining the Defendants/Respondents, their servants and agents from disposing of or causing any transfer of the five parcels of land known as L.R. No. Kajiado/Kaputiei North/121510, 121511, 121512, 121513 and 121514 to any party under any condition of sale whatsoever pending the hearing of this application.



- d. That pending the hearing and determination of this application and the main suit, there be an order compelling the 1st Defendant to produce before Court the original charge documents and loan statements in respect of the loan issued to the 2nd Defendant.
 - e. That pending the hearing and determination of this application and the main suit, there be an order directing forensic investigation in regard to the signatures and markings in the charge or loan documents produced by the 1st Defendant which are alleged to bear the Plaintiff's signature.
 - f. Spent
 - g. That the costs of this application be in the cause.
2. The application is premised upon the grounds appearing on its face and the Supporting Affidavit sworn by Stelamaris Mumbua Malinda, the Plaintiff/Applicant herein. The Plaintiff avers that she is the spouse of the 2nd Defendant and a co-owner and beneficial owner of the suit properties, having actively contributed to their acquisition and development. It is her case that the suit properties constitute matrimonial property within the meaning of Article 45(3) of *the Constitution*, and that the threatened sale or transfer by the 1st Defendant would occasion her irreparable loss and prejudice her constitutional rights.
 3. The Applicant further contends that she only became aware of the intended sale of the properties in July 2024 upon stumbling upon a notice by the 1st Defendant advertising them for sale. Upon inquiry, she discovered that the properties had been charged to the 1st Defendant, a fact she alleges was unknown to her and which, according to her, was undertaken without her knowledge or spousal consent. She asserts that she never executed any spousal consent to support such a charge and that any signatures purporting to be hers in the charge instruments are forgeries. In that regard, she states that she engaged the services of Dignity Forensic Document Examiners who confirmed her suspicions that the signatures attributed to her in the charge documents were not authentic.
 4. The Applicant further avers that her attempts to obtain clarification from the 1st Defendant have been met with intimidation tactics, including the placement of cautions on other properties registered in her name such as Matungulu/Sengani/4050. She maintains that she is not a client or a customer of the 1st Defendant and thus contends that the Bank has no contractual privity with her. She believes that if the impugned sale proceeds, she stands to suffer irreparable harm by being deprived of her beneficial and constitutional rights over the matrimonial property, and her contributions to the acquisition and development of the suit parcels will be rendered nugatory.
 5. The Applicant insists that this application has been brought without unreasonable delay and that no prejudice will be occasioned to the Defendants should the orders sought be granted. She thus urges this Court to intervene by granting her the injunctive reliefs to preserve the substratum of the suit pending full hearing and determination of the main suit.
 6. The application is opposed. The 1st Defendant filed a Replying Affidavit sworn on 19th March 2025 by Amina Jillo, a Recovery Manager in the Credit Support Unit of the 1st Defendant Bank. She deposes that on 6th April 2023, the 2nd Defendant obtained a mortgage facility from the Bank for the sum of Kenya Shillings Sixty Million (Kshs. 60,000,000/-), the purpose of which was to offset existing loan facilities, finance the renovation of rental premises, and partly finance the purchase of land. The said facility, according to the 1st Defendant, was secured by a legal charge registered on 3rd May 2023 over the suit properties, namely L.R. No. Kajiado/Kaputiei North/121511, 121512, 121513 and 121514, to secure an aggregate principal sum of Kenya Shillings Seventy-Five Million (Kshs. 75,000,000/-).



