



**Miyogo v Osano & another (Commercial Case E001 of 2025)  
[2025] KEHC 18273 (KLR) (8 December 2025) (Ruling)**

Neutral citation: [2025] KEHC 18273 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
COMMERCIAL CASE E001 OF 2025  
PN GICHOHI, J  
DECEMBER 8, 2025**

**BETWEEN**

**JEPHTER MARINGO MIYOGO ..... PLAINTIFF**

**AND**

**STELLAH KWAMBOKA OSANO ..... DEFENDANT**

**AND**

**RAFIKI MICROFINANCE BANK ..... RESPONDENT**

**RULING**

1. This Ruling is in respect of the Applicant’s Notice of motion dated 11<sup>th</sup> November, 2024 and brought under sections 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act*, Order 40 rule 1, 2, 3, and 4, and 51 of the Civil Procedure Rules, 2010 and all enabling provisions of the Law, seeking for Orders;-
  1. Spent.
  2. Spent.
  3. A temporary injunction do issue restraining the Defendants whether by themselves, their employees, servants, agents or otherwise howsoever from advertising for sale, selling or dealing in any other way whatsoever in that property known as Njoro/Ngata Block 1/3816 pending the hearing and determination of this suit.
  4. Costs of this application be borne by the Defendants.
2. The Application is supported by the grounds on its face and supported by the Affidavit of the Applicant sworn on even date. He stated that he married Stella Kwamboka Osano (the 1<sup>st</sup> Respondent) in 2004. On 22<sup>nd</sup> June, 2010, he applied and received a loan of Kshs. 5,000,000/= from Bank of Africa Kenya Limited to purchase, develop, and improve the property Njoro/Ngata Block 1/3816. That the



- 1<sup>st</sup> Respondent, being his spouse, was the one that purchased the subject land using this loan and registered it solely in her name.
3. Subsequently a matrimonial home was established on this property where they both resided in together with their children. He stated that he has heavily invested in the said property by building a permanent residential house and several rental houses, and the land and developments are now valued at over Kshs. 24 million. He added that this property is matrimonial property.
  4. It is his case that sometimes in the year 2022, the 1<sup>st</sup> Respondent charged the property to the 2<sup>nd</sup> respondent for a loan of Kshs. 2,000,000/= without the Applicant's knowledge, consent, or concurrence. Soon thereafter, the 1<sup>st</sup> Respondent left Kenya for Canada, where she is now domiciled.
  5. He stated that he only learnt of this Charge sometimes in August 2022, together with the 1<sup>st</sup> Respondent's loan default from the 2<sup>nd</sup> Respondent. He then informed the 2<sup>nd</sup> Respondent that he had not consented to the Charge.
  6. It is the Applicant's position that, he tried contacting the 1<sup>st</sup> Respondent to take up the loan repayment to no avail, further that his advocates wrote to the 2<sup>nd</sup> Respondent on 24<sup>th</sup> August, 2022, and on 14<sup>th</sup> September, 2022, notifying them of the lack of spousal consent, but no response was received.
  7. The Applicant states that the 2<sup>nd</sup> Respondent has now sent valuers to the property to prepare for its realization under their purported statutory power of sale. He stated that he fears the 2<sup>nd</sup> Respondent will proceed to sell the property based on a Charge that he believes is null and void due to the absence of his spousal consent, causing him irreparable loss.
  8. The 2<sup>nd</sup> Respondent opposed the Application by the Replying Affidavit sworn by John Langat, on 13<sup>th</sup> January, 2025, seeking for the Application herein to be dismissed with costs for lacking merit.
  9. He stated that on 14<sup>th</sup> June, 2022, and 23<sup>rd</sup> May, 2022, Jestel Agencies Limited, a company owned by Stella Kwamboka Osano(1<sup>st</sup> Respondent), held meetings where a resolution was passed to obtain a loan facility from the 2<sup>nd</sup> Respondent.
  10. On 7<sup>th</sup> June, 2022, the 1<sup>st</sup> Respondent, through Jestel Agencies Limited, applied for a loan of Kshs. 2,000,000/=. The loan was approved, and a letter of offer was issued and accepted, stating that the loan would be secured by the property number Njoro/Ngata Block 1/3816, registered in the 1<sup>st</sup> Respondent's name. Further that the loan was to be repaid in 60 monthly installments of Kshs. 56,381/=.
  11. He avers that the 1<sup>st</sup> Respondent, as the chargor and sole director, executed a legal charge over the property in favor of the 2<sup>nd</sup> Respondent to secure the principal sum and interest. He elaborated that the charged property includes a main house and several rental apartments, which rental income the 1<sup>st</sup> Respondent intimated that it would aid in loan repayment.
  12. Consequently, that a deed of assignment of rental income was drafted and executed by the Respondents. That though the 1<sup>st</sup> Respondent began remitting payments on 20<sup>th</sup> August, 2022, the amounts were not consistent with the loan agreement.
  13. He avers that due to the 1<sup>st</sup> Respondent's and Jestel Agencies Limited's failure to remedy the default, the 2<sup>nd</sup> Respondent issued a 90-day Statutory Notice to the 1<sup>st</sup> Respondent under Section 90 (1) of the Land Act, 2012. Subsequently, the 2<sup>nd</sup> Respondent intended to auction the property to recover the outstanding loan balance as the 1<sup>st</sup> Respondent was in financial distress.



