



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT CHUKA**

**CHUKA ELC CASE NO 69 OF 2017**

**FORMERLY MERU ELC CASE NO.74 OF 2015**

**ELYJOY KAGENI ..... PLAINTIFF**

**VERSUS**

**BANK OF AFRICA KENYA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**MUGA AUCTIONEERS AND GENERAL MERCHANTS ..... 2<sup>ND</sup> DEFENDANT**

**UNITED BROTHERS CAMPS LTD ..... 3<sup>RD</sup> DEFENDANT**

**HUMPHREY MBABU MBAKA ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. In her plaint dated **25<sup>th</sup> August, 2015** the plaintiff has the following prayers:

- a) A declaration that the intended sale by Public Auction of Land Reference No. CHUKA TOWNSHIP/39 is unlawful, irregular, unprocedural and illegal and that the same be stopped.
- b) A declaration that the charge on CHUKA TOWNSHIP/39 between the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants is void and of no effect in terms of the Land Act 2012 .
- c) An order of permanent injunction restraining the Defendants by themselves, their agents, servants, employees, and/or assignees or whomsoever acting on the defendants behalf from selling, advertising, alienating, disposing off or in any other manner whatsoever from dealing with Plaintiff's matrimonial home comprised in L.R. NO. CHUKA TOWNSHIP/39.
- d) The costs of the suit.
- e) Any further or better relief this Honourable Court may deem fit to grant.

2. Contemporaneously with the filing of the plaint, the plaintiff filed an application whose ruling is reproduced here below so that the totality of this suit can be fully brought to light.

**RULING**

**1.This** application is dated 25<sup>th</sup> August, 2015 and seeks orders:

**1.That** this application be certified as urgent and be heard ex-parte in the first instance.

**2.That** pending the hearing of this application interpartes this Honourable Court be pleased to issue temporary orders of injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, their agents, servants and/or employees or whomsoever acting on their behalf or instructions from selling, advertising for sale or in any other manner whatsoever from dealing with Land Reference No. CHUKA TOWNSHIP/39.

**3.That** pending the hearing of this suit this Honourable Court be pleased to issue temporary orders of injunction restraining the 1<sup>st</sup>

and 2<sup>nd</sup> Defendants, their agents, servants and/or employees or whomsoever acting on their behalf or instructions from selling, advertising for sale or in any other manner whatsoever from dealing with Land Reference No. CHUKA TOWNSHIP/39.

**4. That** the costs of this application be provided for.

**2. The** application is supported by the affidavit of ELYJOY KAGENI, the plaintiff and has the following grounds:

- a) That the 1<sup>st</sup> Defendant has engaged the 2<sup>nd</sup> Defendant to advertise and sell Land Reference No. CHUKA MUNICIPALITY/39.
- b) That the plaintiff stands to suffer irreparable damage if the property is sold as intended by the 1<sup>st</sup> and 2<sup>nd</sup> defendants as the same is plaintiff's only matrimonial home.
- c) That this Honourable Court ought to come to the rescue of the plaintiff/applicant and issue injunction orders as prayed and stop abuse of Law.
- d) That the prayers sought by the plaintiff/applicant are meant to preserve the status quo pending the hearing by the Court and will not in any way prejudice the Defendant's (sic) case in any way as they have acted in contravention of Land Act.

**3. The** affidavit supporting the application was sworn by the plaintiff on 25<sup>th</sup> August, 2015 and says as follows:

**"I, ELYJOY KAGENI** of P. O. Box 776-60400, CHUKA make Oath and state as follows:-

1. THAT I am the Plaintiff/Applicant herein and therefore competent to make and swear this affidavit.
2. THAT I know the 4<sup>th</sup> Defendant who is my husband and live on Land Reference No. CHUKA TOWNSHIP/39 which among others comprises our matrimonial home.
3. THAT on or about 29<sup>th</sup> July, 2015 I noticed some advertisement papers and/or posters on my gate and perimeter wall and on close scrutiny I discovered that they were meant to be notices for sale of Land Reference NO. CHUKA TOWNSHIP/39. (annexed are copies of the same marked "EK 1" and "EK 2")
4. THAT I confronted my husband who refused to talk to me.
5. That I approached the 1<sup>st</sup> Defendant's employees in Meru Town who informed me that the land had been charged to secure a loan.
6. (a) THAT I was surprised as I was not consulted and my consent was never sought although I live on the land.  
(b) THAT I am advised and believe the advice to be sound that the charge was in contradiction of Section 79 (3) of the Land Act of 2012.
7. THAT I am advised by my Advocates and believe the advice to be sound that the charge relied on by the Defendants to sell my matrimonial home is unlawful and does not give them the right to sell my property.
8. THAT the sale of the said land should be stopped as if the same is sold, it will render me and my son homeless.
9. THAT the contents of this affidavit are true to the best of my knowledge, information and belief.

**4. The** plaintiff's supporting affidavit is answered by a Replying Affidavit sworn by SAMUEL IRUNGU, the Recoveries officer at Bank of Africa Kenya Limited. This affidavit was sworn on 2<sup>nd</sup> October, 2015. The affidavit says:

**"I, SAMUEL IRUNGU**, a resident of Nairobi and of Post Office Box Number 69562-00400 Nairobi in the Republic of Kenya do hereby make oath and state THAT:

1. I am an adult of sound mind. I am a Recoveries Officer at Bank of Africa Kenya Limited ("the 1<sup>st</sup> Defendant") and I am competent and duly authorized by the 1<sup>st</sup> Defendant to swear this Affidavit for and on its behalf.
2. I have read and understood the contents of the Plaintiff's Notice of Motion dated 25<sup>th</sup> August, 2015 ("the application") and the Supporting Affidavit of Elyjoy Kageni sworn on 25<sup>th</sup> August, 2015 ("the Supporting Affidavit") and the Exhibits annexed thereto. I swear this affidavit for and on behalf of the 1<sup>st</sup> Defendant in opposition to the Application and Supporting Affidavit.
3. In the year 2012, United Brothers Camp Limited ("the 3<sup>rd</sup> Defendant") through its representatives Humphrey Mbabu Mbaka ("the 4<sup>th</sup> Defendant") and Lucyline Kanyua Mutindwa, approached the 1<sup>st</sup> Defendant requesting for banking facilities amounting to Kshs.20,600,000/=

4. The 4<sup>th</sup> Defendant and Lucyline Kanyua Mutindwa presented themselves to the 1<sup>st</sup> Defendant as husband and wife and all indications were that the 3<sup>rd</sup> Defendant was a family company.

5. By a letter dated 11<sup>th</sup> May, 2012, the 1<sup>st</sup> Defendant offered various banking facilities to the 3<sup>rd</sup> Defendant. The latter expressly accepted the said banking facilities by executing the 1<sup>st</sup> Defendant's letter dated 11<sup>th</sup> May, 2012 which contained some of the terms and conditions of the facilities.

Annexed hereto as Exhibit SI 1 is true copy of the 1<sup>st</sup> Defendant's letter dated 11<sup>th</sup> May, 2012.

6. The 3<sup>rd</sup> Defendant and its directors – the 4<sup>th</sup> Defendant and Lucyline Kanyua Mutindwa –agreed to provide the following securities for the banking facilities offered by the 1<sup>st</sup> Defendant:

i) A First Legal Charge over property Title Number Chuka Township/39 (“the Suit Property”) registered in the name of the 4<sup>th</sup> Defendant for the sum of Kshs.20,600,000/=;

ii) Personal guarantees and indemnities for KSHS.20,600,000/= by the 4<sup>th</sup> Defendant and Lucyline Kanyua Mutindwa; and

iii) Keyman Insurance over the life of the 4<sup>th</sup> Defendant for Kshs.20,600,000/=.

The 4<sup>th</sup> Defendant and Lucyline Kanyua Mutindwa both signed the 1<sup>st</sup> Defendant's letter dated 11<sup>th</sup> May, 2012 (Exhibit SI 1).

7. By a Charge dated 7<sup>th</sup> August, 2012,made between the 4<sup>th</sup> Defendant (as charger), 3<sup>rd</sup> Defendant (as borrower) and the 1<sup>st</sup> Defendant (as charge), the 4<sup>th</sup> Defendant charged his interest in the Suit Property to secure the payment of the sum of Kshs.20,600,000/= constituting the financial facilities granted by the 1<sup>st</sup> Defendant to the 3<sup>rd</sup> Defendant together with interest thereon due or payable to the 1<sup>st</sup> Defendant and all costs, charges and expenses incurred by the Bank in relation to the Charge.

Annexed hereto as Exhibit S12 is a true copy of the Charge dated 7<sup>th</sup> August, 2012.

8. Prior to, during and after the preparation and execution of the Charge, the 4<sup>th</sup> Defendant and Lucyline Kanyua Mutindwa confirmed their relationship as husband and wife and as the person residing on the Suit Property. Indeed, in the Charge, Lucyline Knayua Mutindwa expressly and unreservedly gave spousal consent for 4<sup>th</sup> Defendant to charge the Suit Property to the 1<sup>st</sup> Defendant to secure the financial facilities granted to the 3<sup>rd</sup> Defendant.

9. Under the Charge, the 3<sup>rd</sup> Defendant and the 4<sup>th</sup> Defendant covenanted that either or both of them would pay all the monies, obligations and liabilities secured by the Charge on demand.

10. By a Deed of Guarantee and Indemnity dated 29<sup>th</sup> July, 2012, the 4<sup>th</sup> Defendant inter alia guaranteed performance by the 3<sup>rd</sup> Defendant of its obligations in relation to the financial facilities granted by the 1<sup>st</sup> defendant.

Annexed hereto as Exhibit SI 3 is a true copy of the Deed of Guarantee and Indemnity dated 29<sup>th</sup> July, 2012 and given by the 4<sup>th</sup> Defendant to the 1<sup>st</sup> Defendant.

11. By a Deed of Guarantee and Indemnity dated 29<sup>th</sup> July, 2012 Lucyline Kanyua Mutindwa inter alia guaranteed performance by the 3<sup>rd</sup> Defendant of its obligations in relation to the financial facilities granted by the 1<sup>st</sup> Defendant.

Annexed hereto as Exhibit SI 4 is a true copy of the Deed of Guarantee and Indemnity dated 29<sup>th</sup> July, 2012 and given by Lucyline Kanyua Mutindwa to the 1<sup>st</sup> Defendant.

12. In August 2013, it became clear that the 3<sup>rd</sup> Defendant had not been performing its obligations in relation to the financial facilities granted by the 1<sup>st</sup> Defendant. Consequently, the 3<sup>rd</sup> Defendant's loan account had fallen into arrears. By two letters dated 1<sup>st</sup> August, 2013, the 1<sup>st</sup> Defendant notified the 4<sup>th</sup> Defendant and Lucyline Kanyua Mutindwa of the change of the 3<sup>rd</sup> Defendant's loan account from performing to non-performing status.

Annexed hereto as Exhibit SI 5 are true copies of the two letters dated 1<sup>st</sup> August, 2013.

13. Sometime in September 2013, the 3<sup>rd</sup> Defendant through its representatives, the 4<sup>th</sup> Defendant and Lucyline Kanyua Mutindwa, approached the 1<sup>st</sup> Defendant for purposes of restructuring the financial facilities that had been granted to it. By a letter dated 26<sup>th</sup> September 2013, the 1<sup>st</sup> Defendant offered to restructure the financial facilities granted to the 3<sup>rd</sup> defendant.

14. The 3<sup>rd</sup> Defendant expressly accepted by (sic) the above offer by executing the 1<sup>st</sup> Defendant's letter dated 26<sup>th</sup> September 2013 and the 1<sup>st</sup> Defendant's Standard Terms and Conditions Applicable to all Banking Facilities.

Annexed hereto as Exhibit SI 6 are true copies of the 1<sup>st</sup> Defendant's letter dated 26<sup>th</sup> September 2013 and the 1<sup>st</sup> Defendant's Standard Terms and Conditions Applicable to all Banking Facilities as executed by the 3<sup>rd</sup> Defendant.

15. The 3<sup>rd</sup> Defendant agreed to provide in addition to the existing securities, Personal Guarantees and Indemnities for Kshs.25,700,000/= issued by the 4<sup>th</sup> Defendant and Lucyline Kanyua Mutindwa.

