



LAG v KOG (Civil Appeal E001 of 2026) [2026] KEHC 3013 (KLR) (6 March 2026) (Ruling)

Neutral citation: [2026] KEHC 3013 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E001 OF 2026
OA SEWE, J
MARCH 6, 2026**

BETWEEN

DR LAG APPELLANT

AND

DR KOG RESPONDENT

RULING

1. The Notice of Motion dated 12th February 2026 was filed by Dr. LAG, (the appellant) under Articles 48 and 159 of *the Constitution* of Kenya, Sections 3, 4, 8, 13, and 24 of the *Protection Against Domestic Violence Act*, Cap 151 of the Laws of Kenya, Section 63(e) of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya and Order 51 Rule 1 of the Civil Procedure Rules, 2010. The appellant thereby prayed for the following orders:
 - (a) Spent
 - (b) That pending the hearing and determination of this application inter-partes, this Honourable Court be pleased to issue a Protection Order against the respondent, his relatives, agents, employees, servants, assignees or any other person acting under his authority restraining him from physical abuse, threats to violence, stalking, intimidation or harassment or threats to intimidate or harass the appellant and/or chasing her away from the shared residence in Homa Bay County on land Title Number: Gem/Kowuor/ Kotieno/XXX.
 - (c) That pending the hearing and determination of this appeal, this Honourable Court be pleased to issue a Protection Order against the respondent, his relatives, agents, employees, servants, assignees or any other person acting under his authority restraining him from physical abuse, threats to violence, stalking, intimidation or harassment or threats to intimidate or harass the appellant and/or chasing her away from the shared residence in Homa Bay County on land Title Number: Gem/Kowuor/ Kotieno/XXX.



- (d) That the OCS, Rangwe Police Station, do ensure compliance with the orders issued by this Honourable Court.
 - (e) Any such other or further relief that this Honourable Court may deem appropriate and just to grant.
 - (f) That the costs of the application be in the cause.
2. The application was supported by the affidavit sworn by the appellant and was premised on the following grounds:
- (a) That the appellant and the respondent are husband and wife who got married on 19th September, 1998 in accordance with the African Christian Marriage and Divorce Act, Chapter 151 Laws of Kenya, and are blessed with four issues of the marriage who are now adults, namely:
 - (i) GAG,
 - (ii) ECG,
 - (iii) IAG, and
 - (iv) CAG
 - (b) That both the appellant and the respondent live in a shared residence in Homa Bay County on land Title Number: Gem/Kowuor/ Kotieno/XXX.
 - (c) That the first 15 years of the marriage were blissful until November, 2015 when the respondent started emotionally neglecting the appellant, making family decisions without the knowledge of the appellant and became abusive after the discovery by the appellant of the respondent's dalliance in an extra marital affair.
 - (d) The appellant approached the lower court for a Protection Order following the threats to her life but the Magistrate's Court declined to grant a Protection Order in the interim but instead fixed the application for hearing on 9th March, 2026 despite the urgency of the matter.
 - (e) That the respondent has made the shared residence a toxic environment to an extent that the children are traumatized by the abusive acts of their father, thereby jeopardizing their general welfare including academic performance, social life, spiritual life and self-confidence.
 - (f) That the appellant is now on the brink of succumbing to depression as a result of the continuous violence and psychological torture meted on her by the respondent.
 - (g) That this Honourable Court has the power to grant a Protection Order and has an inherent duty to protect Kenyans from the threats to their lives as provided for under Article 26 of *the Constitution* of Kenya, 2010.
 - (h) That it is in the interest of justice that this Honourable Court grants the orders sought herein.
3. The respondent opposed the application vide his undated Replying Affidavit filed herein on 20th February 2026. The respondent defended the impugned decision and reiterated his stance that the learned magistrate considered the pleadings and appreciated that there existed three separate suits between the parties in three different jurisdictions, each seeking substantially similar protective orders. He averred that the learned magistrate did not decline relief out of indifference, nor did she shut the appellant out, but exercised deliberate restraint and directed that the matter be heard inter partes on 9th