14. On 29<sup>th</sup> November, 2023, a 40-day Statutory Notice was issued to the 1<sup>st</sup> Respondent and Jestel Agencies Limited in accordance with Section 96 (2) of the *Land Act*, 2012. The 2<sup>nd</sup> Respondent then appointed Advert Valuers Limited to value the property, and a valuation report was prepared. On 29<sup>th</sup> October, 2024, instructions were given to Garam Investments Auctioneers to repossess and sell the property via public auction. The auctioneers issued a 45-day Redemption Notice and Notification of Sale to the Applicants.
15. He stated that on 6<sup>th</sup> November, 2024, the auctioneers confirmed compliance with the redemption process and scheduled the auction for 30<sup>th</sup> January, 2025.
16. The deponent asserts that the Applicant is a stranger to them because the 1<sup>st</sup> Respondent swore an affidavit on 24<sup>th</sup> June, 2022, stating she was not married, which was relied upon by the financier to secure their interest.
17. He argues that the Applicant has no documentation proving the property is matrimonial property, making the application likely to fail. Furthermore, that the Applicant has not provided any documents to indicate that he is a beneficiary of the rental income. Further, that the title to the subject parcel of land was acquired on 28<sup>th</sup> April, 2011, and the Applicant never placed a caution on the property, suggesting the current application is an afterthought.
18. Regarding the letters from the Applicant's advocate dated 24<sup>th</sup> August, 2022, and 15<sup>th</sup> September, 2022, he stated that the same were sent suspiciously soon after the loan approval and lacked supporting documents, hence no right of reply was elicited.
19. The affiant maintains that the 2<sup>nd</sup> Respondent has a right to proclaim, attach, and auction the charged property due to the commitment to indemnify the financier in case of default. They state that repeated demands for payment have been neglected by the 1<sup>st</sup> Respondent and her company. Further that they have followed due procedure in repossessing the property and views the Applicant's actions as mere delay tactics.
20. He also stated that a property cannot be categorized as matrimonial property without a matrimonial property cause trial, and thus the current application lacks merit.
21. He concluded by terming the Application herein as misconceived, scandalous, frivolous, and an abuse of court process, advocating for its dismissal with costs.
22. In a rejoinder, the Applicant filed a further Affidavit sworn on 24<sup>th</sup> February, 2025, reiterating his marriage to the 1<sup>st</sup> Respondent and stating that he is the one that sought a loan to purchase the subject parcel of land, though it was registered in the sole name of the 1<sup>st</sup> Respondent. He further maintained, he erected their matrimonial property in the suit property, therefore his consent is paramount before any dealing in the said matrimonial property. He adds that the property now is worth 28 Million.
23. The Applicant confirms that the 1<sup>st</sup> Respondent filed for divorce on 7<sup>th</sup> October 2021, and their marriage was dissolved by a judgment delivered on 30<sup>th</sup> January, 2024. He emphasizes that throughout the period from the 1<sup>st</sup> Respondent application for the loan to its approval and disbursement by the 2<sup>nd</sup> Respondent, he was legally married to the 1<sup>st</sup> Respondent. Hence, his spousal rights over the property crystallized by law and did not require registration of caution on the subject property.
24. He stated that both Respondents were aware that spousal consent was a prerequisite to charging the property as he discovered an uncommissioned affidavit in lieu of spousal consent, purportedly sworn by the 1<sup>st</sup> Respondent on 24<sup>th</sup> June, 2022, falsely stating she was not married, thereby claiming the property was not matrimonial property. The Applicant believed that this Affidavit contains untrue



averments and was sworn to defeat his rights in the suit property, and that the loan was procured through fraud and misrepresentation.