16. The 3<sup>rd</sup> Defendant failed to perform its obligations in relation to the financial facilities granted by the 1<sup>st</sup> Defendant and secured by the Charge and the Personal Guarantees and Indemnities referred to above. In view of the foregoing default, the 1<sup>st</sup> Defendant issued three separate demands dated 9<sup>th</sup> October 2014, 21<sup>st</sup> November, 2014 and 11<sup>th</sup> December 2014 to the 3<sup>rd</sup> Defendant through its directors (the 4<sup>th</sup> Defendant and Lucyline Kanyua Mutindwa).

Annexed hereto as Exhibit SI 7 are true copies of the letters dated 9<sup>th</sup> October 2014, 21<sup>st</sup> November 2014 and 11<sup>th</sup> December 2014.

17. The 3<sup>rd</sup> Defendant failed to comply with the demands set out in the above letters. Accordingly, the 1<sup>st</sup> Defendant decided to exercise its rights as Chargee. Indeed –

a) Through Coulson Harney Advocates, its Advocates on record, the 1<sup>st</sup> Defendant issued a statutory notice dated 3<sup>rd</sup> February 2015 to the 4<sup>th</sup> Defendant (and copied to the 3<sup>rd</sup> Defendant). The foregoing statutory notice was issued in accordance with section 90 of the Land Act, 2012 and sent to its recipients by way of registered post:

b) Following the issuance of the statutory notice, the 1<sup>st</sup> Defendant did not receive any proposal for payment, response or acknowledgement from the 3<sup>rd</sup> Defendant, the 4<sup>th</sup> Defendant or Lucyline Kanyua Mutindwa;

c) Following the expiry of the statutory notice referred to above, the 1<sup>st</sup> Defendant decided that it would exercise its statutory power of sale in relation to the Suit Property.

d) Through, Coulson Harney Advocates, the 1<sup>st</sup> Defendant issued a notice to sell dated 21<sup>st</sup> May 2015 to the 4<sup>th</sup> Defendant (and copied to the 3<sup>rd</sup> Defendant, Lucyline Kanyua Mutindwa and the County Government of Tharaka Nithi). The foregoing notice to sell was issued in accordance with section 96 of the Land Act, 2012 and sent to its recipients by way of registered post;

e) The notice to sell was copied to Lucyline Kanyua Mutindwa in her capacity as the spouse of the 4<sup>th</sup> Defendant residing on the Suit Property.

f) Following the issuance of the notice to sell, the 1<sup>st</sup> Defendant did not receive any proposal for payment, response or acknowledgment from the 3<sup>rd</sup> Defendant, the 4<sup>th</sup> Defendant or Lucyline Kanyua Mutindwa;

g) Following the Expiry of the notice to sell, the 1<sup>st</sup> Defendant instructed Muga Auctioneers and General Merchants (“**the 2<sup>nd</sup> Defendant**”) to issue the requisite statutory notices and advertisements and sell the Suit Property by public auction. I note from the Supporting Affidavit that the issuance by the 2<sup>nd</sup> Defendant of the requisite statutory notices has led to the filing of this case.

Annexed hereto as Exhibit SI 8 are true copies of the statutory notice dated 3<sup>rd</sup> February 2015 and the notice to sell dated 21<sup>st</sup> May 2015.

18. I confirm that the Notification of Sale and the 45 days Redemption Notice annexed to the Supporting Affidavit as **Exhibits EK1** and **EK2** are statutory notices issued by the 2<sup>nd</sup> Defendant on behalf of the 1<sup>st</sup> Defendant in pursuance of the 1<sup>st</sup> Defendant's statutory power of sale. It is clear from the said notices that as at 7<sup>th</sup> July, 2015, the amount owed to the 1<sup>st</sup> Defendant was a sum of **Kshs.38,222,227.94**, which continued to accrue interest.

19. The 1<sup>st</sup> Defendant and its representatives have never heard of, encountered or interacted with the Plaintiff herein in relation to the Suit Property or any of the matters herein. The only spouse of the 4<sup>th</sup> Defendant that is known to the 1<sup>st</sup> Defendant is Lucyline Kanyua Mutindwa.

20. In view of the matters set out above, I verily believe that-

a) The Charge dated 7<sup>th</sup> August, 2012 is valid and complies with all laws applicable in Kenya;

b) The 1<sup>st</sup> Defendant is entitled to exercise its statutory power of sale in relation to the Suit Property and it has complied with all statutory requirements for exercising the said power;

c) The 4<sup>th</sup> Defendant's spouse residing on the Suit Property, Lucyline Kanyua Mutindwa, has been served with a copy of a notice to sell as required by Section 96 of the Land Act, 2012;

d) The Plaintiff is not a spouse of the 4<sup>th</sup> Defendant and that she does not reside on the Suit Property.

21. Further to the above, I verily believe that the Application and this suit in general is a ploy to delay the 1<sup>st</sup> Defendant's right to recover of (sic) the sums owed to it pursuant to the Charge.

22. In view of the above, I verily believe that the Application is without merit and ought to be dismissed with costs.

23. I swear this affidavit in opposition to the Application.

24. I make this affidavit from facts within my knowledge and from information and belief, sources and grounds whereof have been disclosed.

5. I have reproduced the above two affidavits because in their submissions the parties have, by and large, postulated the issues raised in the affidavits.

6. The parties canvassed the application by way of written submissions.

7. It is submitted for the plaintiff that she is the 1<sup>st</sup> wife of the 4<sup>th</sup> defendant and that she and her son live on Land Reference No. CHUKA/TOWNSHIP/39 which is claimed to be the matrimonial home of the plaintiff.

8. The plaintiff's submissions state that: "it appears that the 4<sup>th</sup> defendant also took a 2<sup>nd</sup> wife LUCYLINE KANYUA MUTINDWA who also happens to have been blessed with one child." The submissions state that the two wives live in separate houses **BUT** on the same parcel of land.

9. The plaintiff's submissions say that the 4<sup>th</sup> defendant and the 2<sup>nd</sup> wife are the only Directors and Share-holders of a Company known as UNITED BROTHERS CAMPS LTD. It is said that the Company through which the 3<sup>rd</sup> defendant and the 4<sup>th</sup> defendant took a loan from the 1<sup>st</sup> defendant took it without obtaining the spousal Consent of the plaintiff.

10. The plaintiff's submissions state that section 79(3) of the Land Act has made it mandatory for the consent of a spouse residing on the matrimonial property to be obtained before a charge can be made valid. For this proposition, the case of PAMELA I MBUKO NJARO AND ANOTHER VERSUS JOSEPH VUTITA NJARO AND ANOTHER [KAKAMEGA ELC CASE NO.78 OF 2014. NAIROBI CIVIL CASE NO.433 OF 2003 IS ALSO PROFFERED.

11. The plaintiff's advocate categorically opines that the apposite charge is invalid by application of the relevant law.

12. The plaintiff's advocate says that she has a prima facie case because for lack of spousal consent, there is no charge and for this reason the sale of the apposite land must be stopped.

13. The plaintiff's advocate goes on to argue that there would be irreparable injury, as if the apposite land was sold, her matrimonial home would not come back. And for this reason also, it is argued that the balance of convenience tilts in favour of the plaintiff.

14. The plaintiff has proffered the following authorities in support of her propositions:

(a) Section 79 of the Land Act, No.6 of 2012

(b) Pamela Imbuki Njaro and another versus Joseph Vutita Njaro and another H.C ELC No.78 of 2014 (Kakamega)

(c) ROSE FLORENCE WANJIRU VERSUS STANDARD CHARTERED BANK (K) LTD AND 2 OTHERS (NAIROBI).

15. The 1<sup>st</sup> defendant's submissions give a summary of the salient facts. I do not find the need to restate them as they more or less reflect the position contained in the 1<sup>st</sup> defendant's replying affidavit.

16. The 1<sup>st</sup> defendant says that the debt owed by the 3<sup>rd</sup> defendant as at 7<sup>th</sup> July, 2015, stood at **Kshs.38,222,227.94**

17. The 1<sup>st</sup> defendant asserts that all the required processes were followed before the suit land was advertised for sale.

18. The 1<sup>st</sup> defendant argues that the plaintiff has not demonstrated presence of the 3 principles necessary for the grant of a temporary injunction as enunciated in the case of *Giella versus cassman Brown* [1973] EA 358 which are:

(a) the applicant must demonstrate that she has a prima facie case with a probability of success;

(b) an injunction will not issue unless the applicant will suffer irreparable harm or damage which cannot be adequately compensated by an award of damages, and

(c) if the court is in doubt, it will decide the application on a balance of convenience.

19. The defendant opines that the principles for Grant of an interlocutory order should be considered sequentially and proffers the

case of *Nguruman Limited V Jan Bonde Nielsen & 2 Others, Civil Appeal No. 77 of 2012 Nairobi* for this proposition. He cites the court as stating:-

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. ***It is established that all the above three conditions and states are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.*** See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. ***If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.*** The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”

**20.** The 1<sup>st</sup> defendant submits that although the plaintiff claims that she is the wife of the 4<sup>th</sup> defendant and she has a child with him, there is no proof provided by either the plaintiff or the 4<sup>th</sup> defendant that they are married. The 1<sup>st</sup> defendant says that the only purported evidence of a marriage between the plaintiff and the 4<sup>th</sup> defendant is the Birth Certificate of David Mwema who is alleged to be a child of the Plaintiff and the 4<sup>th</sup> defendant. The 1<sup>st</sup> defendant opines that even assuming that the Plaintiff and the 4<sup>th</sup> defendant have a child together, the birth certificate of the child is not proof of a marriage.

**21.** The 1<sup>st</sup> defendant says that Section 59 of the Marriage Act clearly sets out that the only ways through which marriage can be proved in Kenya are:

- (a) a certificate of marriage issued under the Marriage Act or any other written law;
- (b) a certified copy of a certificate of marriage issued under the Marriage Act or any other written law;
- (c) an entry in a register of marriages maintained under the Marriage Act or any other written law;
- (d) a certified copy of an entry in a register of marriages, maintained under the Marriage Act or any other written law; or
- (e) an entry in a register of marriages maintained by the proper authority of the Khoja Stia, Ith’nasheri, Shia Imam, Ismaili or Bohra Communities or a certified copy of such an entry.

**22.** The first defendant contends that the plaintiff has not presented any of the documents set out in section 59 of the Marriage Act. In support of this submission the 1<sup>st</sup> defendant proffers the case of *EWM Versus EMK, HCCCC 33 of 2010, OS, Nairobi* and Quotes the court as having held:

***“In this case, the applicant asserts that she was married to the respondent. She neither in her court papers nor in oral evidence discloses the system of law under which the alleged marriage was contracted. There is, to my mind, no evidence that the applicant was married to the respondent. If they had contracted a statutory marriage, a certificate of marriage ought to have been produced to prove existence of the statutory marriage. If it was alleged that the parties had contracted a customary law marriage, then, by virtue of Section 51 of the Evidence Act, evidence should have been adduced to prove existence of the alleged customary marriage. If the applicant was asserting a marriage out of prolonged cohabitation, and wanted the court to presume marriage out of such cohabitation, then evidence geared to establish cohabitation from which marriage could be presumed ought to have been presented. The applicant merely asserted that she was married to the respondent and left it at that. With respect, that was not sufficient, even without any counter-pleading by the respondent. It is my view that the applicant has not established that she is or was married to the applicant at any one time. She alleges that they had a child between them. That by itself is neither here nor there. The fact that two people are parents of a particular child is not proof of marriage. In any event, the applicant did not lead any evidence which established that the alleged child was sired by the respondent or that he had assumed responsibility over him.”***

**23.** The 1<sup>st</sup> defendant submits that the plaintiff had failed to prove existence of a marriage between herself and the 4<sup>th</sup> defendant. It also submits that she has failed to demonstrate that her matrimonial home is situated on the suit land. In support of this submission the defendant relies on the case of *Stella Mokeira Matara Versus Thadeus Mose Mangenya and another – ELC No.209 of 2012 (Kisii)* and quotes it as saying:

***“The plaintiff placed no evidence before the court to prove that her matrimonial home is situated on the suit property. I do not think that the mere fact that one is married to a registered owner of a property qualifies such property to be a matrimonial home. Matrimonial home is defined in the Land Act, 2012 as “any property that is owned or leased by one or both spouses and occupied by the spouses as their family home”. A reading of section 79 (3) of the Land Act, 2012 gives me the impression that a home only qualifies to be termed a matrimonial home if the same is occupied by the spouses as such. The plaintiff had a duty therefore to demonstrate that the plaintiff and the 1<sup>st</sup> defendant occupied the suit properties as their family home. The plaintiff failed first, to show that there is a home on the suit properties and, secondly, that the plaintiff and the 1<sup>st</sup> defendant were occupying the alleged home on the suit properties as their family home.***

***Due to the foregoing, I am unable to find that the plaintiff has a matrimonial home on the suit properties. It is the matrimonial home that would have entitled the plaintiff to an overriding interest in the suit properties which interest would have imposed an obligation on the 1<sup>st</sup> defendant under the provisions of the law cited above to obtain the plaintiff’s consent before the suit***

*properties were charged to the 2<sup>nd</sup> defendant.”*

**24.The** 1<sup>st</sup> defendant submits that it undertook due diligence and confirmed that prior to, during and after preparation and execution of the Charge, Lucyline Kanyua Mutindwa and the 4<sup>th</sup> defendant were husband and wife and the person residing on the suit property. It asserts that on this basis, Lucyline Kanyua Mutindwa gave her spousal consent as required for the suit property to be charged to the 1<sup>st</sup> defendant.