7. It is contended that prior to the registration of the charge, the Bank undertook due diligence and confirmed that the titles to the suit properties were registered in the sole name of the 2nd Defendant. Further, pursuant to the terms of the letter of offer, the 2nd Defendant furnished the Bank with an Affidavit of Marriage as well as an Affidavit of Spousal Consent executed by the Plaintiff/Applicant, thereby signifying her knowledge of and consent to the charge. Both affidavits, it is averred, were duly witnessed by an advocate and commissioner for oaths, and the charge was accordingly registered upon the Bank satisfying itself that all the statutory requirements had been complied with.
8. The 1st Defendant therefore takes the position that there is a presumption of validity attaching to the registered charge under Section 56 of the [Land Registration Act](#), which the Plaintiff/Applicant has not displaced. It is argued that the Plaintiff has not made any official complaint to the Bank or to the police concerning the alleged forgery of her signature on the Affidavit of Spousal Consent, notwithstanding that she claims to have been aware of the impugned transaction since July 2024. The 1st Defendant questions the authenticity of the private forensic report relied upon by the Applicant and contends that if there were genuine concerns of forgery, the proper course would have been to lodge a formal complaint with the Directorate of Criminal Investigations, which has a dedicated forensic document examination laboratory mandated to handle such matters.
9. The 1st Defendant further avers that the Applicant's conduct demonstrates lack of candour and that her approach is tainted with mala fides. It is asserted that the Plaintiff has concealed from the Court the existence of prior proceedings arising from the same subject matter, including Kajiado HCCC No. E012 of 2024 filed by the 2nd Defendant and Kajiado ELC Cause No. E160 of 2024 filed by the Plaintiff herself.
10. The 1st Defendant therefore characterizes the present proceedings as a continuation of a scheme by the Plaintiff and the 2nd Defendant to avoid repayment of the loan and to frustrate the Bank in the exercise of its statutory power of sale.
11. The 1st Defendant further avers that the Plaintiff has previously litigated over the same subject matter. It is deposed that in Kajiado ELC Cause No. E160 of 2024, *Stellamaris Mumbua Malinda v Kenya Commercial Bank Limited & Peter Malinda Muthiani*, the Plaintiff had filed a Notice of Motion dated 1st November 2024 seeking injunctive reliefs to restrain the 1st Defendant from dealing with the suit properties pending determination of the main suit. That application, together with the entire suit, was dismissed on 27th February 2025, as evidenced by the ruling annexed to the replying affidavit. The 1st Defendant contends that the Plaintiff, together with the 2nd Defendant, has now "moved to another court to try their luck," thereby abusing the court process through multiplicity of suits.
12. It is deposed that by legal craft and successive filings, the Plaintiff and the 2nd Defendant have enjoyed injunctive protection against the Bank's exercise of its statutory power of sale for over ten (10) months. The 1st Defendant views the Plaintiff as a proxy or surrogate of the 2nd Defendant, whose intention is to frustrate realization of the securities and to postpone repayment of the loan indefinitely. On that basis, it is asserted that the instant proceedings amount to an abuse of process.
13. The Bank further outlines that the 2nd Defendant's loan account fell into arrears, and as at 19th February 2025, the total outstanding sum stood at Kenya Shillings Seventy-Four Million, Two Hundred and Ten Thousand, Six Hundred and Seven and Eighty-Seven Cents (Kshs. 74,210,607.87/-), a debt that continues to accrue interest. Copies of the loan account statements were exhibited. It is averred that pursuant to the terms of the charge, default in repayment entitled the Bank to demand immediate settlement of all obligations, and accordingly, a statutory notice under Section 90 of the [Land Act](#) was issued on 29th January 2024 and duly served upon the 2nd Defendant. The