25. He concluded by stating that he protested the transaction to the 2<sup>nd</sup> Respondent upon learning of the charge, but his protests were ignored.

### **Applicant's Submissions**

26. The Applicant submitted on one issue, that is; whether a temporary injunction should be issued to restrain the defendants from dealing with the property pending the suit's determination.
27. The Applicant cited the case of Nyanza Fish Processors Limited v Barclays Bank of Kenya Limited & 3 others [2016] eKLR, where the Court of Appeal opined that it had previously given guidance on grant of temporary injunctions in Vivo Energy Kenya Limited v Maloba Petrol Station & 3 others [2015] eKLR (Civil Appeal No.21), where the Court quoted the celebrated case of Giella v Cassman Brown & Co. Limited [1973] EA 358, on the principles of granting interlocutory injunctions, requiring an applicant to show; a prima facie case with a probability of success, a risk of irreparable injury not compensable by damages, and if in doubt, the balance of convenience favoring the applicant
28. Regarding prima facie case, it was submitted that the property is matrimonial property and that the Charge over it by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent is null and void for want of spousal consent. The Applicant asserts that he was married to the 1<sup>st</sup> Respondent at all material times, including when the loan was approved and disbursed, therefore, his rights as a spouse crystallized by law and did not require registration for protection in form of caution.
29. He submitted that both Respondents were aware that spousal consent was a prerequisite, and the commissioned affidavit of no marriage sworn by the 1st Respondent was untrue and a misrepresentation, an indication that the loan was procured through fraud and misrepresentation. In support of this, he submitted that Matrimonial Property as defined in the *Matrimonial Property Act* and the *Land Act* fits to the subject property herein. On that note, the Applicant argued that he has established a prima facie case.
30. On adequate remedy, the Applicant argued that damages would not be an adequate remedy, even though the property is valued at over Kshs. 28 million. He asserts the 1<sup>st</sup> Respondent's inability to repay a Kshs. 2 million loan indicates she cannot pay damages. On the contrary, that while the 2<sup>nd</sup> Respondent may be able to pay damages, that alone should not be a ground for disallowing an Injunction. To support this position reliance was placed on the case of Champaklal Ramji Raishi Patel v I & M Bank Limited & 2 others [2020] eKLR, which states that ability to pay damages should not permit violation of legal rights and that denying a guaranteed legal right based on financial muscle would lead to a lawless society.
31. In respect to balance of convenience, the Applicant submitted that if the injunction is not granted and the property is sold, it may not be recovered if the suit succeeds. Conversely, if the injunction is granted and the suit is without merit, the 2nd Defendant can still realize the security, with any delay compensated by accrued interest. Thus, the balance of convenience favours granting the injunction to maintain the status quo and preserve the suit's subject matter.
32. On costs, the Applicant cited the case of Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others [2014] eKLR, which states that costs normally follow the event, but the court has judicious discretion. Accordingly, the Applicant argued that but for the Respondent's unjustified dealings, he would not have brought this application. He thus urged this Court to find the application merited and grant the requested orders.