**25.The** 1<sup>st</sup> defendant submits that for the above reason, the plaintiff has not demonstrated a prima facie case.

**26.Regarding** suffering irreparable damage, the 1<sup>st</sup> defendant says that the 3<sup>rd</sup> and 4<sup>th</sup> defendants willingly charged the property and knew that if they failed to pay the apposite loan, the charged property would be sold. It says that prior to the charge the suit land had been ascertained to have a commercial value of Kshs.29,000,000 when a valuation was carried out. The 1<sup>st</sup> defendant said that should the plaintiff win this suit, damages constituted an adequate remedy. It asserted that in the case of **Andrew M. Wanjohi versus Equity Bank and Another**, HCCC No.203 of 2005, Nairobi, the court held that damages are an adequate remedy as once a property is given as security, it becomes a commodity and is subject to sale.

**27.On** the balance of convenience, inter alia, the 1<sup>st</sup> defendant submits that as the 3<sup>rd</sup> defendant is in default for a lengthy period and it owed the 1<sup>st</sup> defendant a sum of Kshs.38,222,227.94 as at 7<sup>th</sup> July, 2015 which amount continues to accrue interest, the balance of convenience tilts in its favour as it continues to suffer loss due to the 3<sup>rd</sup> and 4<sup>th</sup> defendants default to repay the money they borrowed from it.

**28.The** 1<sup>st</sup> defendant submits that the loan amount and applicable penalties and interest will exceed the value of the suit property and deny the 1<sup>st</sup> defendant to recover the amount owing. It says that it will suffer loss as a result. It laconically states that the balance of convenience favours it. It proffers the case of Andrew M. Wanjohi Versus Equity Building Society (supra) which held:

***“In my considered view if the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were restrained from selling off until the suit was heard and determined, there is a very real risk that the debt may outstrip the value of the suit property, as the borrower has never made any repayments for more than three years. That fact, coupled with the status of the 1<sup>st</sup> and 2<sup>nd</sup> defendants, persuades me that the balance of convenience is in favour of the said Defendants. If the property was sold, the Plaintiff can find other accommodation. And if it were finally held that the property should not have been sold, the 1<sup>st</sup> and 2<sup>nd</sup> defendants would be able to compensate the Plaintiff. In contrast, the stoppage of the intended sale by the charger would result in the continued growth of debt and thus exposing them to potentially substantial irrecoverable losses. I therefore find that provided the charge complies with all other legal requirements, he should be permitted to release the security.”***

**29.The** 1<sup>st</sup> defendant submits that the plaintiff’s application is an attempt to delay the execution of the terms of the apposite charge and thereby violate its right to exercise its statutory power of sale over the suit property.

**30.The** 1<sup>st</sup> defendant proffered the following cases in support of its various propositions:

(i) GIELLA VERSUS CASSMAN BROWN & CO LTD [1973] E.A 358.

(ii) NGURUMAN LIMITED (APPELLANT) AND JAN BONDE NIELSON AND 2 OTHERS, COURT OF APPEAL CA 77 OF 2012 – NAIROBI.

(iii) EWM VERSUS EMK ALIAS JN – Nairobi HCCC 33 of 2013 (OS).

(iv) STELLA MOKEIRA MATARA VERSUS THADEUS MOSE MANGENYA AND FAMILY BANK LIMITED – ELC 209 OF 2012 – KISII.

(v) JULIUS MAINYE ANYEGA VERSUS ECOBANK KENYA LIMITED –NAIROBI HCCC 455 OF 2012.

(vi) ANDREW MURIUKI WANJOHI VERSUS EQUITY BUILDING SOCIETY AND 2 OTHERS – NAIROBI HCCC 203 OF 2005.

(vii) DAVIS NYANJUI NJEHIA VERSUS NATIONAL BANK OF KENYA LIMITED – HCCC 22 OF 2015 – NAKURU.

(viii) CHATUR RADIO SERVICE AND PRONOGRAM LIMITED – COURT OF APPEAL (NAIROBI) CA NO.50 OF 1988.

(ix) DANIEL KAMAU MUGAMBI VERSUS HOUSING FINANCE COMPANY OF KENYA LIMITED – HCCC NO.261 OF 2006 (OS).

**31.I have** carefully considered the pleadings, the submissions and the authorities proffered by the parties in support of their propositions. The authorities proffered by the parties are good law in their circumstances. But no circumstances are completely in congruence in any two cases.

**32.Regarding** the authorities proffered by the plaintiff, there is no dispute that section 79 (3) of the Land Act makes it mandatory for spousal consent to be obtained before a charge is executed that affects a matrimonial home. However, the case of **Pamela Imbuka Njaro** concerns a matter where there was only one spouse whereas in this case it is claimed that there were two spouses. The case of **Rose Florence Wanjiru versus Standard Bank Ltd et al** (op cit) largely concerned itself with determination of what is the core or essential contest of notice by public advertisement Under Order 1 rule 8 (2) of the CPR.

**33.I find** that the authorities proffered by the 1<sup>st</sup> defendant in support of its assertions are, by and large relevant to the issues being considered in this application.

**34.Considering** the relevant weight of the parties propositions, I find that those of the 1<sup>st</sup> defendant have more weight.

**35.I find** that the plaintiff has not demonstrated to the satisfaction of this court that she is the wife of the 4<sup>th</sup> defendant. Indeed, except for the Birth Certificate of David Mwema who she claims is their son with the 4<sup>th</sup> defendant, no other evidence was proffered.

**36.The** plaintiff has not satisfied this court that she has a matrimonial house on the suit property. She has proffered no evidence to that effect.

**37.It is** clear to me that the plaintiff does not stand to suffer irreparable loss not compensable by monetary damages, that she has not demonstrated a prima facie and that she has not demonstrated that the balance of convenience tilts in her favour.

**38.Without** insinuating that this is the case in this matter, I opine that the existence of multiple spouses, real or contrived, is an area that can be misused by unscrupulous people to defraud financial institutions. This is why it is necessary for courts to obtain proof that multiple spouses are real spouses. It is also necessary for such spouses to prove that there existed a matrimonial house on the suit land.

**39.I also** wish to debunk the notion that if an applicant at the interlocutory stage seeks orders which if not granted may negatively affect the final order sought in the plaint, then such orders should not be granted at the interlocutory stage. Prayer 3 in this application and prayer (c) in the plaintiff's plaint seek to stop the sale of the suit property. I opine that the court's hands cannot be fettered if it finds that an interlocutory prayer is not meritorious even though denial of that prayer will affect the status of a prayer in the plaint.

**40.I agree** with the 1<sup>st</sup> defendant and as was held in the case of **Andrew M. Wanjohi versus Equity Building Society, supra**, if the orders sought by the plaintiff are granted, the 1<sup>st</sup> defendant will be denied an opportunity to recover the amount it is owed by the 3<sup>rd</sup> and 4<sup>th</sup> defendants. The owed amount may over time balloon into an irrecoverable colossal amount of money. As in business time is of the essence, such a scenario would not augur well for all concerned.

**41.In** the circumstances, this application is dismissed with the result that any extant interlocutory orders are vacated forthwith.

**42.It** is so ordered.

Delivered in open court at Chuka this **16<sup>th</sup> day of March, 2017** in the presence of:

CA: Ndegwa

Miss Njenga h/b Rimita for plaintiff

Kiongo h/b Coulson Harney for 1<sup>st</sup> defendant

Humphrey Mbabu Mbaka 4<sup>th</sup> defendant

**P. M. NJOROGE,**

**JUDGE.**

3. Upon closure of the hearing, the parties filed written submissions.

4. The plaintiff's written submissions are reproduced in full herebelow:

#### **PLAINTIFF'S WRITTEN SUBMISSIONS**

In her plaint dated **25<sup>th</sup> August, 2015** filed in court the same day the plaintiff made the following prayers:-

a) A declaration that the intended sale by Public Auction of Land Reference No. CHUKA TOWNSHIP/39 is unlawful, irregular, unprocedural and illegal and thus the same be ordered stopped.

b) A declaration that the charge on CHUKA TOWNSHIP/39 between the 1<sup>st</sup> 2<sup>rd</sup> and 4<sup>th</sup> defendants is void and of no effect in terms of the Land Act 2012.

c) An order of permanent injunction restraining the defendants by themselves, their agents, servants, employees, and/or assignees or whomsoever acting on the defendants' behalf from selling, advertising, alienating, disposing off or in any other manner whatsoever from dealing with plaintiff's matrimonial home comprised in L.R. NO. CHUKA TOWNSHIP/39.

d) The costs of the suit.

e) Any further or better relief this honourable court may deem fit to grant.

This claim was resisted especially by the 1<sup>st</sup> defendant the bank. In our most humble submission what has to be decided in this case is simple.

i. Has the plaintiff proved on the required standard that is on the balance of probabilities that she is the wife (spouse) of the 4<sup>th</sup> defendant and whether she lives with him on the charged property ie Land Reference No. CHUKA/TOWNSHIP/39.

ii. Was her consent ever sought to charge the Land in terms of section 79 (3) of the Land Act No. 6 of 2012 (sic) was it given?

#### **A. EVIDENCE**

The court has the record and we need not repeat it here. But what is clear is that the plaintiff gave evidence that was uncontroverted to show that she was and is the wife of the 4<sup>th</sup> defendant. She was the 1<sup>st</sup> wife and that they live on L.R. NO. CHUKA TOWNSHIP/39. They live there with their son. There is a 2<sup>nd</sup> wife LUCYLINE KANYUA MUTINDWA. Both are married under Meru Customary Law. Each of them has a boy child. It also came out from the cross-examination that there was a third woman who was to be a third wife but refused the marriage. She however, had a boy child who she left behind and is now in school.

He is in standard 1 and about 7 years.

Our submission (sic) that this is all a by-the way.

The plaintiff called very important witnesses to support her case. This was her own father and her father in law.

The plaintiff 's father confirmed that the plaintiff is the 1<sup>st</sup> wife of the 4<sup>th</sup> defendant

The 4<sup>th</sup> defendant's father confirmed that the plaintiff was the wife of her son, the 4<sup>th</sup> defendant

In our submission (sic) could have been no better evidence to prove that the plaintiff is the 4<sup>th</sup> defendant's wife.

In cross examination the 1<sup>st</sup> defendant's counsel among other questions asked whether she had any documents to prove the marriage.

Customary law in marriages have (sic) always been a matter of fact to be proved through evidence. This the plaintiff has done.

But there is the issue of The Marriage Act 2014.

Section 96 The Marriage Act is on transitional provisions.

Although the period of registration is three years sub section (4) of section 96 gives the cabinet secretary powers to extend the registration period by Notice in Gazzette.

The act therefore did not apply to customary marriages until 1<sup>st</sup> August, 2017. So the period of 3 years should be counted from 1<sup>st</sup> August, 2017.

What we are saying is that at all material times the Marriage Act of 2014 did not apply to the plaintiff's marriage or affect her case.