- 2nd Defendant is said to have acknowledged receipt of the said notice through the correspondence annexed to the replying affidavit.
14. The Bank clarifies that although its statutory power of sale has arisen due to persistent default, the formal notices of intention to sell under Section 96 of the *Land Act* and the redemption notice under Rule 15(d) of the Auctioneers Rules had not been issued at the time of filing this suit, largely because the Defendants had enjoyed injunctive orders arising from the earlier proceedings. Nonetheless, it is contended that the 2nd Defendant remains in default, and therefore the Bank's right to realize the securities stands.
 15. The 1st Defendant's position is that equity cannot be invoked to protect a party who has defaulted in meeting contractual obligations. It is argued that he who seeks equity must come with clean hands, and that once the 2nd Defendant offered the suit properties as collateral for the loan, the same became commodities for sale upon default. The Bank maintains that the Plaintiff cannot be heard to resist the sale on the basis that the properties are matrimonial property, as land given as security for a loan is assignable for value and, should the borrower's case ultimately succeed, damages are an adequate remedy. In this regard, it is argued that the Plaintiff has not demonstrated that she will suffer irreparable loss, since the 1st Defendant, being a sound financial institution, is well positioned to compensate her should she succeed in the substantive suit.
 16. It is finally deputed that the Plaintiff has not established a prima facie case with a probability of success, nor has she shown that the balance of convenience tilts in her favour. On the contrary, the Bank argues that continued injunctive orders will only exacerbate the debt, risk the insufficiency of the securities, and prejudice the Bank's right to recover what is due. The 1st Defendant therefore urges that the Plaintiff's application should be dismissed with costs.
 17. The Plaintiff thereafter filed a Further Supporting Affidavit sworn on 28th March 2025 in response to the 1st Defendant's Replying Affidavit. She reiterates that while the suit properties are registered in the name of the 2nd Defendant, her husband, she neither executed nor consented to the charge instruments as alleged. She maintains that the spousal consent and affidavit of marriage relied upon by the 1st Defendant are forgeries, emphasizing that she has never met nor appeared before the commissioner of oaths who purportedly witnessed the said documents.
 18. The Plaintiff deposes that the Bank cannot rely on assumptions of her intent, nor can it shield itself behind statutory registration when the process was tainted with illegality. She asserts that the Bank's due diligence was superficial, limited only to confirming the registered proprietor, and that it ignored the duty to verify the authenticity of her alleged consent. She further contends that the registrar of lands merely acts on the information presented by the chargee and is not in a position to authenticate signatures presented on spousal consents.
 19. The Plaintiff avers that she reported her grievance to the police at Kitengela, but was advised that pursuing investigations against a multinational financial institution would be slow and possibly futile. She therefore turned to the Court to protect her interests in the matrimonial property, adding that waiting for criminal investigations would not safeguard her rights since the suit properties could be disposed of by the time such investigations conclude. She stresses that this Court, being the Environment and Land Court, is properly seized of jurisdiction to determine the validity of the charge documents in a civil dispute, whereas criminal investigations fall within a different legal framework.
 20. On the issue of forensic examination, the Plaintiff defends the report she annexed, stating that it was prepared by a reputable expert whose services are also utilized by State security agencies. She insists that if the 1st Defendant doubts the report, it is at liberty to seek an independent forensic analysis, including from the Government's Document Examiner, and she is willing to cooperate in that process.



In her view, both parties are in agreement that forensic examination is crucial, and accordingly prayers 3 and 4 of her Notice of Motion—seeking directions for forensic testing of the impugned documents—are unopposed and ought to be granted.

21. The Plaintiff also addresses the issue of multiplicity of suits raised by the 1st Defendant. She clarifies that Kajiado MCELC No. E160 of 2024 was dismissed on grounds of want of pecuniary jurisdiction, not on the merits. She further explains that her earlier suit, Kajiado ELCLC No. E047 of 2024, was withdrawn after the 1st Defendant failed to enter appearance, and thereafter she filed the present matter. She denies any abuse of process and asserts that the issues now before Court are being presented for the first time for substantive determination.
22. Additionally, the Plaintiff complains that the 1st Defendant has registered cautions against her ancestral land in Machakos where her extended family resides, despite her not being indebted to the Bank. She views this as an act of intimidation, contending that the Bank has a pattern of irregularly registering documents at the lands registry, which casts further doubt on the genuineness of the spousal consent in issue. She rejects the suggestion that she is a proxy of the 2nd Defendant, insisting that she has come to Court in her own right as a wife seeking to safeguard her matrimonial interests.
23. She maintains that she has moved to Court without delay and that no interim orders are in place restraining the Bank as of 27th February 2025. The Plaintiff concludes that equity cannot condone a party who has forged or procured fraudulent documents, and that the maxim *volenti non fit injuria* applies against the Bank for failing to exercise proper diligence in securing authentic spousal consent. She therefore urges the Court to disregard the Bank’s objections and to grant the orders sought in her application.

