

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ELCLA NO. E093 OF 2025

BENEDICTA WAWIRA IRERI

APPELLANT

VERSUS

DUNCAN MURIITHI NDWIGA 1ST

RESPONDENT

BIASHARA SACCO SOCIETY LIMITED 2ND

RESPONDENT

GIANT AUCTIONEERS 3RD

RESPONDENT

RULING ON PRELIMINARY OBJECTION

BACKGROUND

This Appeal arises from a Ruling delivered by the trial court on 3rd December 2025, which dismissed an application for a temporary injunction filed by the Appellant. The said application had sought to restrain the Respondents from transferring Land Reference No. GATURI/GITHIMU/10111 to the highest bidder following a public auction conducted on 15th July 2025. The trial court dismissed the application on the grounds that the Appellant had failed to meet the conditions for the grant of an interlocutory injunction as enunciated in *Giella v Cassman Brown & Co. Ltd* [1973] EA 358.

Aggrieved by that decision, the Appellant preferred the present appeal. Before the appeal could be heard on its merits, the 2nd and 3rd Respondents, through the firm of Wairimu Rugaita & Co. Advocates, filed a Notice of Preliminary Objection dated 15th January 2026, challenging the jurisdiction of this Court to hear and determine the appeal.

The Preliminary Objection is grounded on three main limbs, namely:

- a) That this Honourable Court lacks jurisdiction to hear and determine this appeal in view of section 13 of the Environment and Land Court Act.
- b) That the substratum of the dispute before the trial court and this appeal is commercial in nature.
- c) That the appeal is incompetent, bad in law, and an abuse of the court process. The parties agreed to canvass the Preliminary Objection by way of written submissions.

The Appellant, through M/S Mugambi Njeru & Company Advocates, submitted that this Court has jurisdiction by dint of Article 162(2)(b) of the Constitution of Kenya 2010 as read with Section 13(2) and (4) of the Environment and Land Court Act, 2011. The Appellant argued that the substratum of the dispute is the validity of a charge instrument executed without spousal consent over matrimonial property, which directly affects the Appellant's proprietary rights and constitutes an overriding interest under Section 28(a) of the Land Registration Act, 2012 and Section 12(1) of the Matrimonial

Property Act, 2013. The Appellant relied on *Re Estate of Prisca Ong'ayo Nand (Deceased)* [2020] KEHC 6553 (KLR).

The 2nd and 3rd Respondents, through their advocates, submitted that the jurisdiction of this Court is anchored in Article 162(2)(b) of the Constitution and Section 13 of the Environment and Land Court Act, which limits the Court to disputes relating to land use, occupation, title, and administration. They contended that the substratum of the dispute is commercial in nature, arising from the exercise of a statutory power of sale by a chargee following loan default, and that issues touching on the validity of a charge instrument and spousal consent are largely commercial and only incidentally intertwined with matrimonial rights. They relied on *Co-operative Bank of Kenya v Patrick Kangethe Njuguna & 5 Others* [2017] KECA 79 (KLR); *Bank of Africa Kenya Ltd & Another v TSS Investment Limited & 2 Others* [2024] KECA 410 (KLR); and *Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others* [2012] eKLR.

The 1st Respondent, who is acting in person, did not file any submissions.

ISSUES FOR DETERMINATION

The singular issue for determination is: whether this Court has jurisdiction to hear and determine the present appeal.

ANALYSIS AND DETERMINATION

The legal threshold for a valid Preliminary Objection was settled by the Court of Appeal in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, where Law JA held that a preliminary objection raises a pure point of law which, if argued as a preliminary point, may dispose of the suit. It must not be blended with factual disputes. The Preliminary Objection before this Court raises a pure point of law – whether the Court has jurisdiction – and is therefore properly before the Court for determination at this stage

Jurisdiction is the threshold question in any judicial proceeding. As the Supreme Court of Kenya authoritatively stated in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others* [2012] eKLR, a Court can only exercise jurisdiction as conferred by the Constitution or statute, and any purported act beyond jurisdiction is a nullity.

Article 162(2)(b) of the Constitution of Kenya 2010 establishes the Environment and Land Court with the status of the High Court and grants it jurisdiction to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. This mandate is elaborated in Section 13 of the Environment and Land Court Act, 2011, which grants the Court jurisdiction over disputes relating to:

- a) environmental planning and protection;
- b) climate issues;
- c) land use and administration;

- d) public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land;
- e) land administration and management;
- f) public land;
- g) compulsory acquisition of land;
- h) land rate and rent issues;
- i) recovery of interest in land;
- j) specific performance of contracts, agreements or covenants relating to land;
- k) questions of title to or interest in land; and
- l) any other dispute relating to land.

The operative test, as consistently applied by superior courts, is one of the substratum or the essence of the dispute – not merely its form or the incidental issues arising therefrom. Where the core dispute is fundamentally about land, this Court has jurisdiction; where the core dispute is essentially commercial – involving a loan transaction and a chargee's rights – jurisdiction vests in the High Court's Commercial and Admiralty Division or other competent court.