The plaintiff has abundantly proved that she was and is the wife of the 4<sup>th</sup> defendant and that her consent was necessary before her matrimonial home was charged to the 1<sup>st</sup> defendant.

#### **B. THE LAW**

Section 79(3) of the Land Act reads as follows:-

*"79(3) A charge of a matrimonial home, shall be valid only if any document or form used in applying for such a charge, or used to grant the charge, is executed by the chargor and any spouse of the chargor living in that matrimonial home, or there is evidence*

*from the document that it has been assented to by all such persons.”*

It was established that the plaintiff lives on this property. It is her matrimonial home. Her consent to charge the property was not sought nor obtained. The charge was therefore invalid in terms of section 79 (3).

We have attached the following for court's perusal

- a. Kenya Gazette Notice No.5345 of 9<sup>th</sup> June, 2017
- b. Land Act No. 6 of 2012
- c. Pamela Imbuka Njaro and another vs Joseph Vutita Njaro & Another HCE&L NO.78 of 2014 (KAKAMEGA)

We also pray for costs

**DATED AT MERU THIS 21<sup>ST</sup> DAY OF MARCH, 2018**

**MAITAI RIMITA & CO**

**ADVOCATES FOR THE PLAINTIFF**

5. The 1<sup>st</sup> defendant's written submissions are reproduced herebelow in full:

**THE FIRST DEFENDANT'S WRITTEN SUBMISSIONS**

May it please your Lordship

These are the 1<sup>st</sup> defendant's written submissions in respect of this suit.

Background

1. This suit was filed on **25<sup>th</sup> August, 2015** by way of a plaint dated **25<sup>th</sup> August, 2015**. The plaint is supported by a verifying affidavit sworn by the plaintiff on 25<sup>th</sup> August, 2015. In the plaint, the plaintiff seeks the following orders:-

- a) A declaration that the intended sale by public auction of Land Reference No. Chuka Township/39 is unlawful, irregular, unprocedural and illegal and thus the same be ordered stopped
- b) A declaration that the charge on Chuka Township/39 between the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants is void and of no effect in terms of the Land Act, 2012;
- c) An order of permanent injunction restraining the defendants by themselves, their agents, servants, employees and/or assignees or whomsoever acting on the defendant's behalf from selling, advertising, alienating, disposing off or in any other manner whatsoever from dealing with plaintiff's matrimonial home comprised in L.R. NO. Chuka Township/39;
- d) Costs of the suit
- e) Any further or better relief this honourable court may deem fit to grant

2. The plaintiff subsequently filed the following further documents in support of her claim:

- a) Plaintiff's list of witnesses dated 5<sup>th</sup> March, 2018;
- b) Plaintiff's list of witness statement dated 5<sup>th</sup> March, 2018;
- c) Plaintiff's list of witnesses dated 23<sup>rd</sup> February, 2018;
- d) Witness statement of Festus Mutegi M'Rithaa dated 23<sup>rd</sup> February, 2018;
- e) Witness statement of Dunstan Mbaka Mugeru dated 23<sup>rd</sup> February, 2018 and
- f) Witness statement of David Mwema dated 23<sup>rd</sup> February, 2018

It is important to note that the plaintiff attached two documents to her plaint and verifying affidavit - a 45 day redemption notice dated 27<sup>th</sup>

July 2015 and a notification of sale dated 27<sup>th</sup> July, 2015, both of which were issued by Muga Auctioneers & General Merchants (“the second defendant”)

3. The 1<sup>st</sup> defendant opposes the suit and the prayers sought therein. The 1<sup>st</sup> defendant has filed the following documents:

- a) A Memorandum of appearance dated 18<sup>th</sup> July, 2017
- b) A statement of defence dated 31<sup>st</sup> August, 2017
- c) A list of witnesses dated 31<sup>st</sup> August, 2017
- d) Witness statement of Samuel Irungu dated 19<sup>th</sup> June, 2017 (sic)
- e) List and bundle of documents dated 31<sup>st</sup> August, 2017

4. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants did not file any pleadings or other documents in respect of the main suit.

5. The suit came up for hearing on 6<sup>th</sup> March, 2018, when the following witnesses attended court and gave their evidence:

- a) Elyjoy Kagani – as PW1, who adopted her witness statement dated 5<sup>th</sup> March, 2018 and gave oral testimony on her own behalf;
- b) Festus Mutegi M’Rithaa – as PW2, who adopted his witness statement dated 23<sup>rd</sup> February, 2018 and gave oral testimony on behalf of the plaintiff;
- c) Dunstan Mbaka Mugeru – as PW3, who adopted his witness statement dated 23<sup>rd</sup> February, 2018 and gave oral testimony on behalf of the plaintiff.
- d) Samuel Irungu – as DW1, who adopted his witness statement dated 19<sup>th</sup> June, 2017 (sic) and gave oral testimony on behalf of the 1<sup>st</sup> defendant.

6. It is important to mention that David Mwema, who was named as a witness for the plaintiff and who filed a witness statement dated 23<sup>rd</sup> February, 2018 did not attend court during hearing. His witness statement dated 23<sup>rd</sup> February, 2018 was neither adopted nor withdrawn so it does not form part of the plaintiff’s evidence but remains part of the record.

7. The 4<sup>th</sup> defendant attended court in person during the hearing but he did not present any statement or give any oral evidence on his own behalf or on behalf of any other party.

#### **The undisputed facts**

8. The following constitute pertinent facts that were presented before this honourable court, which are not contested or disputed by any of the parties:

- a) The 4<sup>th</sup> defendant is the registered proprietor of the property known as Title Number Chuka Township/39 (“the suit property”).
- b) The suit property is charged by the 4<sup>th</sup> defendant to the 1<sup>st</sup> defendant to secure banking facilities amounting to Kshs.20,600,000.000 which the 1<sup>st</sup> defendant granted to the 3<sup>rd</sup> defendant.
- c) The relevant charge is dated 7<sup>th</sup> August, 2012 and is made between the 1<sup>st</sup> defendant (as lender), the 3<sup>rd</sup> defendant (as borrower) and the 4<sup>th</sup> defendant (as chargor) (“the charge”) – see charge on page 6 to 22 of the 1<sup>st</sup> defendant’s list and bundle of documents;
- d) Under the charge, the 3<sup>rd</sup> defendant and 4<sup>th</sup> defendant covenanted that either or both of them would pay all the monies, obligations and liabilities secured by the charge on the 7<sup>th</sup> day after the date of the charge or as per the letter of offer. Further, it was agreed in terms of clause 8(a) of the charge that in the event of the 3<sup>rd</sup> defendant’s default in paying when demanded any sum due and owing to the 1<sup>st</sup> defendant under the charge, the monies secured by the charge would immediately become due and payable;
- e) Spousal consent to the charge was granted by Lucyline Kanywa Mutinda, who the 4<sup>th</sup> defendant acknowledged and presented as his wife – see page 21 of the 1<sup>st</sup> defendant’s list and bundle of documents.
- f) The 4<sup>th</sup> defendant and Lucyline Kanywa Mutinda are the directors and shareholders in the 3<sup>rd</sup> defendant;
- g) The 3<sup>rd</sup> defendant failed to perform its obligations under the charge ie repaying the banking facilities granted by the 1<sup>st</sup> defendant;

- h) The 1<sup>st</sup> defendant issued three separate demand letters to the 3<sup>rd</sup> defendant – one dated 9<sup>th</sup> October, 2014, another dated 21<sup>st</sup> November, 2014 and the last dated 11<sup>th</sup> December, 2014. The 3<sup>rd</sup> defendant did not respond to these letters – see pages 77 and 79 of the 1<sup>st</sup> defendant’s list and bundle of documents;
- i) The 1<sup>st</sup> defendant decided to exercise its rights as a chargee and it caused a statutory notice dated 3<sup>rd</sup> February, 2015 to be issued to the 3<sup>rd</sup> defendant, the 4<sup>th</sup> defendant and Lucyline Kanyua Mutindwa – see page 80 to 81 of the 1<sup>st</sup> defendant’s list and bundle of documents. None of the foregoing persons responded to the statutory notice;
- j) The 1<sup>st</sup> defendant caused a 40 day notice to sell dated 21<sup>st</sup> May, 2015 to be issued to the 3<sup>rd</sup> defendant, the 4<sup>th</sup> defendant and Lucyline Kanyua Mutindwa – see page 82 to 83 of the 1<sup>st</sup> defendant’s list and bundle of documents. None of the foregoing persons responded to the notice to sell;
- k) The 1<sup>st</sup> defendant caused Muga Auctioneers & General Merchants (‘the 2<sup>nd</sup> defendant’) to issue notices – a 45 day redemption notice dated 27<sup>th</sup> July, 2015 and a notification of sale dated 27<sup>th</sup> July, 2015 – to the 3<sup>rd</sup> defendant in accordance with the provisions of the Land Act and Auctioneers Act and the same were duly issued;
- l) As at the time the 2<sup>nd</sup> defendant issued the above mentioned notices, the debt owed by the 3<sup>rd</sup> defendant to the 1<sup>st</sup> defendant stood at Kshs.38,222,227,94. However, as at 27<sup>th</sup> June, 2017, the outstanding debt had risen to Kshs.57,175,934.77;
- m) Following the issuance of the above-mentioned notices by the 2<sup>nd</sup> defendant, the plaintiff filed this suit and an application for an injunction;
- n) At all times material to the charge and the attempted exercise by the 1<sup>st</sup> defendant of its statutory power of sale, the 1<sup>st</sup> defendant was never informed about and did not deal with the plaintiff.

### **The dispute and the issues arising therefrom**

9. The following constitute the dispute the subject matter of this suit:

- a) The plaintiff asserts that she is a wife/spouse of the 4<sup>th</sup> defendant. This is denied by the 1<sup>st</sup> defendant.
- b) The plaintiff asserts that she lives on the suit property together with the 4<sup>th</sup> defendant and a child belonging to the two of them. This is denied by the 1<sup>st</sup> defendant.
- c) The plaintiff asserts that the suit property constitutes her matrimonial home and that her consent ought to have been obtained before the suit property was charged to the 1<sup>st</sup> defendant. This is denied by the 1<sup>st</sup> defendant.
- d) The 1<sup>st</sup> defendant insists that the charge is valid and that on account of the default in payment of the debt due and issuance of all the requisite notices, the 1<sup>st</sup> defendant is entitled to exercise its power of sale. The plaintiff denies this and asserts that the charge is void.

10. The following therefore constitute the issues of determination by this honourable court:

- a) Whether the plaintiff is a wife/spouse of the 4<sup>th</sup> defendant;
- b) Whether the suit property is the plaintiff’s matrimonial home and, if so, whether the plaintiff’s consent was required prior to the suit property being charged to the 1<sup>st</sup> defendant;
- c) Whether the charge is valid or void and of no effect’
- d) What orders should be issued by this honourable court.

### **A. Whether the plaintiff is a wife/spouse of the 4<sup>th</sup> defendant**

11. The 1<sup>st</sup> defendant submits that the plaintiff is not a wife/spouse of the 4<sup>th</sup> defendant.

The 1<sup>st</sup> defendant’s submission is based on the following

- a) The plaintiff and her witnesses gave contradicting evidence on the time when and the manner in which the alleged marriage between the plaintiff and the 4<sup>th</sup> defendant came to be:
- i) In her witness statement (see line 2 thereof) and her oral testimony, the plaintiff insisted that she married the 4<sup>th</sup> defendant in September, 1992 but she did not provide any clarification on how she concluded that the alleged marriage had taken place;

ii) In his witness statement and his oral testimony, Festus Mutegi M'Rithaa alleged that the marriage between the plaintiff and the 4<sup>th</sup> defendant took place following a party that was allegedly held on 9<sup>th</sup> April, 1994. In his own words he states (see the last paragraph of his witness statement): "The dowry price was later on settled in full on diverse dates and I embraced the new family and I became the father in law to the 4<sup>th</sup> defendant."

iii) On his part, Dunstan Mbaka Mugeru was equivocal about the time when the alleged marriage took place. In his witness statement, he suggests that the alleged marriage took place in September, 1992 when "the 4<sup>th</sup> defendant took the plaintiff as his wife" (However, during his oral testimony, he asserted that the alleged marriage took place in accordance with Meru customs but was non-committal on whether under Meru customary law a marriage takes place before or after customary practices have taken place;

iv) Further to the above, there is a notable discrepancy between the evidence of Festus Mutegi M'Rithaa and the evidence of Dunstan Mbaka Mugeru regarding the significance of a meeting that allegedly took place on 11<sup>th</sup> December, 1993:

§ According to Festus Mutegi M'Rithaa, on 11<sup>th</sup> December, 1993, he received 3 visitors who arrived without prior arrangement. He added that during the visit he was informed by Dunstan Mbaka that the plaintiff was living with the 4<sup>th</sup> defendant. Festus Mutegi M'Rithaa does not mention any cultural rites taking place on that day;

§ However, according to Dunstan Mbaka Mugeru, the 4<sup>th</sup> defendant visited Festus Mutegi M'Rithaa long before 11<sup>th</sup> December, 1993 and informed him that he (the 4<sup>th</sup> defendant) was living with the plaintiff. He added that the meeting of 11<sup>th</sup> December, 1993 was a party organized in accordance with Meru Customs during which certain cultural rites took place.