- March 2026 so that the allegations could be tested in an orderly manner. The respondent averred that such a course was not only prudent but necessary, given the risk of contradictory orders and duplication of reliefs that would likely arise from parallel proceedings.
4. The respondent further averred that it was misguided for the appellant to characterize that measured judicial restraint as an injustice warranting appellate intervention, yet no misdirection, error of principle, or failure of duty had been demonstrated. In the respondent's view, the appellant's conduct reveals a pattern of filing suits and moving to a higher court in the hopes of securing uniform exclusionary control over every property in contest between the parties. The respondent pointed out that in Milimani MCFC No. El46 of 2025, the appellant was granted interim orders which were subsisting as at the time the instant application was filed. He therefore contended that, in the circumstances, the appellant is neither destitute nor exposed to immediate or irreparable danger.
 5. The respondent posited that the what the appellant seeks to achieve by the orders sought is to totally dispossess him and leave him without a place of abode. In his submission the *Protection Against Domestic Violence Act* is neither a device for strategic property acquisition nor is it a weapon to secure exclusive occupation of assets without proof of violence or imminent danger. He denied the specific allegations of violence set out in the appellant's affidavit and pointed out that nearly a decade has elapsed since the earliest of the acts complained of by the appellant. His postulation was that, if indeed there existed sustained and continuous violence as alleged, the parties would not have coexisted for years thereafter without sustained criminal proceedings or judicial intervention.
 6. Similarly, the respondent denied the allegation that on 1st November 2025 he threatened to shoot the appellant. He deposed that this is a such a grave accusation, yet it was unsupported by independent evidence. He surmised that the allegation was introduced at the point of litigation merely to provoke immediate judicial alarm; adding that the appellant is an accomplished and well connected medical practitioner with access to professional colleagues, law enforcement, and legal representation. The respondent conceded that, whereas disagreements had occurred within their marriage, as is not uncommon in long unions, they have never escalated into the violent portrait now painted by the appellant.
 7. The respondent further deposed that the right of appeal is a preserved constitutional and statutory safeguard available to every litigant; but such a right is neither a licence to leapfrog procedural stages nor to compel interim relief merely because a litigant is dissatisfied with the refusal of ex parte indulgence. He added that the appellant had utterly failed to demonstrated that the appeal is arguable in substance, or that it would be rendered nugatory if interim orders were not granted. He therefore prayed that the appellant's application be dismissed with costs and a direction given that Homa Bay MGJCC No. EOOI of 2025 be proceeded with to hearing as scheduled.
 8. With the leave of the Court, the appellant filed a Further Affidavit in response to some of the issues raised by the respondent in his Replying Affidavit. She reiterated her stance that the subject matter of this application as well as the application filed at the lower court in MGJCC NO. E001 of 2025 elicits life and death concerns and therefore deserves prompt action. She contended that far from the respondent's allegations, the learned magistrate failed to appreciate the nature and the unique circumstances of the case, especially the fact that her life is in grave danger.
 9. The appellant averred that, as a matter of fact, the respondent herein is a licensed gun-holder; and that he had severally threatened to shoot her. She averred that she is the sitting Member of Parliament for Rangwe Constituency in Homabay County and therefore it is a serious matter that her life is in danger. She restated that she is in need of a Protection Order; and that the instant application has nothing to do with division of matrimonial property.



10. The appellant conceded that she has filed three separate suits in different courts seeking Protection Orders, but explained that the suits involve different matrimonial residences in the Counties of Nakuru and Nairobi in addition to Homa Bay. She explained that, given that the jurisdiction to hear and determination an application for Protection Orders under the *Protection Against Domestic Violence Act* is reposed in the Resident Magistrate’s court, she had no option but to file the applications in all the relevant jurisdictions where the properties are situate.
11. The appellant also mentioned that the respondent conceded to the fact that they have three different homes in the Counties of Nairobi, Nakuru and Homa Bay and added that the Protection Order issued in Milimani in MCFC No. E146 of 2025 is only enforceable within the jurisdiction of the issuing court and does not therefore apply to their shared residence in the County of Homa Bay or Nakuru.
12. The application was duly certified urgent and directions given that it be canvassed by way of written submissions. Consequently, the appellant relied on her written submissions dated 25th February 2026. She submitted that, whereas it is the Resident Magistrate’s Court that has jurisdiction to grant a Protection Order under the *Protection Against Domestic Violence Act* (“the Act”) in the first instance, she has approached this Court on appeal because this is a matter of life and death. In her submissions, the lower court did not appreciate the urgency of the matter and therefore failed to fast-track the hearing. Accordingly, the appellant proposed the following issues for determination:
 - (a) Whether an appellate Court can interfere with the judicial discretion of an inferior court;
 - (b) Whether the appellant and the respondent are in a domestic relationship; and
 - (c) Whether there are acts constituting domestic violence and or threats of domestic violence in their relationship.
13. On the authority of *Mbogo and another v Shah* [1968] EA 93, the appellant submitted that this Court has the power to intervene where the subordinate court is shown to have improperly exercised its discretion. She added that in the instant matter, although the application was filed on 7th November 2025 under a Certificate of Urgency, the learned magistrate declined to issue a Protection Order, notwithstanding that her life was in danger and instead fixed the matter for hearing on 9th March 2026. She submitted that, in the circumstances, she had no option but to seek this Court’s intervention on appeal.
14. The appellant referred to the definition of domestic relationship in Section 4 of the Act and urged the Court to find that she had proved the existence of a marital relationship by annexing a Marriage Certificate to her Supporting Affidavit. She further submitted that she had demonstrated, for purposes of Section 3 of the Act that she had been subjected to physical, emotional, verbal and psychological abuse, as well as intimidation and harassment. She also complained that her right to life and the right to dignity are fundamental rights guaranteed under Articles 26 and 28 of *the Constitution* of Kenya 2010 and under the Universal Declaration of Human Rights (UDHR). The appellant relied on the case of *State v Truphena Ndonga Aswani* [2021] KEHC8758(KLR) at Paragraph 1 and 29 to demonstrate that she had sufficiently proved that she was being subjected to domestic violence and therefore is in need of a Protection Order.
15. The respondent relied on his written submissions dated 25th February 2026. He submitted that an appellate court ought not to interfere with the exercise of discretion of a subordinate court merely because it would have arrived at a different conclusion. On the authority of *Mbogo v Shah* (supra), the respondent submitted that an appellate court may only interfere where the lower court misdirected itself in law, took into account irrelevant considerations, failed to consider relevant matters, or reached