In determining the substratum of the dispute, the Court must look at the pleadings in their entirety and discern the real question in controversy between the parties, rather than the reliefs sought or the label attached to the dispute. This approach was affirmed by the Court of Appeal in Co-operative

Bank of Kenya v Patrick Kangethe Njuguna & 5 Others [2017] KECA 79 (KLR).

Upon a careful consideration of the pleadings, affidavits, and submissions filed herein, the Court finds that while the dispute necessarily involves land, its true substratum is threefold: first, whether the 1st Respondent's spouse gave valid spousal consent to the charge of the matrimonial property as required under the Matrimonial Property Act, 2013; second, whether the charge instrument executed in favour of the 2nd Respondent is valid; and third, whether the 2nd Respondent lawfully exercised its statutory power of sale under the Land Act, 2012.

The Appellant's case, reduced to its essence, is that the suit land is matrimonial property, that her spousal consent was neither sought nor given before the charge was created, and that consequently the auction and impending transfer of the property are unlawful. The 2nd Respondent, on the other hand, avers that spousal consent was duly obtained from one Nelius Nyambura Mukoma, who was presented as the 1st Respondent's spouse, and that it is therefore entitled to exercise its statutory power of sale to protect its members' funds.

The Court notes that the dispute directly implicates the following statutory provisions: Section 12(1) of the Matrimonial Property Act, 2013, which provides that a spouse cannot alienate, mortgage, pledge, transfer, lease, or otherwise dispose of matrimonial property without the written consent of

the other spouse; and Section 28(a) of the Land Registration Act, 2012, which recognises a spouse's overriding interests in matrimonial property as interests that override a registered disposition. These provisions are squarely within the domain of land law as administered by this Court.

The Court further finds guidance in the Court of Appeal decision in *Bank of Africa Kenya Ltd & Another v TSS Investment Limited & 2 Others* [2024] KECA 410 (KLR), where the Court held that where a dispute arises from a charge over land and the exercise of a statutory power of sale, the substratum is commercial even if it incidentally touches on land rights. However, this Court respectfully distinguishes the present matter from such purely commercial disputes. In the instant case, the central question is not merely about the exercise of a power of sale by a commercial lender, but fundamentally about whether the charge itself was validly created in the first instance, having regard to overriding interests of a spouse in matrimonial property. This question of the validity of the root transaction – the charge – is inextricably intertwined with questions of title and interest in land.

If the charge is invalid for want of proper spousal consent, then the entire edifice of the power of sale crumbles, and the question of who holds title to the land comes directly into play. Such questions – touching on the validity of interests in land and the rights of a spouse over matrimonial property – are

manifestly within the jurisdiction conferred upon this Court by Article 162(2)(b) of the Constitution and Section 13 of the Environment and Land Court Act, particularly Section 13(2)(d) which covers "contracts, choses in action or other instruments granting any enforceable interests in land" and Section 13(2)(k) relating to "questions of title to or interest in land."

The Court is fortified in this view by the observation that the property, Land Reference No. GATURI/GITHIMU/10111, is registered land and has been declared by the Appellant to be the matrimonial home. A spouse's interest in matrimonial property constitutes an overriding interest under Section 28(a) of the Land Registration Act, 2012 and is, by its very nature, a land law question. To hold otherwise would be to leave a category of aggrieved parties – spouses whose matrimonial property is charged and auctioned without their consent – without a clear forum to ventilate their grievances, an outcome inconsistent with the Constitution's guarantee of access to justice under Article 48.

The 2nd and 3rd Respondents further argue that the appeal is incompetent and an abuse of the court process. The Appellant filed the present appeal under Order 42 of the Civil Procedure Rules and the Environment and Land Court Act. Having found, as above, that this Court has jurisdiction over the subject matter, the Court further finds that the appeal is properly before it. The ruling of the trial court dismissing an application for injunction is an interlocutory order from which an appeal

lies to this Court. The preliminary objection on this ground accordingly fails.

In light of the foregoing analysis, the Court makes the following orders:

1. The Preliminary Objection dated 15th January 2026 is hereby dismissed in its entirety.
2. This Court has jurisdiction to hear and determine the present appeal, the substratum of the dispute being fundamentally a question of the validity of an interest in and charge over matrimonial land, which falls within the jurisdiction of this Court under Article 162(2)(b) of the Constitution and Section 13 of the Environment and Land Court Act, 2011.
3. The costs of the Preliminary Objection shall be in the cause.
4. The appeal shall proceed to hearing on its merits. The parties are directed to take fresh directions before the Deputy Registrar within 14 days from the date of this ruling.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT EMBU THIS 05TH
DAY OF MAY, 2026.**

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JUDGE

ENVIRONMENT AND LAND COURT AT EMBU

In the presence of;

1. M/S Njagi H/B Mugambi Njeru for Appellant

2. M/S Ombongi H.B M/S Rugaita for 2nd & 3rd

Respondents

3. M/S Diana C/A