## 2<sup>nd</sup> Respondent's Submissions

33. The Respondent herein submitted on four issues, that is; whether the Applicant has established a prima-facie case with probability of success, whether the Applicant will suffer irreparable harm if the Application is dismissed, whether the balance of convenience tilts in favour of Applicant and whether Application is premature.
34. The 2<sup>nd</sup> Respondent argued that the loan facility and charge were legitimate and followed due process, asserting that the 1<sup>st</sup> Respondent swore an affidavit stating she was single, thus negating the need for spousal consent. They maintain that the Applicant is a stranger to them.
35. The 2<sup>nd</sup> Respondent contends that the Applicant has failed to substantiate his claim of investing in the property or proving it is matrimonial property, and that the Application herein is merely a delay tactic. They assert their right to realize the security due to the 1<sup>st</sup> Respondent's default.
36. In support of its position, the 2<sup>nd</sup> Respondent relied on the case of *Giella V Cassman Brown*(Supra) that laid down the clear principles for granting interlocutory injunctions, with the burden on the applicant to satisfy the court of a prima facie case with high chances of success.
37. The 2<sup>nd</sup> Respondent also relied on the case of *Mrao Versus First American Bank Of Kenya Limited & 2 Others* [2003] KLR 125, that defined a prima facie case as a genuine and arguable case where a right has apparently been infringed, calling for an explanation or rebuttal from the opposing party. Further reliance was palced on the case of *Nguruman Limited V Jan Bonde Nielsen & 2 Others* [2014] Eklr where the Court emphasized that in determining a prima facie case, the court does not conduct a mini-trial but examines if a right has been or is threatened with violation.
38. The 2<sup>nd</sup> Respondent cited the case of *Ougo And Another Vs Otieno* Civil Appeal No. 3 Of 1987, arguing that the Court stated that where there are serious conflict of facts the trial Court should maintain the status quo until the dispute has been decided in at trial.
39. Regarding the allegation that the property is matrimonial property, the 2<sup>nd</sup> Respondent cited *Christopher Muroki v Housing Finance Company of Kenya Ltd & Anor* and argued that a claim for matrimonial property cannot be a ground to grant an injunction to curtail the exercise of statutory power of sale, particularly if the property was offered as security.
40. Further that in *National Bank Of Kenya Ltd -Vs- Pipe Plastics Samkolit (K) Ltd* [2002] EA 503, the Court was of the view that a court of law cannot rewrite a contract between parties and must enforce its terms unless riddled with coercion, fraud, or illegality that have been pleaded and proved.
41. Addressing the second principle of irreparable harm, the 2<sup>nd</sup> Respondent reiterated that an interlocutory injunction is not typically granted unless the Applicant would suffer an injury not adequately compensated by damages, as established in *Giella V Cassman Brown* case(Supra), that referenced Halsbury's Laws of England, Third Edition, Volume 21, paragraph 739, page 352, to clarify that irreparable injury signifies injury which is substantial and could never be adequately remedied or atoned for by damages. However, the Respondent leverages the holding in *Amos Wangeera Njoroge & 9 Others V Serah Wamuyu Muriuki & Another* [2014] Eklr, which states that when property is offered as loan security, it becomes a commercial asset, and in such cases, an award of damages would be an adequate remedy for any irregular sale.
42. On the balance of convenience, the Respondent relied on the case of *Jane Wambui Weru vs Overseas Private Inv. Corp & 3 others* [2012] eKLR. and argued that the Court asserted that injunctions are granted very sparingly and only in exceptional circumstances where the applicant's case is very strong



and straight forward and may be denied if the applicant's conduct is not approved by a court of equity or if their equity is defeated by laches.

43. The 2<sup>nd</sup> Respondent also cited the case of Andrew M. Wanjohi Vs Equity Building Society & Another [2006] eKLR, arguing that restraining a sale when the debt is escalating and the borrower has defaulted for an extended period creates a risk that the debt will exceed the property's value.
44. He argued that in such scenarios, if the property were sold, the Applicant could find alternative accommodation, and the defendants would be capable of compensating the plaintiff if the sale were later deemed improper. Conversely, that halting the sale would lead to continued debt growth and potentially substantial, irrecoverable losses for the chargee.
45. The Respondent concluded that the Applicant has failed to satisfy the Giella tri-partite test, and therefore, interlocutory orders should not be granted as they would interfere with the 2<sup>nd</sup> Respondent's proprietary rights.

### **Analysis and Determination**

46. This Court has considered the application, the Affidavit in support and opposition, together with the rival submissions by the Applicant and the 2<sup>nd</sup> Respondent and the case law cited. The only issue for determination herein is whether the Applicant has satisfied the Court on all the grounds for grant of an injunctive Order.
47. In order to succeed in an application for an interlocutory injunction, the Applicant must satisfy the conditions established in *Giella v Cassman Brown & Co. Ltd* (supra). First, they must show a prima facie case with a probability of success. Second, they must establish that they will suffer irreparable injury, which would not adequately be compensated by an award of damages. Third, if the court is in doubt, it will decide an application on the balance of convenience.
48. In *Nguruman Limited v Jane Bonde Nielsen and 2 others* NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR the Court of Appeal clarified that the three conditions are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.
49. As to what constitutes a prima facie case, the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 others* [2003] eKLR explained as follows:

“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.”
50. In this case, the basis for the application is the failure of the 2<sup>nd</sup> Respondent to obtain spousal consent before charging the suit property herein. Indeed, Section 79(3) of the *Land Act*, 2012, stipulates that a charge (mortgage) over matrimonial property is valid only if it is signed by all spouses or there is a document evidencing assent from the other spouse.
51. Further, Section 93 of the *Land Registration Act* provides that:-

“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*.”