Directions

24. The court directed that the application be canvassed by way of written submissions. I have had the opportunity to read the submissions filed by the parties within the set time frame; and which have been considered in the writing of this ruling.

Analysis and Determination

25. Having carefully considered the application, this court finds that the primary issue for determination is whether the plaintiff/applicant should be granted the temporary injunctive reliefs as sought.
26. The applicable test for the grant of interlocutory injunctions was settled in *Giella v Cassman Brown & Co. Ltd* [1973] EA 358, where the court held that:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, 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 the application on the balance of convenience.”

27. The Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, emphasized the sequential nature of this test, stating that:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to: (a) establish his case only at a *prima facie* level, (b) demonstrate irreparable injury if a temporary injunction is not granted, and (c) allay any doubts as to (a) or (b) by



showing that the balance of convenience is in his favour. These are the three pillars on which rests the platform for the grant of a temporary injunction, interim in nature. 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.”

28. Guided by the foregoing principles, the first issue is whether the Plaintiff has demonstrated a prima facie case with a probability of success. The suit properties are registered in the name of the 2nd Defendant, who is the Plaintiff's spouse. The evidence placed before the Court shows that the properties were charged to the 1st Defendant as security for a loan advanced to the 2nd Defendant. The 1st Defendant has exhibited the charge documents together with an affidavit of spousal consent and an affidavit of marriage allegedly executed by the Plaintiff, each document witnessed by an Advocate/Commissioner for Oaths.
29. The Plaintiff on the other hand denies having executed any spousal consent and alleges forgery. She contends that the documents relied upon by the Bank bear signatures which are not hers, and relies on a report from Dignity Forensic Document Examiners to that effect. She asserts that since the properties constitute matrimonial property to which she made direct contributions, the Bank was under a legal obligation to obtain her consent in accordance with Section 79(3) of the Land Act, which provides:

“A charge of a matrimonial home shall be valid only if any document or form used in applying for such a charge is executed by the borrower and any spouse of the borrower living in that matrimonial home, or there is evidence from the document that it has been assented to by all such persons.”
30. The definition of a prima facie case was set out in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] eKLR, where the court stated that:

“A prima facie case in a civil application includes but is not confined to a ‘genuine and arguable case.’ It is a case 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.”
31. Allegations of fraud require a higher standard of proof than the ordinary balance of probabilities, though not as high as beyond reasonable doubt. This principle was articulated in *Kinyanjui Kamau v George Kamau* [2015] eKLR, where the Court of Appeal held:

“It is trite law that any allegations of fraud must be pleaded and strictly proved. Although the standard of proof required is not beyond reasonable doubt, it is higher than the standard of a balance of probabilities generally applied in civil matters.”
32. On the material before this Court, the Bank has exhibited an apparently regular affidavit of spousal consent sworn before an advocate and Commissioner for Oaths. The Plaintiff disputes its execution and produces a private forensic report in support. However, the report remains untested through cross-examination, the chain of custody of the specimen signatures is not demonstrated, and no contemporaneous report to investigative authorities has been exhibited. At this interlocutory stage, the Court cannot resolve the contested factual issue of forgery or make definitive findings on the authenticity of documents. Those are matters reserved for trial where viva voce evidence and expert testimony may be tested. Accordingly, the Court is not satisfied that the Plaintiff has demonstrated a prima facie case with a probability of success within the meaning of *Giella v Cassman Brown and Mrao Ltd v First American Bank* (supra).