The above contradictions blight the plaintiff's allegations that she is a wife/spouse of the 4<sup>th</sup> defendant.

b) The plaintiff has not discharged the burden she bears to present evidence demonstrating that she is a wife/spouse of the 4<sup>th</sup> defendant. Indeed –

i) In the plaint, her witness statement and her oral testimony before this honourable court, the plaintiff did not specify the system of marriage under which she alleged that she and the 4<sup>th</sup> defendant got married. The plaintiff did not specify the system of marriage under which she alleged that she and the 4<sup>th</sup> defendant got married. The plaintiff only made a blanket statement to the effect that she married the 4<sup>th</sup> defendant in September 1992;

ii) In their witness statements and oral testimony, Festus Mutegi M'Rithaa and Dunstan Mbaka Mugeru suggested that the alleged marriage between the plaintiff and the 4<sup>th</sup> defendant was in accordance with Meru Customary Law. However, no evidence was led on behalf of the plaintiff to show the following –

§ The specific steps and practice that must be followed and the specific requirements and conditions that must be met under Meru Customary Law before a man and a woman are considered to have become husband and wife under that law;

§ That the plaintiff and the 4<sup>th</sup> defendant followed all the steps and practices and complied with all the requirements and conditions set under Meru customary law, thereby becoming husband and wife under that.

iii) In the above regard, section 51 of the Evidence Act (CAP. 80) is pertinent. Evidence of an opinion on what constitutes Meru customs relating to marriage would have been admissible but no such opinion was presented.

iv) Under section 59 of the Marriage Act, 2014, a marriage can be only be proved in the following ways –

§ Through a certificate of marriage issued under the Marriage Act or any other written law;

§ Through a certified copy of a certificate of marriage issued under the Marriage Act or any other written law;

§ Through an entry in a register of marriages maintained under the Marriage Act or any other written law;

§ Through a certified copy of an entry in a register of marriages, maintained under the marriage Act or any other written law; or

§ Through an entry in a register of marriages maintained by the proper authority of the Khoja Shia, Ith'nasheri, Shia Imam, Ismaili or Bohra Communities, or a certified copy of such an entry.

The existence of the above provision of law was raised by the 1<sup>st</sup> defendant in March, 2016 through written submissions in opposition to the plaintiff's application for a temporary injunction. Despite being made aware of this provision 2 years before the hearing of the main suit, the plaintiff did not obtain and provide proof of marriage by presenting any of the documents set out above as required by law.

v) The following important matters must be noted regarding the Marriage Act, 2014:

§ The Act was assented to by the President on 29<sup>th</sup> April, 2014 and it came into force on 20<sup>th</sup> May, 2014;

§ Under section 96(2) and (3) of the Act, parties to a customary marriage were statutorily required to register such a marriage within three years of the coming to force of the Act. Accordingly, parties to customary marriages that were in existence as at 20<sup>th</sup> May, 2014 were required to register those marriages by 20<sup>th</sup> May, 2017.

§ Section 96(4) of the Act gave the Cabinet Secretary power to extend the 3 year registration period provided for in section 96(2) and (3) of the Act.

vi) Considering the provisions of the Marriage act, 2014 highlighted above:

§ If the plaintiff and the 4<sup>th</sup> defendant were married under Meru customary law as at 20<sup>th</sup> May, 2014, they should have registered their marriage by 20<sup>th</sup> May, 2017 in accordance with the mandatory provisions of the section 96 of the Act.

§ By the time this suit was heard on 6<sup>th</sup> March, 2018, the plaintiff and the 4<sup>th</sup> defendant should have been holding a certificate of marriage or a certified copy of such certificate. Alternatively, they should have been able to refer to an entry relating to their alleged marriage as contained in a marriage register maintained under the Act. Such evidence would have been produced in compliance with the requirements of section 59 of the Act;

§ Non-compliance with the above requirements would only have been excused if the cabinet secretary published a Gazette Notice expressly extending the registration period under section 96 (4) of the Act from 3 years to a longer period. No such notice has ever been published by the Cabinet Secretary.

c) The plaintiff's demeanor during the hearing and her testimony during cross-examination demonstrated that she was largely inconsistent and shifty. For instance:

i) On several occasions during cross examination, the plaintiff was caught fibbing but she stubbornly refused to accept that she was making false statements;

ii) During her oral testimony, the plaintiff could not make any specific references to dates or even months in year when events that formed part of her evidence took allegedly occurred. All the plaintiff's references to events were generalized;

iii) The plaintiff alleged that the 4<sup>th</sup> defendant was her husband and they had lived together for a long time but she could not state with certainty the kind of business that the 4<sup>th</sup> defendant was involved in;

iv) The plaintiff alleged that she did not know about the 3<sup>rd</sup> defendant but subsequently prevaricated and stated that she knew the 3<sup>rd</sup> defendant and the business it conducted;

v) The plaintiff alleged that she had documentary evidence of her alleged marriage to the 4<sup>th</sup> defendant but when challenged to produce it, she was not able to.

12. In support of its submissions set out above, the 1<sup>st</sup> defendant relies on the following authorities:

a) *EWM VS EMK [2014] eKLR* (see page 1 to 4 of the attached authorities) where the court held as follows (at page 2 to 3 of the attached authorities):

“In this case, the applicant asserts that she was married to the respondent. She neither in her court papers nor in oral evidence discloses the system of law under which the alleged marriage was contracted. There is, to my mind, no evidence that the applicant was married to the respondent. If they had contracted a statutory marriage, a certificate of marriage ought to have been produced to prove existence of the statutory marriage. If it was alleged that the parties had contracted a customary law marriage, then, by virtue of section 51 of the Evidence Act, evidence should have been adduced to prove existence of the alleged customary marriage. If the applicant was asserting a marriage out of prolonged cohabitation, and wanted the court to presume marriage out of such cohabitation, then evidence geared to establishing cohabitation from which marriage could be presumed ought to have been presented. The applicant merely asserted that she was married to the respondent and left it at that. With respect, that was not sufficient, even without any counterpleading by the respondent. It is my view that the applicant has not established that she is or was married to the applicant at any one time. She alleges that they had a child between them. That by itself is neither here nor there. The fact that two people are parents of a particular child is not proof of marriage. In any event, the applicant did not lead any evidence which established that the alleged child was sired by the respondent or that he had assumed responsibility over him”

b) *Anastasia Mumbi Kibunja & Others vs Njihia Mucina & Others [2013] eKLR* (see page 5 to 12 of the attached Authorities) in which the Court of Appeal emphasized the need for clear evidence in proving the existence of a marriage, particularly customary marriage where the rites of the particular community have to be identified and the significant ones must be accomplished for a valid marriage to be contracted. The Court of Appeal stated (see page 8 of the attached authorities):

“We begin with whether there was evidence from the appellant's side that indeed there existed a Kikuyu Customary law marriage between Elizabeth and the deceased. Before we consider that evidence, we need to understand the rites of a kikuyu Customary Law Marriage. This is because customary marriages in any community have rites and ceremonies at every stage, on the way to contracting a valid marriage. All rites may not be accompanied but significant ones must be.”

**B. Whether the suit property is the plaintiff's matrimonial home and, if so, whether the plaintiff's consent was required prior to the suit property being charged to the 1<sup>st</sup> defendant**

13. In section 2 of the Land Act, 2012, matrimonial home is defined as “any property that is owned or leased by one or both spouses and occupied by the spouses as their family home.”

14. For purposes of (sic) plaintiff's claim in this suit, it is necessary for the plaintiff to demonstrate that the suit property was her matrimonial home on 7<sup>th</sup> August, 2012, when the charge was made. Indeed, section 79 (3) of the Land Act, 2012 states as follows:

“A charge of a matrimonial home, shall be valid only if any document or form used in applying for such a charge, or used to grant the charge, is executed by the chargor and any spouse of the chargor living in that matrimonial home, or there is evidence from the document that it has been assented to by all such persons”

15. The 1<sup>st</sup> defendant reiterates it (sic) submissions in paragraphs 11 and 12 above and in addition submits that the suit property was not the plaintiff's matrimonial home on 7<sup>th</sup> August, 2012. The 1<sup>st</sup> defendant's submission is based on the following:

a) No independent or documentary evidence has been presented by the plaintiff to demonstrate that the suit property was her matrimonial home as at 7<sup>th</sup> August, 2012;

b) From the plaintiff's plaint, the plaintiff's witness statement and the plaintiff's oral testimony, it is clear that the plaintiff asserts that the suit property is her matrimonial home and that she lives there with the 4<sup>th</sup> defendant and their child but she does not give any indication when they allegedly started living there and when the suit property became her matrimonial home;

c) In his witness statement and his oral testimony, Festus Mutegi M'Rithaa insisted that the plaintiff and the 4<sup>th</sup> defendant live together but he did not specify where they live. He also did not give any evidence that could point to the establishment of a matrimonial home at the suit property;

d) In the evidence presented by the plaintiff's witnesses, there are material contradictions regarding the time when it is alleged that she started living at the suit property. Indeed –

i) In his witness statement (see page 2 thereof), Dunstan Mbaka Mugeru asserts the plaintiff and the 4<sup>th</sup> defendant first lived in a rented house but after the 4<sup>th</sup> defendant bought the suit property and built a house on it they moved there. Absolutely no references are made to the date when the foregoing occurred.;

ii) In the witness statement signed and filed by David Mwema, which continues to form part of the record but was not adopted by the plaintiff, David Mwema alleges in paragraphs 4 and 5 of the statement that: “I was born and raised in the matrimonial home which is built on the suit land, where my mother lives to date. My step mother one Lucyline Kanyua also lives on the same land but in a separate house built for him (sic) by my father the 4<sup>th</sup> defendant”

iii) Seeing as it is alleged that David Mwema was born in September, 1992, the above statements cannot be reconciled with the evidence presented by Dunstan Mbaka Mugeru.

16. In support of the above submissions, the 1<sup>st</sup> defendant relies on the Court of Appeal decision in **Stella Mokeira Matara vs. Thaddeus Mose Manganya & Anor. [2016] eKLR** (see page 13 to 19 of the attached authorities) where the court stated as follows (see page 17 of the attached authorities):

“Matrimonial home” is defined by the Land Act, 2012 to mean any property that is owned or leased by one or both spouses and occupied by the spouses as their family home.

“Taking into account the above definition, the learned judge held that the appellant had failed to show, firstly, that there is a home on the suit properties and, secondly, that together with the 1<sup>st</sup> respondent they were occupying the alleged home. Perhaps photographs of the home, if at all, or the valuation report containing appropriate description of the suit properties would have sufficed. In the circumstances, we cannot fault the learned judge for the conclusion that he arrived regarding absence of proof of existence of a matrimonial home on the suit properties.”

17. Based on paragraphs 13 to 16 above, the 1<sup>st</sup> defendant submits that no spousal consent was required from the plaintiff prior to the suit property being charged to the 1<sup>st</sup> defendant.