52. On the other hand, Section 12 of the *Matrimonial Property Act* explicitly states that matrimonial property cannot be validly alienated (sold, transferred, mortgaged, leased, etc.) without the written consent of both spouses in a monogamous marriage.
53. The Applicant herein has stated that he married the 2<sup>nd</sup> Respondent in 2004 and divorced in 2024. Though no evidence was tendered on the said marriage, the Divorce proceedings vide Chief Magistrates Court Nakuru Divorce Cause No. 113 of 2021 were exhibited and show that indeed the Applicant and the 2<sup>nd</sup> Respondent cohabited from 1998 and solemnised their marriage sometime in August 2004 (Civil Marriage). The exhibited title deed of the suit property shows that it was registered on 28<sup>th</sup> April, 2011, during the pendency of their marriage.
54. On the face value, the issue is whether property may be termed as matrimonial property as defined under section 2 (d) of the *Land Act* that;-

“matrimonial home” means any property that is owned or leased by one or both spouses and occupied by the spouses as their family home.”
55. From the above, and looking at the prayers sought in the plaint dated 11<sup>th</sup> November 2023, it follows that the issue as to whether the subject parcel of land is matrimonial property to require the Applicant’s spousal consent before the property was charged can only be determined in the main suit filed herein.
56. On whether damages would be an adequate remedy, it was argued that according to the valuation report by the 2<sup>nd</sup> Respondent, the the property in issue is now valued at Kshs. 28 Million and while any loss the Applicant may suffer may be ascertained in monetary terms, the 1<sup>st</sup> Respondent is not in any position to pay any damages to the 2<sup>nd</sup> Respondent as she demonstrated in her inability to repay the 2<sup>nd</sup> Respondent’s loan of Kshs. 2 Million.
57. He argued that though the damages he may suffer if the property is sold mat be ascertained in monetary terms, will not be adequate compensation because the value of the property subject of these proceedings is now valued at 28 Million. The 2<sup>nd</sup> Respondent on the other hand maintained that the Applicant has not demonstrated any damage it will suffer if the Orders are denied.
58. It is noted that the subject property up for auction is alleged to be matrimonial property and that is where the Applicant and his children are currently residing in from the time of its construction in 2011 to date. The property was initially valued at 24 Million and has currently rose to 28 Million.
59. It is evident from the material before this Court that that the auction of this property at this point will cause irreparable damage to the Applicant unless the issues raised herein are fully heard and determined.
60. Conversely, the loan arrears due to the 2<sup>nd</sup> Respondent is quantifiable and a right that the 2<sup>nd</sup> Respondent can still pursue with interest in the event the suit is determined against the Applicant herein
61. The Applicant has claimed co- ownership of the suit property and that he and the children reside in the said property. In all fronts therefore, the balance of convenience tilts in favour of granting the injunction so as to preserve the substratum on the suit filed herein.
62. As regards costs, the issue is within the discretion of the court and considering the nature of this case, costs should await the outcome of the suit.
63. According, the application herein is allowed in the following terms:-



1. A temporary injunction be and is hereby issued restraining the Respondents/Defendants whether by themselves, their employees, servants, agents or otherwise howsoever from advertising for sale, selling or dealing in any other way whatsoever in that property known as Njoro/Ngata Block 1/3816 pending the hearing and determination of this suit.

2. Costs of this application to abide the outcome of the main suit.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 8<sup>TH</sup> DAY OF DECEMBER, 2025.**

**PATRICIA GICHOHI**

**JUDGE**

In the presence of:

Mr Ratemo Plaintiff/Applicant

N/A 1<sup>st</sup> Defendant/Respondent

Mr. Waweru for Mr. Juma for 2<sup>nd</sup> Respondent

Kamau- Court Assistant