33. Even assuming that a prima facie case had been established, the Plaintiff must still demonstrate irreparable harm not compensable by damages. The principle is that once land is offered as security for a loan facility, it becomes a commodity for sale upon default. This position was affirmed in *John Nduati Kariuki t/a Johester Merchants v National Bank of Kenya Ltd* [2006] eKLR, where the Court held that:
- “Once a property has been given as security for a financial facility, the property becomes a commodity which can be sold by that financial institution in the event of default.”
34. Similarly, in *Elijah Kipng’eno Arap Bii v Kenya Commercial Bank Ltd* [2001] eKLR, the Court stated that:
- “Once property is offered as security, it by that very fact becomes a commodity for sale. There is no commodity for sale whose loss cannot be compensated for in damages.”
35. The suit properties were voluntarily charged by the 2nd Defendant. While the Plaintiff argues that they constitute matrimonial property, her claims of the sanctity of matrimonial property cannot override the commercial incidents of a registered charge. The Bank is a solvent financial institution capable of compensating the Plaintiff by way of damages should her claim succeed. In addition, the Bank has confirmed that although a Section 90 notice has been issued, notices under Section 96 of the *Land Act* and the Auctioneers Rules have not been served owing to prior injunctive orders. Consequently, there is no imminent sale, and the apprehended harm is speculative. It follows that irreparable harm has not been demonstrated.
36. On the balance of convenience, even if the Court were to reach that stage, the balance tilts in favour of the 1st Defendant. The outstanding debt is substantial, exceeding Kshs. 74 million as at February 2025, and continues to accrue interest. To restrain the Bank would unfairly prejudice its contractual and statutory rights and obligations to its shareholders while the debt continues to mount, risking erosion of the value of the security. In contrast, the Plaintiff’s rights, if vindicated, remain fully compensable by damages.
37. A final consideration relates to the equitable nature of temporary injunctive reliefs sought. The Plaintiff failed to disclose that there had been prior proceedings involving the same subject properties, namely *Kajiado ELCLC/E047/2024*, *Kajiado MCELC E160/2024*, and *HCCC No. E012/2024*. In her plaint she averred that there were no previous proceedings touching on the same subject matter, which was not candid. In *Halima Haji Sarah v Multiple Hauliers (E.A) Ltd & Another* [2022] eKLR, the Court emphasized that suppression of material facts disentitles an applicant to equitable reliefs. The Plaintiff’s non-disclosure in this case further discourages against the grant of the discretionary orders sought.
38. From the foregoing, I find that the Plaintiff has not satisfied the conditions set out in *Giella v Cassman Brown* (supra). She has not demonstrated a prima facie case with a probability of success, nor has she established irreparable harm incapable of compensation by damages. Even if the matter were to be considered on the balance of convenience, the scales would tilt in favour of the 1st Defendant.
39. In respect to the other prayers sought in the application, more so the prayer that there be an order directing forensic investigation in regard to the signatures and markings in the charge or loan documents produced by the 1st Defendant which are alleged to bear the Plaintiff’s signature; the holding of the Court of Appeal in the case of *Stanley Mombo Amuti vs Kenya Anti-Corruption Commission* (2019) eKLR, suffices. The Court emphasized that a court must remain an impartial



arbiter and its obligation is to allow parties to bring forth and propagate their respective cases taking into account established rules of procedure and not otherwise. The court was emphatic that;

“In civil as in criminal proceedings, the plaintiff (prosecution) is solely responsible for deciding how to present its case and choosing which witnesses to call. In the instant case, the respondent alone bore the responsibility of deciding whether a person will be called as a witness in its case. (See *Dabbah v Attorney-General for Palestine* (1944) AC 156; *Whitehorn v R* (1983) 152 CLR 657). A court cannot ordinarily direct a party to call any witness. Save in exceptional circumstance, a trial court cannot call any witness.”

40. Litigation before the court must remain a solemn process which is owned by the parties subject to the provisions of the law and each party is the best driver of its case. It is not the business of the court to decree how the case should be conducted and what document(s) should be produced or which witness(s) should be called to testify.
41. In the premises, and for the reasons set out above, the Plaintiff's Notice of Motion dated 27th February 2025 is hereby dismissed with costs to the 1st Defendant against the plaintiff.

It is so ordered

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 9TH DAY OF OCTOBER 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Nyoike h/b for Mr. Waudu for the 1st Defendant/Respondent

N/A by the Plaintiff and the 2nd Defendant

Court Assistant: Mpoye