18. Without prejudice to the submissions made above, the 1<sup>st</sup> defendant submits that even if the plaintiff was able to demonstrate that she was a spouse of the 4<sup>th</sup> defendant as at 7<sup>th</sup> August, 2012 (which the 1<sup>st</sup> defendant asserts she has not demonstrated) and even if she was able to demonstrate that the suit property was her matrimonial home as at 7<sup>th</sup> August, 2012 (which the 1<sup>st</sup> defendant asserts she has not demonstrated), spousal consent would not have been required from her for the suit property to be charged to the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant's submission is based on the provisions of section 79 (3) of the Land Act, 2012 which does not require each and every spouse living on a matrimonial home to consent to the matrimonial home being charged: rather it requires the charge to be executed by “the chargor and any spouse of the chargor living in that matrimonial home.”

**C. Whether the charge is valid or void and of no effect**

19. Based on the submissions set out above, the 1<sup>st</sup> defendant submits that the charge dated 7<sup>th</sup> August, 2012 is valid, proper and lawful and a finding to that effect ought to be made by this honourable court.

**D. What orders should be issued by this honourable court**

20. The 1<sup>st</sup> defendant submits that as demonstrated above, the plaintiff's suit has no merit. Accordingly, the same should be dismissed with costs to the 1<sup>st</sup> defendant.

**DATED AT NAIROBI THIS 2<sup>ND</sup> DAY OF MAY, 2018**

**COULSON HARNEY LLP**

**ADVOCATES FOR THE 1<sup>ST</sup> DEFENDANT**

6. The 3<sup>rd</sup> and 4<sup>th</sup> defendants' written submissions are reproduced in full herebelow:

**3<sup>RD</sup> AND 4<sup>TH</sup> DEFENDANTS WRITTEN SUBMISSIONS**

I am the 4<sup>th</sup> defendant in this matter. I am a Director of the 3<sup>rd</sup> defendant. I am therefore making these submissions for the two said defendants.

I am the owner of Chuka Township/39 which is subject of this case.

I rely on my affidavit and the written statements of defence.

The truth is that when the valuer visited the land we went round with him and I explained to him who had occupied each house.

Nobody told me that it was necessary to have my first wife agree to the taking of the loan.

The second wife signed because she was a director of the 3<sup>rd</sup> defendant.

The bank 1<sup>st</sup> defendant know (sic) all these facts through their valuer nobody told me that it was necessary to have my first wife agree to (sic) the taking of the loan.

My first wife was properly married to me as the evidence show (sic).

Let the court decide according to the law.

**DATED AT CHUKA THIS 30<sup>TH</sup> DAY OF APRIL, 2018**

**FOR 3<sup>RD</sup> AND 4<sup>TH</sup> DEFENDANTS.**

7. PW1, the plaintiff, told the court that the 4<sup>th</sup> defendant was her husband since 1992. She asked the court to adopt her witness statement dated 5<sup>th</sup> March, 2018 as her evidence in this suit. Her witness statement states as follows:

**STATEMENT OF ELYJOY KAGENI**

I am the plaintiff herein. I know the 4<sup>th</sup> defendant. He is my husband.

We were married in September, 1992.

We have one child a boy who was born in September, 1992

The 4<sup>th</sup> defendant has another wife (sic) she is Kanyua. We all live on L.R. NO. CHUKA TOWNSHIP/39 but separate houses.

I learnt of the loan my husband's company had taken when I (sic) some papers for sale of the land by auction.

I contacted by (sic) lawyers and we brought this case to court

I pray the court to protect me by allowing my case and stopping the sale.

That's all I have to state.

**Signed**

**Dated this 5<sup>th</sup> day of March, 2018**

8. During cross examination by the 1<sup>st</sup> defendant's advocate, she told the court that she was 45 years old, having been born in 1972. She went on to say that she came to know the 4<sup>th</sup> defendant in 1990, got married in 1992 and got a son.

9. She told the court that the 4<sup>th</sup> defendant was a businessman who owned other businesses, which except for his wholesale business called Mbaabu Wholesale, she did not know. Indeed in answer to a question by the 1<sup>st</sup> defendant's advocate, she said that: "It is not a must that I must know all his businesses." She told the court that at the wholesale business the 4<sup>th</sup> defendant sold shop goods such as cooking fat and fruits. She also said that she knew the 4<sup>th</sup> defendant's cattle business which she said was carried out on the suit land where she had a house. She reiterated that the 4<sup>th</sup> defendant had many businesses which she did not know.

10. She told the court that she knew Lucyline Kanyua who she said was the 4<sup>th</sup> defendant's second wife. She told the court that she had not mentioned her in her plaint because the plaint in this suit was hers. However, before she gave this answer she demurred for about ten minutes. She went on to say that she did not know Bank of Africa, the 1<sup>st</sup> defendant and averred that she got its name from the auctioneer's notice along the streets which indicated that Plot No. 39, Chuka was to be sold by Public Auction.

11. PW1 was categorical that she did not know why the suit land was being sold. She was also unequivocal that she did not inquire from her husband or anyone else why the land was being sold. At one time she answered the 1<sup>st</sup> defendant's advocate in the following way: "Unless you tell me why, I do not know why the suit land was being sold."

12. During further cross examination she changed tack and gave a new narrative. She told the court that her husband had told her that the 4<sup>th</sup> defendant, had obtained a loan from Bank of Africa. Put it to her by the 1<sup>st</sup> defendant that she had originally lied, she riposited that she had merely forgotten. She also said that her husband had told her that the interest charged by the lending Bank was prohibitive. She owned up that she had seen some people around the suit land when the apposite loan was being taken. In her next breath, she was unequivocal that she only came to know about the loan when she saw the auctioneer's notices.

13. She was unequivocal that she had never asked Lucyline Kanyua who signed the spousal consent and whom she said was the 4<sup>th</sup> defendant's second wife about the loan. She went on to say that the 4<sup>th</sup> defendant had told her that he took the loan to enlarge his wholesale business. She added that she did not know if he expanded the wholesale business because, according to her, she never went there. She also said that the 4<sup>th</sup> defendant had repaid the loan but only had a balance.

14. During further cross examination she told the court that she knew United Brothers, the 3<sup>rd</sup> defendant. Asked why she had earlier said that she did not know the same, she replied that she had not been asked any question about United Brothers. She reiterated that she knew it but did not know what business it is engaged in. She particularized that she came to know it in 2007.

15. Asked despite her evidence that she did not know Bank of Africa, why she had written in her supporting affidavit that she had gone to the bank seeking details about the loan and that the bank had refused to give details, PW1 demurred. After she was pressed further she merely said that she was not lying to the court but admitted that she had said in her affidavit that she had gone to the bank to seek details.

16. PW1 told the court that she had a birth certificate showing that the 4<sup>th</sup> defendant was the father of David Mwema, her son. She also told the court that she had no other document showing that the 4<sup>th</sup> defendant was her husband. She insisted that she was married in 1992. After producing her identity card, she said that she had not put the name of the 4<sup>th</sup> defendant in the identity card because she did not find it necessary. Pressed further regarding why she did not do so, she refused to answer the question.

17. PW1's cross examination by the 4<sup>th</sup> defendant only elicited two answers. One, that she did not know where the 4<sup>th</sup> defendant got his money. Two, that she did not help the 4<sup>th</sup> defendant to conduct business.

18. During re-examination by her advocate, PW1 was adamant that she only came to know about the apposite loan only after the auctioneer placed advertisements at their gate and also pasted it on trees and walls. She also said that she had mentioned Lucyline Kanyua in her witness statement. She further said that she had been married under Meru Customary law where elders did not issue certificates.

19. PW2, Festus Mutegi M'Rithaa told the court that PW1 was his daughter and that the 4<sup>th</sup> defendant was his son in law. He asked the court to adopt his witness statement dated **23<sup>rd</sup> February, 2018** as his evidence in this suit.

PW2's witness statement is reproduced herebelow

**STATEMENT OF FESTUS MUTEGI M'RITHAA**

I hail from Chuka within Tharaka Nithi County.

I know the plaintiff herein. She is my daughter. The 4<sup>th</sup> defendant is the husband to the plaintiff.

It all started when I noticed that my daughter was missing at home. On 11<sup>th</sup> December, 1993 three people came to my home. They were:

1. Dunstan Mbaka
2. Humphrey Mbaabu
3. Beanice Mbaka
4. Julius Ndeke

I welcomed them at home and served them tea. Dunstan Mbaka informed me that my daughter was living with his son one Humphrey Mbaabu. They assured me that she was safe. I therefore told them that they had to plan for another party (Ruracio) so that we can negotiate on the dowry price.

The party was set for 9<sup>th</sup> April, 1994. The 4 individuals came on that day. They met me with the following.

1. David Mbaka (brother)
2. Janet Kaari (wife)
3. Patrick Muriithi (neighbour)

The negotiations were done and it was agreed that they pay the following as bride price; A castrated he-goat and a knife, traditional brew, 15 goats, a heifer and a bull, a drum full of honey, 2 blankets, a coat for the father and a lesa for the mother. The discussion was done. The dowry price was later on settled in full on diverse dates and I embraced the new family and I became the father in law to the 4<sup>th</sup> defendant.

That is all I have to state.

**Signed**

**DATED AT MERU THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2018**

20. During cross examination by the 1<sup>st</sup> defendant's advocate he told the court that PW1, his daughter, had told him that her house was being auctioned because she had taken a loan. He told the court, that concerning the loan, all he knew was what he had been told by his daughter. He testified that his daughter was married to the 4<sup>th</sup> defendant in 1993 and a report to that effect was made to him on 11<sup>th</sup> December, 1993. He said that is when he learnt that DW1 was co-habiting with the 4<sup>th</sup> defendant. He went on to say that under Meru Customary Law marriage is deemed to have taken place when dowry starts being paid. He said that the 4<sup>th</sup> defendant's father started paying dowry on 9<sup>th</sup> October, 1994. He was unequivocal that is when the marriage between PW1 and the 4<sup>th</sup> defendant commenced, and not before. He also testified that before 1993, he did not know the 4<sup>th</sup> defendant.

21. The 4<sup>th</sup> defendant, also representing the 3<sup>rd</sup> defendant, opted not to cross-examine PW2.

22. The re-examination by PW1's advocate only elicited one answer. That is that PW1 was living with the 4<sup>th</sup> defendant in 1993.

23. PW3 Dunstan Mbaka Mugeru told the court that he knew the 4<sup>th</sup> defendant. He said that he was his son. He also said that PW1 was his son's wife. He asked the court to adopt his witness statement dated **23<sup>rd</sup> February, 2018** as his evidence in this suit. PW3's witness statement is reproduced herebelow:

**STATEMENT OF DUNSTAN MBAKA MUGERA**

I hail from Chuka within Tharaka Nithi County.

I know the plaintiff herein. She is the wife, to my son Humphrey Mbaabu Mbaka, the 4<sup>th</sup> defendant herein.

On or about the 8<sup>th</sup> of September in the year 1992, my son, the 4<sup>th</sup> defendant herein came and told me that he had brought in a wife. I advised him to go and see the plaintiff's father to tell him that he has taken his daughter as his wife and thereafter plan for a party according to the Meru Customs. The party was planned and set for 11<sup>th</sup> December, 1993 at Kibumbu village, a suburb of Chuka Town.

We went to the party with gifts which included sugar, tea leaves, wheat flour, maize flour and fermented porridge in a gourd. This was all in line with the customary laws. I was accompanied by:

1. Beanice Mbaka (wife)
2. Julius Ndeke Mugeru (brother)

3. Humphrey Mbaabu (Son)

At the plaintiff's home we were welcomed by:-

1. Festus Mugegi (father)

2. Janet Kaari (mother)

3. David Mbaka (uncle)

4. Patrick Muriithi (neighbour)

All the formalities were done and at the end the plaintiff's father requested us to go and prepare for another party (ruracio) which was set for Saturday, 9<sup>th</sup> April, 1994. The same individuals attended to us.

We exchanged our gifts and ate together which traditionally means that we had come to an agreement. We negotiated on the dowry price and the following was agreed upon; A castrated he-goat together with a knife, traditional brew, 15 goats, a heifer and a bull, 2 blankets, drum full of honey, a coat for the father and lesa for the mother. And the day was done. The dowry we paid in full on diverse dates.

The plaintiff and the 4<sup>th</sup> defendant used to live as man and wife on a rented house. He later bought the suit land where he built a house and they moved there.

Having moved to the new home the 4<sup>th</sup> defendant married the 2<sup>nd</sup> wife, one Lucyline Kanyua for whom he built a house on the same suit property.

That is all I have to state.