- a decision that is plainly wrong. He submitted that in this instance, the learned magistrate's insistence on an inter partes hearing before issuing far-reaching exclusionary orders was entirely consonant with the constitutional imperative of a fair hearing under Article 50.
16. In the respondent's submission, the appeal is premature, considering that the subordinate court has not determined the application on its merits. He pointed out that the appellant retains the right to prosecute her claim fully before the lower court and to thereafter exercise her right of appeal if need be. He urged the Court to not entertain piecemeal litigation as the appellant proposes. He relied on *Republic v Chief Magistrate's Court at Kisumu; Ex parte Oiwang'* [2005] eKLR, where it was held that interlocutory directions which do not finally determine rights should not ordinarily be the subject of appellate intervention, particularly where the matter is still pending before the trial court; and that to permit such intervention would disrupt the orderly progression of proceedings and undermine the authority of subordinate courts to manage their dockets.
 17. The respondent also took issue with the fact that the appellant has instituted parallel proceedings in Milimani, Nakuru and Homa Bay, each seeking exclusionary orders over properties said to be matrimonial. In his submission that pattern discloses, not just mere dissatisfaction, but an attempt at forum shopping and is therefore an abuse of the process of the court. The respondent cited *Republic v Muruatetu & another* [2012] eKLR, for the proposition that litigants must not multiply proceedings across different courts seeking the same relief, as such conduct erodes judicial coherence and invites conflicting decisions.
 18. Lastly, the respondent submitted that to grant the orders sought by the appellant would portray the subordinate court as a mere procedural stepping stone rather than a court of competent jurisdiction with power to determine the cases placed before it. He also posited that it would also lend credence to the perception that litigants may, through multiplicity of actions, manufacture jurisdictional overlap in order to exert pressure or obtain interlocutory advantage. Accordingly, the respondent prayed that the appeal as well as the application be dismissed with costs.
 19. It is manifest from the foregoing summary that the respondent did not confine his submissions to the application for Protection Order but expanded his arguments to justify his prayer for the striking out of the appeal on the ground that it is premature. I have given due consideration to the submissions by either party and opt to confine this ruling to the application dated 12th February 2026.
 20. There is no dispute that the appellant and the respondent are husband and wife. The evidence placed before the Court shows that their marriage is troubled and has been for some time. The appellant puts the turning point as 19th November 2015 when she discovered that the respondent was embroiled in an extra marital affair. She alleges violence and emotional abuse ever since. Accordingly, she approached the Magistrates Court pursuant to Sections 3, 4, 8, 13 and 14 of the *Protection Against Domestic Violence Act* in Homa Bay MGJCC No. E001 of 2025 for various reliefs, including a Protection Order.
 21. The record of the lower court shows that, after giving due consideration to the pleadings, the learned magistrate ordered that the application be served for directions inter partes on 8th December 2025. The parties appeared before the Magistrates Court a couple of times thereafter, the last date of activity being the 12th of January 2026. On that date, directions were given that the application be heard on 9th March 2026. That is the order that precipitated the filing of the instant appeal.
 22. In her Memorandum of Appeal, the appellant contended that:
 - (a) The learned magistrate erred both in law and in fact by failing to appreciate the facts of the case and the applicable law specifically that the appellant was in dire need of a Protection Order following the serious threats to her life and the evidence adduced before the Court as provided



for under Sections 3, 4, 8, 13 and 24 of the *Protection Against Domestic Violence Act*, and thus arrived at a wrong decision.

