



REPUBLIC OF KENYA



**Mohammed & another v Shimanyula & 3 others (Civil Application  
E040 of 2025) [2025] KECA 917 (KLR) (23 May 2025) (Ruling)**

Neutral citation: [2025] KECA 917 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E040 OF 2025  
J MOHAMMED, HA OMONDI & LK KIMARU, JJA  
MAY 23, 2025**

**BETWEEN**

**ZENAH MAKOKHA MOHAMMED ..... 1<sup>ST</sup> APPLICANT**

**MARTHA ATIENO ONYANGO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JOYCE PACILISHA SHIMANYULA ..... 1<sup>ST</sup> RESPONDENT**

**THOMAS SHIMANYULA ..... 2<sup>ND</sup> RESPONDENT**

**FAMILY BANK LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**PAWABA AUCTIONEERS ..... 4<sup>TH</sup> RESPONDENT**

*(Being an appeal from the judgment of the High Court of Kenya at Kakamega  
(P. J. Otieno, J.) dated 11th December 2024 in HCCC No. E001 of 2021)*

**RULING**

1. Thomas Shimanyula [Thomas], the 2<sup>nd</sup> respondent herein, on 5<sup>th</sup> February 2016 obtained a loan of Kshs.33,943,000/- from Family Bank Limited (the Bank), the 3<sup>rd</sup> respondent, which was secured by a charge on the title to the suit property known as Butsoso/Shikoti/2866, registered in his name. He submitted to the Bank an affidavit of spousal consent dated 23<sup>rd</sup> January, 2016, sworn by Lorna Shaly Chapia, who described herself as a spouse to the 2<sup>nd</sup> respondent; and deposed that she was under no compulsion to consent to creation of the written charge.
2. Subsequently on 17<sup>th</sup> September 2019, Thomas obtained a further Kshs.20, 357,000/-; and created a further charge over the same property. In his affidavit dated 17<sup>th</sup> September, 2019, in support of his loan application, the 2<sup>nd</sup> respondent indicated that he was not married, therefore did not require spousal consent; and that the suit property was therefore not matrimonial property.



3. Thomas eventually defaulted in repayment; the sum owing rose to over Kshs.46 Million; and the Bank eventually exercised its statutory power of sale, instructing Pawaba Auctioneers to sell the suit property by way of a public auction. In step with the Bank's instructions, Pawaba Auctioneers advertised the suit property for sale - that is the point at which Zenah Makokha Mohammed and Martha Atieno Onyango, the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively, who described themselves as wives to the 2<sup>nd</sup> respondent, realised that the suit property which they claimed was acquired during the subsistence of the marriage; and which they considered as their matrimonial home was up for sale.
4. The applicants filed Kakamega HCCC No. 001 of 2021, seeking to stop the public auction on grounds that the charge was void. They managed to get temporary orders halting the sale, pending hearing and determination of the suit. On 11<sup>th</sup> December, 2024, the High Court (Otieno, J.) dismissed their prayers and awarded costs to the Bank, thus paving way for Pawaba to re-advertise the property for auction set for 10<sup>th</sup> April, 2025.
5. The applicants being aggrieved by this outcome filed a Notice of Appeal; and apprehensive that they will suffer irreparably during this rainy season if the suit property is sold, as they will be rendered homeless and get evicted into the cold, filed the application dated 21<sup>st</sup> March, 2025, under Order 5(2) (b) of the Court of Appeal Rules, seeking that, pending hearing and determination of the appeal, an injunctive order do issue stopping Family Bank, the 3<sup>rd</sup> respondent or its agents from auctioning or selling the suit property known as Butsoso/Shikoti/2866 scheduled for 10<sup>th</sup> April 2025.
6. The application is based on the grounds set out on its face and is supported by an affidavit of even date, sworn by Martha Atieno Onyango, stating that they have an arguable appeal with high chances of success as the issue regarding their status as wives or non-wives needs to be determined; that if an order of injunction is not granted, they stand to lose the matrimonial property which may not be recoverable at all, not even by way of damages.
7. In her affidavit, Martha Atieno Onyango avers that she and Zenah are spouses of Thomas Shimanyula, the 2<sup>nd</sup> respondent who incidentally executed a main charge and further charge without their consent. According to the applicants, the 2<sup>nd</sup> respondent provided conflicting information on his marital status claiming that he was married to one Lorna; that they reside on the suit property, a fact they pointed out before the superior court culminating into the instant appeal.
8. The respondent opposes the application through a replying affidavit dated 3<sup>rd</sup> April 2025, sworn by Sylvia Wambani, its Legal Manager, Ms. Wambani avers that the 2<sup>nd</sup> respondent executed a charge and a further charge in favour of the 3<sup>rd</sup> respondent as security for advancement of a loan of Kshs. 34,943,000/=. The charge was over LR. No. Butsotso/Shikoti/2866 which was duly registered in the name of the bank; that upon defaulting in loan repayments, the 3<sup>rd</sup> respondent was compelled to exercise its statutory power of sale. However, the applicant's contention that they were wives; and that the suit property was matrimonial property was dismissed on the grounds that they had failed to prove their marriage with Thomas Shimanyula, the chargor; and consequently, had no legal basis to challenge the validity of the charges created in favour of the 3<sup>rd</sup> respondent.
9. The applicants filed submissions dated 25<sup>th</sup> March, 2025 in which they argue that they have met the standard for grant of orders of injunction. They argue that the suit property being matrimonial, Section 12(1) of *Matrimonial Property Act* prohibits any form of alienation; that spousal consent was not obtained; and the true status of the 2<sup>nd</sup> respondent's marital status needs to be resolved.
10. In its submissions dated 26<sup>th</sup> March 2025, the 3<sup>rd</sup> respondent submits that the applicants do not have an arguable appeal as they failed to prove their alleged marriages to the 2<sup>nd</sup> respondent. Reliance was