**Signed**

**DATED AT MERU THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2018**

24. During cross examination, he told the court that he knew Lucyline Kanyua, the lady who had given the impugned spousal consent. He said that she got married to his son in 2007 under Meru Customary law. He told the court that he did not know the matters in dispute in this suit.

25. PW3 went on to say that Eljoy Kageni started living with his son in 1992 and that his son had given him this information on 8<sup>th</sup> September, 1992. He said that he asked his son, the 4<sup>th</sup> defendant to go to the father of PW1 to seek a date for the required visit. He went on to say that the 4<sup>th</sup> defendant did so but he could not remember the date he went to the father of PW1. But he was unequivocal that was before 11<sup>th</sup> December, 1993. Asked if he would be surprised if he was told that PW1's father had testified that he had not seen the 4<sup>th</sup> defendant before 1993, he answered that he would not be surprised.

26. PW1 testified that PW1 had only had one child with the 4<sup>th</sup> defendant but added that he had other children. He said that in all he had three children. He said that his first child was with PW1 and that his 2<sup>nd</sup> child was with Lucyline Kanyua. The 3<sup>rd</sup> child, he proffered, was with a third lady who refused to get married and went away living the child with the 4<sup>th</sup> defendant. He, however, said that he could not remember the year she went away. He also told the court that he did not remember the age of that child but added that he started school in the year 2017.

27. PW1's advocate did not re-examine this witness.

28. DW1, Samuel Irungu told the court that he was a recovery officer at the Bank of Africa, the 1<sup>st</sup> defendant, which had been his employer since 2012. He asked the court to adopt his witness statement dated 19<sup>th</sup> June, 2017 as his evidence in this suit.

29. DW1's statement states as follows:-

I, Samuel Irungu, residing in Nairobi and of Post Office Box Number 69562-00400 in the Republic of Kenya, do hereby state as follows:-

1. I am a male adult person employed by the 1<sup>st</sup> defendant as a Recoveries Officer and have been authorized by it to make this statement on its behalf.

2. I am aware that the 1<sup>st</sup> defendant and the 3<sup>rd</sup> defendant were involved in a banker customer relationship.

3. I wish to state that sometime in the year 2012, the 3<sup>rd</sup> defendant through the 4<sup>th</sup> defendant and his wife Lucyline Kanyua Mutindwa approached the 1<sup>st</sup> defendant requesting for banking facilities amounting to Kshs.20,600,000.

4. I am aware that that the 4<sup>th</sup> defendant and Lucyline Kanyua Mutindwa presented themselves to the Bank as husband and wife and all indications were that the 3<sup>rd</sup> defendant was a family company.

5. By a letter dated 11<sup>th</sup> May, 2012, the 1<sup>st</sup> defendant offered various banking facilities to the 3<sup>rd</sup> defendant.

6. The 3<sup>rd</sup> defendant expressly accepted the said banking facilities by executing the 1<sup>st</sup> defendant's letter of offer of 11<sup>th</sup> May, 2012. The said letter is found at pages 1 – 5 of the 1<sup>st</sup> and 2<sup>nd</sup> defendant's list and bundle of documents.

7. I am aware that the 3<sup>rd</sup> defendant and its directors, the 4<sup>th</sup> defendant and Lucyline Kanyua Mutindwa, agreed to provide the following securities for the banking facilities offered to them by the 1<sup>st</sup> defendant.

i. A first legal charge over property title number Chuka Township/39 (“the suit property”) registered in the name of the 4<sup>th</sup> defendant for the sum of Kshs.20,600,000/=.

ii. Personal guarantees and indemnities for Kshs.20,600,000/= by the 4<sup>th</sup> defendant and Lucyline Kanyua Mutindwa; and

iii. Keyman insurance cover over the life for the 4<sup>th</sup> defendant for Kshs.20,600,000/-

8. By a charge dated 7<sup>th</sup> August, 2012, made between the 4<sup>th</sup> defendant (as chargor), the 3<sup>rd</sup> defendant (as borrower) and the 1<sup>st</sup> defendant as chargee), the 4<sup>th</sup> defendant charged his interest in the suit property to secure the payment of the sum of Kshs.20,600,000/= constituting the financial facilities granted to the 3<sup>rd</sup> defendant together with interest thereon due or payable to the 1<sup>st</sup> defendant and all costs, charges and expenses incurred by the bank in relation to the charge. A copy of the charge dated 7<sup>th</sup> August, 2012 is found at pages 6 – 22 of the 1<sup>st</sup> and 2<sup>nd</sup> defendant's list and bundle of documents.

9. I wish to point out that prior to, during, and after the preparation and execution of the charge, the 4<sup>th</sup> defendant and Lucyline Kanyua Mutindwa confirmed their relationship as husband and wife and as the persons residing on the suit property. Indeed, in the charge, Lucyline Kanyua Mutindwa expressly and unreservedly gave spousal consent for 4<sup>th</sup> defendant to charge the suit property to the 1<sup>st</sup> defendant to secure the financial facilities granted to the 3<sup>rd</sup> defendant. (I refer to page 21 of the 1<sup>st</sup> and 2<sup>nd</sup> defendant's list and bundle of documents.)

10. Under the charge, the 3<sup>rd</sup> defendant and the 4<sup>th</sup> defendant covenanted that either or both of them would pay all the monies, obligations and liabilities secured by the charge on demand.

11. By a deed of guarantee and indemnity dated 29<sup>th</sup> July, 2012, the 4<sup>th</sup> defendant inter alia guaranteed performance by the 3<sup>rd</sup> defendant of its obligations in relation to the financial facilities granted by the 1<sup>st</sup> defendant. A copy of the deed of guarantee given by the 4<sup>th</sup> defendant is found at pages 23-36 of the 1<sup>st</sup> and 2<sup>nd</sup> defendant's list and bundle of documents.

12. Further, by a deed of guarantee and indemnity dated 29<sup>th</sup> July, 2012, Lucyline Kanyua Mutindwa inter alia guaranteed performance by the 3<sup>rd</sup> defendant of its obligations in relation to the financial facilities granted by the 1<sup>st</sup> defendant. A copy of the deed of guarantee given by the 4<sup>th</sup> defendant's wife is found at pages 37-50 of the 1<sup>st</sup> and 2<sup>nd</sup> defendant's list and bundle of documents.

13. I wish to state that by August, 2013, it became clear that the 3<sup>rd</sup> defendant had not been performing its obligations in relation to the financial facilities granted to it by the 1<sup>st</sup> defendant. Consequently, the 3<sup>rd</sup> defendant's loan account had fallen into arrears.

14. By two letters dated 1<sup>st</sup> August, 2013, the 1<sup>st</sup> defendant notified the 4<sup>th</sup> defendant and Lucyline Kanyua Mutindwa of the change of the 3<sup>rd</sup> defendant's loan account from performing to non-performing status. Copies of the said letters are found at page 51 – 52 of the 1<sup>st</sup> and 2<sup>nd</sup> defendant's list and bundle of documents.

15. I wish to point out that sometime in September, 2013, the 3<sup>rd</sup> defendant through its representatives, the 4<sup>th</sup> defendant and Lucyline Kanyua Mutindwa approached the 1<sup>st</sup> defendant and sought to have the financial facilities granted to the 3<sup>rd</sup> defendant restructured.

16. By a letter dated 26<sup>th</sup> September, 2013, the 1<sup>st</sup> defendant offered to restructure the financial facilities it had granted to the 3<sup>rd</sup> defendant in the year 2012.

17. I am aware that the 3<sup>rd</sup> defendant and Lucyline Kanyua Mutindwa expressly accepted the terms of the restructure contained in the 1<sup>st</sup> defendant's letter by executing the 1<sup>st</sup> defendant's letter of offer dated 26<sup>th</sup> September, 2013 and the 1<sup>st</sup> defendant's standard terms and conditions applicable to all banking facilities. Copies of the letter of offer and the 1<sup>st</sup> defendant's standard terms and conditions applicable to all banking facilities are found at pages 53 – 76 of the 1<sup>st</sup> and 2<sup>nd</sup> defendant's list and bundle of documents.

18. I wish to state that the 3<sup>rd</sup> defendant failed to perform its obligations in relation to the financial facilities granted to it by the 1<sup>st</sup> defendant and secured by the charge and the personal guarantees and indemnities I have mentioned.

19. In view of the foregoing default, the 1<sup>st</sup> defendant issued three separate demands dated 9<sup>th</sup> October, 2014, 21<sup>st</sup> November, 2014 and 11<sup>th</sup> December, 2014 to the 3<sup>rd</sup> defendant through its directors ( the 4<sup>th</sup> defendant and Lucyline Kanyua Mutindwa). Copies of the demand letters are found at pages 77 – 79 of the 1<sup>st</sup> and 2<sup>nd</sup> defendant’s list and bundle of documents.

20. I am aware that the 3<sup>rd</sup> defendant failed to comply with the demands set out in the above letters. Accordingly, the 1<sup>st</sup> defendant decided to exercise its rights as chargee, indeed –

a) Through Coulson Harney Advocates, its advocates on record, the 1<sup>st</sup> defendant issued a statutory notice dated 3<sup>rd</sup> February, 2015 to the 4<sup>th</sup> defendant (and copied the 3<sup>rd</sup> defendant). The foregoing statutory notice was sent to its recipients by way of registered post;

b) Following the issuance of the statutory notice, the 1<sup>st</sup> defendant did not receive any proposal for payment, response or acknowledgment from the 3<sup>rd</sup> defendant, the 4<sup>th</sup> defendant or Lucyline Kanyua Mutindwa;

c) Following the expiry of the statutory notice referred to above, the 1<sup>st</sup> defendant decided that it would exercise its statutory power of sale in relation to the suit property;

d) Through, Coulson Harney Advocates, the 1<sup>st</sup> defendant issued a notice to sell dated 21<sup>st</sup> May, 2015 to the 4<sup>th</sup> defendant (and copied to the 3<sup>rd</sup> defendant, Lucyline Kanyua Mutindwa and the County Government of Tharaka Nithi) The foregoing notice to sell was sent to its recipients by means of registered post;

e) The notice to sell was copied to Lucyline Kanyua Mutindwa in her capacity as the spouse of the 4<sup>th</sup> defendant residing on the suit property;

f) Following the issuance of the notice to sell, the 1<sup>st</sup> defendant did not receive any proposal for payment, response, or acknowledgement from the 3<sup>rd</sup> defendant, the 4<sup>th</sup> defendant or Lucyline Kanyua Mutindwa.

g) Following the expiry of the notice to sell, the 1<sup>st</sup> defendant instructed Muga Auctioneers and General Merchants (“the 2<sup>nd</sup> defendant”) to issue the requisite notices and advertisements and sell the suit property by public auction. I note from the supporting affidavit that the issuance by the 2<sup>nd</sup> defendant of the requisite statutory notices has led to the filing of this case.

Copies of the statutory notice dated 3<sup>rd</sup> February, 2015 and the notice to sell dated 21<sup>st</sup> May, 2015 are found at pages 80-83 of the 1<sup>st</sup> and 2<sup>nd</sup> defendant’s list and bundle of documents.

21. I wish to confirm that the notification of sale and the 45 days redemption notice were served upon the 4<sup>th</sup> defendant and his spouse Lucyline Kanyua Mutindwa as required by the law.

22. I also wish to reemphasize that the whole recovery process described above was in accordance with the law and the court in its ruling delivered on 16<sup>th</sup> March, 2017 vindicated the 1<sup>st</sup> defendant.

23. Further, I wish to state that the loan continues to accrue and has even surpassed the value of the charged property. The outstanding loan as at 27<sup>th</sup> June, 2017 was Kshs.57,175,934.77. Copies of the loan statement are found at page 84 of the 1<sup>st</sup> and 2<sup>nd</sup> defendant’s list and bundle of documents.

24. I wish to make it abundantly clear that the 1<sup>st</sup> defendant and its representatives have never heard of, encountered or interacted with the plaintiff herein in relation to the suit property or any of the matters herein. The only spouse of the 4<sup>th</sup> defendant that is known to the 1<sup>st</sup> defendant is Lucyline Kanyua Mutindwa.