- (b) The learned magistrate erred both in law and in fact by failing to appreciate the fact that the respondent had made the family home which is the shared residence so toxic for the appellant to the extent that the children were traumatized by the shocking acts of their father and were disturbed and scared for the life of their mother which affected their general welfare including academics, social and spiritual life.
 - (c) The learned magistrate erred both in law and in fact by failing to appreciate the fact that the appellant was on the brink of succumbing to depression as a result of the continued violence and psychological torture meted on her and therefore the entire suit would be simply for academic purposes if the respondent's threats were to come to pass.
23. Accordingly, the appellant prayed that the appeal be allowed; the Ruling and Order of the lower court rendered on 12th January, 2026 be set aside, and the application dated 7th November, 2025 be allowed as prayed. She also prayed for costs of the appeal.
24. Along with her Memorandum of Appeal, the respondent filed the instant application for a Protection Order pending the hearing and determination of the appeal. Hence, the single issue for determination is whether the appellant is entitled to the orders sought by her in the application dated 12th February 2026.
25. Section 24 of the *Protection Against Domestic Violence Act* is explicit that:
- (1) Jurisdiction for any proceedings under this Act shall be vested in the Resident Magistrates' Courts.
 - (2) An application for a protection order shall be lodged with the court and, where directed by the court shall—
 - (a) be supported by the affidavit of any person who can depone to matters which are relevant to the application; and
 - (b) require the police, a social worker, probation officer, medical practitioner, children officer or other appropriate person or authority to investigate the acts or omissions of the domestic violence and forward findings directly to court as may be directed by the Court.
 - (3) If the applicant is not represented by an advocate, the court shall inform the applicant of the—
 - (a) reliefs available under this Act;
 - (b) effect of any order which may be granted and the means provided by the law for its enforcement under this Act;
 - (c) right to lodge a criminal complaint against the respondent if a criminal offence has been committed by the respondent; and
 - (d) right to claim compensation for any loss suffered or injury caused by any act of domestic violence.
26. It is plain from the above provision that the court mandated under the Act to entertain applications for a Protection Order is the Resident Magistrate's court. Needless to say that, although this Court may have the original jurisdiction to hear and determine certain issues presented before it, it may nonetheless



exercise restraint or refrain itself from assuming jurisdiction if there are other appropriate legislatively mandated institutions to handle such disputes. Indeed, in *Benson Ambuti Atega & 2 others v Kibos Distillers Limited & 5 others* [2020] eKLR the Court of Appeal pointed out, in the lead judgment of Hon. Asike Makhandia, JA, thus:

“...Even if a court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and determine a dispute. Original jurisdiction is not an ouster clause that ousts the jurisdiction of other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction on a court or body to hear and determine all and sundry disputes. Original jurisdiction simply means the jurisdiction to hear specifically constitutional or legislatively delineated disputes of law and fact at first instance. To this end, I reiterate and affirm the dicta that in *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR where it was stated that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.”

27. Section 30 of the Act is also pertinent. It states as follows with regard to appeals:

- (1) The respondent may appeal to the High Court against the making of a protection order or any term thereof within thirty days of the date of the order.
- (2) An appeal under subsection (1) shall not stay the operation of the order unless the respondent moves the court for an order of stay.
- (3) The court which made the order may, on the application of the respondent and taking into account the circumstances of the case, stay the operation of the order or any term thereof pending the decision of the appeal.

28. In this instance, the lower court is yet to make its decision. It cannot be said that it has declined the appellant’s application for a Protection Order. In effect there is no decision on the merits that can be challenged on appeal. It is plain therefore that the appeal itself is premature; and that the proceedings before the subordinate would be rendered otiose and devoid of practical utility if this Court were to proceed and issue a Protection Order in the manner proposed by the appellant.

29. In its wisdom Parliament bestowed the jurisdiction of entertaining applications for Protection Order with the Court of the Resident Magistrate and therefore it would blur the distinct constitutional and statutory boundaries between the jurisdiction of courts of first instance and appellate courts for purposes of enforcement of the *Protection Against Domestic Violence Act* if this Court were to intervene and grant the Protection Order sought by the appellant in the circumstances of this appeal.

30. In the result, it is my finding that the application is premature and is accordingly dismissed with no order as to costs. I further direct that:

- (a) the appeal be and is hereby stayed pending the hearing and determination of the lower court suit.
- (b) the lower court proceedings be prioritized in view of the nature of the dispute.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 6TH DAY OF MARCH 2026

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OLGA SEWE



JUDGE