laid on the case of *Kimani Gituanja vs. Jane Njoki Gitunja* (1983) eKLR, where the court established that marriage requires affirmative proof, not mere assertion. The 3<sup>rd</sup> respondent submitted further that without proof of marriage, the provisions of Article 45(3) of *the Constitution* and Section 12(1) of the *Matrimonial Property Act* could not engage.

11. Regarding the nugatory aspect, the 3<sup>rd</sup> respondent contended that the suit revolved around a commercial transaction where the suit property was offered for a loan and that the applicants have already enjoyed protection through interim orders since 2021, preventing the Bank from exercising its statutory power of sale for a period of over four years. That the prolonged restriction severely prejudices the 3<sup>rd</sup> respondent, which operates with depositors' funds.
12. The principles for granting a stay of execution, injunction or stay of proceedings under rule 5(2) (b) of the Court of Appeal Rules are well settled as was observed by this Court in the case of *Trust Bank Limited and Another vs. Investech Bank Limited and 3 Others* [2000] eKLR where the Court delineated the jurisdiction of this Court in such an application as follows:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”
13. In considering the twin principles set out above, the Court is cognizant that to benefit from its discretion, both limbs must be demonstrated to the Court's satisfaction. Regarding the consideration of whether the appeal is arguable this Court in *Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others* [2013] eKLR elaborated as follows:
  - “vi) On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. *Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.
  - vii. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. *Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008.”
14. Having carefully considered the grounds set out in the motion, it is arguable inter alia whether the 2<sup>nd</sup> applicant was married, if at all; whether the applicants are the 2<sup>nd</sup> respondents' wives and whether spousal consent was necessary to be obtained from them as de facto wives, in our considered view, adequately demonstrates that the appeal is arguable and not frivolous.
15. In determining whether or not an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties and each case has to be determined on its merits. See *Reliance Bank Limited vs. Norlake Investments Ltd* [2002]1 EA 227.
16. The applicants say that the suit property is their matrimonial home if the suit property is sold in a public auction, it will be beyond their reach if the appeal succeeded. There does not seem to be a dispute about the applicant's claim to occupancy; or their fears of eviction, being rendered homeless or being evicted would certainly predispose the applicants to incomparable loss. We are of the view that balancing the interests of the parties, the status of the parties before the impugned sale should be



preserved pending appeal. If the matrimonial property is transferred to a third party it would prejudice the applicants and be beyond their reach if the appeal succeeded, the appeal would be rendered nugatory.

17. In the instant application, execution is imminent and if it proceeds, it will render the intended appeal nugatory as the applicants and their families who are on the suit property will be evicted; and the intended appeal will be rendered nugatory in the event that the appeal succeeds. Consequently, it is our finding that the applicants have satisfied both limbs of the requirements under Rule 5(2)(b) of this Court's Rules. The notice of motion dated 21<sup>st</sup> March, 2025 is merited and is hereby allowed.

**DATED AND DELIVERED AT KISUMU THIS 23<sup>RD</sup> DAY OF MAY, 2025.**

**JAMILA MOHAMMED**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**L. KIMARU**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**Signed**

**DEPUTY REGISTRAR**