25. In light of the foregoing, I believe that –

a) The charge dated 7<sup>th</sup> August, 2012 is valid and complies with all laws applicable in Kenya;

b) The 1<sup>st</sup> defendant is entitled to exercise its statutory power of sale in relation to the suit property and it has complied with all statutory requirements for exercising the said power;

c) The 4<sup>th</sup> defendant’s spouse residing on the suit property, Lucyline Kanyua Mutindwa, has been served with a copy of a notice to sell as required by section 96 of the Land Act, 2012;

d) The plaintiff is not a spouse of the 4<sup>th</sup> defendant and does not reside on the suit property as claimed.

26. I therefore believe that this suit has no merit and should be dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

27. This is all I wish to state

**DATED AT NAIROBI THIS 19<sup>TH</sup> JUNE, 2017**

**SAMUEL IRUNGU**

**WITNESS FOR THE 1<sup>ST</sup> DEFENDANT**

30. DW1 produced, as a bundle, the following documents

1. Letter of offer dated 11<sup>th</sup> May, 2012
2. A copy of the charge dated 7<sup>th</sup> August, 2012
3. A copy of the Deed of Guarantee issued by the 4<sup>th</sup> defendant
4. A copy of the deed of guarantee given by Lucyline Kanyua Mutindwa
5. Letters dated 1<sup>st</sup> August, 2013 on change of loan status
6. Copies of the letter of offer and the 1<sup>st</sup> defendant's standard terms and conditions applicable to all banking facilities.
7. Demand letters dated 9<sup>th</sup> October, 2014, 21<sup>st</sup> November 2014 and 11<sup>th</sup> December, 2014.
8. Copies of the statutory notice dated 3<sup>rd</sup> February, 2015 and the notice to sell dated 21<sup>st</sup> May, 2015.
9. Copies of the loan statements

31. During cross-examination by PW1's advocate, DW1 told the court that he had not visited the suit land and therefore, could not know how many houses stood on the suit land. He told the court that the bank relied on valuation reports.

32. Regarding spousal consent, DW1 told the court that the bank did not obtain PW1's consent because it had already obtained consent from Lucyline Kanyua whom the 4<sup>th</sup> defendant had introduced to the bank as his wife.

33. He told the court that when the 4<sup>th</sup> defendant defaulted in repaying the loan advanced to him, the bank instructed the 2<sup>nd</sup> defendant to sell the land. He said that he did not know if or if not the auction notices had been fixed on the suit property.

34. In his cross examination, the 4<sup>th</sup> defendant asked DW1 if he had personally sued him. Upon DW1 saying that he had not, the 4<sup>th</sup> defendant said that he did not have any other questions.

35. When re-examined by the 1<sup>st</sup> defendant's lawyer, DW1 explained that the bank used its valuers to visit and assess securities. He said that the Branch Manager, Meru, also visited the suit land. He added that he was no longer employed by the Bank. He said that the plaintiff did not sign a spousal consent because Lucyline Kanyua, the 4<sup>th</sup> defendant's wife, had already signed a spousal consent.

36. Regarding the notification of sale, DW1 told the court that apposite notification had been served upon the 4<sup>th</sup> defendant and his wife, Lucyline Kanyua. He added that the two had never disputed service of the notification upon them.

37. The 4<sup>th</sup> defendant, who also represents the 3<sup>rd</sup> defendant did not give evidence.

38. I have examined the pleadings, the oral evidence and the submissions proffered by the parties in support of their assertions. I have also examined the authorities proffered by the parties.

39. I frame the issues for determination in this suit as:

- a) Is the charge on CHUKA TOWNSHIP/39 between the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants void in terms of the Land Act
- b) Does the plaintiff deserve a declaration that sale of CHUKA TOWNSHIP/39 would be unlawful, irregular, unprocedural and illegal and should be stopped?
- c) Is the order of permanent injunction prayed for by the plaintiff and intended to be issued against the 1<sup>st</sup> and 2<sup>nd</sup> defendants tenable?
- d) Who is entitled to costs

40. The plaintiff has proffered the case of Pamela Imbuka Njaro and Another Versus Joseph Vutita Njaro & Another, Kakamega HCEL NO. 78 of 2014 to support her assertion that spousal consent is necessary for a charge to be valid.

41. The 1<sup>st</sup> defendant proffered three authorities. The first authority is the case of EWM Versus EMK, Nairobi High Court [2014] eKLR. This case is a good authority that any alleged marriage must be proved by way of evidence and that the fact that any two people are parents of a child is not, by that fact alone, proof of marriage. The second case is Anastasia Mumbi Kibunja & Others Versus Njihia Mucina & Others, Nairobi Court of Appeal [2013] eKLR. This case is a good authority that there is need for clear evidence to be adduced in proving existence of a marriage, and particularly customary marriage. In this case the court opined as follows:

***“We begin with whether there was evidence from the appellant’s side that indeed there existed a Kikuyu Customary Marriage between Elizabeth and the deceased. Before we consider that evidence, we need to understand the rites of a Kikuyu Customary Law Marriage. This is because customary marriages in any community have rites and ceremonies at every stage, on the way to contracting a valid marriage. All rites may not be accomplished but significant ones must be.”***

42. The 3<sup>rd</sup> case proffered by the 1<sup>st</sup> defendant is the case of Stella Mokeira Versus Thaddeus Mose Mangenya and Another, Court of Appeal at Kisumu [2016] eKLR. This case is an authority that a claimant needs to demonstrate the existence of a matrimonial home. The court opined as follows:

“Matrimonial home is defined by the Land Act 2012 to mean any property that is owned or leased by one or both spouses as their family home.”

“Taking into account the above definition, the learned judge held that the appellant had failed to show, firstly, that there is a home on the suit properties and, secondly, that together with the 1<sup>st</sup> respondent, they were occupying the alleged home. Perhaps photographs of the home, if at all, or the valuation report containing appropriate description of the suit properties would have sufficed. In the circumstances, we cannot fault the learned judge for the conclusion that he arrived regarding absence of proof of existence of a matrimonial home on the suit land.”

43. I opine that all the authorities proffered by the parties constitute a valid exposition of good precedents in their right facts and circumstances. The case of Pamela Imbuka Njaro & Another versus Joseph Vutita & Another (op.cit) is a good precedent that spousal consent is necessary for a charge to be valid. However, the evidence proffered by the plaintiff, as will be shown later, did not satisfy me that the plaintiff was a spouse of the 4<sup>th</sup> defendant when the apposite charge was executed.

44. I find all the cases proffered by the 1<sup>st</sup> defendant (op.cit) useful in their support of its assertions.

45. The main issue in this suit revolves around whether a second spousal consent was necessary before the suit land was charged in favour of the 1<sup>st</sup> defendant. Whether or not one is a spouse is a matter that should be proved by way of evidence.

46. PW1’s evidence was veritably riddled with inconsistencies. What she would deny one moment would be admitted soon thereafter. Although she claimed that she was married to the 4<sup>th</sup> defendant, she only had knowledge of one of his businesses. She denied knowledge of the 3<sup>rd</sup> defendant. Then during cross examination she admitted that she knew it. She denied knowledge of the loan advanced to the 4<sup>th</sup> defendant. Then in cross examination she admitted knowledge of the loan. She denied knowledge of the 1<sup>st</sup> defendant then in cross examination admitted that she had averred in her supporting affidavit that she had visited the bank, which according to her, had refused to give her the loan details.

47. PW1 was categorical that she was not aware of the impugned loan and that even after she had learnt about it through the auction notices, she never inquired the matter from the 4<sup>th</sup> defendant or from Lucyline Kanyua whom she claims was her co-wife. Later on, she changed her narrative and said that her husband had told her about the loan and that he had paid part of it but the interest charged was exorbitant.

48. I opine that PW1’s evidence constitutes a litany of assertions which were later on denied. A conspectus of her evidence is that it is veritably garbled and contradictory to an extent that it loses all probative value. Indeed, one cannot know when she is telling the truth and when she is lying.

49. PW1, except for the allegation that she had a son called Mwenda with the 4<sup>th</sup> defendant, she did not have any other document except his birth certificate to prove her claim that she was the 4<sup>th</sup> defendant’s wife. Even assuming that she had a child with the 4<sup>th</sup> defendant, I opine that the mere fact that a woman has a child with a man, this does not mean that she becomes a spouse. Indeed PW1 came out as a person who did not know what a spouse should know.

50. PW2’s and PW3’s evidence does not persuade me that PW1 was the 4<sup>th</sup> defendant’s wife. Indeed PW2 was truthful and admitted that whatever evidence he gave was given to him by PW1. There were material inconsistencies in the evidence proffered by PW1, PW2 and PW3. PW1 was especially evasive. In short, their evidence had inconsistencies galore.

51. I find it necessary to add one more thing. This concerns the submission that the plaintiff’s spousal consent, which would have been a second spousal consent, was necessary for the impugned charge to be valid. I do not think that it was necessary. Section 79 (3) of the Land Act reads as follows:

***“A charge of a matrimonial home, shall be valid only if any document or form used in applying for such a charge, or used to grant the charge, is executed by the chargor and any spouse of the chargor living in that matrimonial home, or there is evidence from the document that it has been assented to by all such persons.”***

52. “All such persons” are the chargor and any spouse. The 4<sup>th</sup> defendant and Lucyline Kanyua, a spouse whose “living” in the suit land is

not controverted by the plaintiff, signed the charge document. In my view, even though I have not found that the plaintiff was at the time the charge was consummated a spouse of the 4<sup>th</sup> defendant, there was no need for a second spousal consent even if the 4<sup>th</sup> defendant had two spouses. I opine that if the legislature intended "ALL" spouses to give their consent, there would be no easier thing than to unequivocally say "ALL" instead of "ANY".

53. I do not agree with the plaintiff's submissions that she has proved her case. I agree in toto with the 1<sup>st</sup> defendant's submissions that this suit should be dismissed. I also admit the relevance, in toto, of the 1<sup>st</sup> defendant's proffered authorities.

54. On a balance of probabilities, I am not persuaded that PW1 was the 4<sup>th</sup> defendant's wife at the time the impugned charge was consummated between the 1<sup>st</sup> defendant on the one part and the 3<sup>rd</sup> and 4<sup>th</sup> defendants on the other part. Indeed I find that she was not a spouse of the 4<sup>th</sup> defendant. It would be an academic misadventure to speculate if or if not she became the 4<sup>th</sup> defendant's spouse thereafter.

55. This court notes that the original loan amount was the sum of Kshs.20,600,000/= but as at 1<sup>st</sup> June, 2017, over one year ago, this amount had ballooned to Kshs.57,175,934.77. As in business time is of the essence, this is not a satisfactory position.

56. I opine that the existence of spouses, including multiple spouses, real or contrived, is an area that can be misused by unscrupulous people to defraud financial institutions. Even unmarried people who sign documents confirming that they do not have spouses may come back and claim that they had spouses at the time they executed charge documents. This is why it is necessary for courts to obtain proof that spouses, single or multiple, are real spouses. It is also necessary for such spouses to prove that there existed a matrimonial house on the suit land. The mere existence of land would not be enough. Even mere existence of houses on the land may not suffice. The existence of matrimonial homes must be proved.

57. I do find as follows:

- a) The Plaintiff is not entitled to a declaration that sale by public auction of Land Reference No. CHUKA TOWNSHIP/39 would be unlawful, irregular, unprocedural and illegal and thus amenable to an order that it be stopped.
- b) The plaintiff is not entitled to a declaration that the charge on CHUKA TOWNSHIP/39 between the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants is void and of no effect in terms of the Land Act 2012.
- c) The plaintiff is not entitled to an order of permanent injunction restraining the defendants by themselves, their agents, servants, employees, and/or assignees or whomsoever acting on the defendant's behalf from selling, advertising, alienating, disposing of or in any other manner whatsoever from dealing with the Plaintiff's matrimonial home comprised of L.R. NO. CHUKA TOWNSHIP/39.
- d) In the circumstances, this suit is dismissed
- e) Costs shall follow the event and are awarded to the 1<sup>st</sup> Defendant.

58. It is so ordered

Delivered in open court at Chuka this 27<sup>th</sup> day of June, 2018 in the presence of:

CA: Ndegwa

Claire Odunga h/b Omondi for 1<sup>st</sup> defendant

Humphrey Mbaka for 3<sup>rd</sup> and 4<sup>th</sup> defendants

Rimita for the plaintiff – absent.

**P. M. NJOROGE,**

**JUDGE.**