



**Muriungi v Mwebia & 2 others (Environment and Land Appeal E027 of 2024) [2024] KEELC 4558 (KLR) (6 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4558 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E027 OF 2024**

**CK NZILI, J**

**JUNE 6, 2024**

**BETWEEN**

**HELLEN K. MURIUNGI ..... APPLICANT**

**AND**

**HENRY MWEBIA ..... 1<sup>ST</sup> RESPONDENT**

**CAPITAL SACCO SOCIETY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**EDWARD MURIUNGI MIRIGO ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The court is asked to issue a temporary order of injunction barring and restraining the 2<sup>nd</sup> respondent or its servants from selling, auctioning, leasing, or transferring LR No. Abogeta/U-Kiungone/4509 pending hearing and determination of this appeal. The reasons are contained on the face of the application and as the supporting affidavit of Hellen K Muriungi sworn on 24.4.2024. The applicant avers that the suit land is registered in the name of the 3<sup>rd</sup> respondent, who is her husband, since 1987 as a matrimonial home, for it was bought during the pendency of their marriage on 11.12.2020.
2. The applicant says that she was shocked on 27.11.2023 to see auctioneers pin a notice on the suit land showing that an auction sale would take place on 29.11.2023, for default of a loan secured by the 1<sup>st</sup> respondent of Kshs.1.6 million guaranteed by her husband using the suit land.
3. The applicant avers that she was not aware of the charge, and her spousal consent was not sought or obtained. The applicant says that she made an application at the lower court, which was dismissed on 25.3.2023, triggering this appeal. She further says that she did not give the spousal consent, as confirmed in the replying affidavit by the 2<sup>nd</sup> respondent, since the 3<sup>rd</sup> respondent had allegedly said that he was single. The applicant terms her appeal meritorious, and there is a real danger if the suit property is auctioned. She has attached a copy of a marriage certificate, a replying affidavit by the 3<sup>rd</sup> respondent, and an affidavit denouncing marriage as annexures marked HKM "1" & HKM "6".



4. The application is opposed by a replying affidavit of Nathaniel Kithinji Ikiugu sworn on 8.5.2024 and through a preliminary objection. As a credit manager of the 2<sup>nd</sup> respondent, he averred that the 3<sup>rd</sup> respondent charged the suit land, executed a charge, swore an affidavit saying that he was not married, and the charge was eventually registered. As a result of saying that he was not married, the 2<sup>nd</sup> respondent averred that the question of spousal consent did not arise.
5. Further, the 2<sup>nd</sup> respondent averred that the 3<sup>rd</sup> respondent defaulted on the loan; a 90-day notice was issued to realize the security, followed by a 40-day notice, and later on, the property was put up for auction sale. He attached affidavits, demand notice, certificate of postage, and the 40-day notice as annexures marked NK I, 2 (a) & (b), N.K. "3" and 4, respectively. The 2<sup>nd</sup> respondent stated that the loan stood at Kshs.3,008,410/= plus accrued interest and other charges.
6. The 2<sup>nd</sup> respondent termed the application as brought by a person with dirty hands working in cohorts or collusion with the 1<sup>st</sup> & 3<sup>rd</sup> respondents, to defeat their right to the statutory power of sale without liquidating or servicing the debt.
7. The 2<sup>nd</sup> respondent relies on written submissions dated May 27, 2024. Reliance was placed on Meru HCC E001 of 2024 *Mary Muthoni v Capital Sacco, Cooperative Bank of Kenya v Patrick Kangethe* (2017) eKLR, Mombasa Court of Appeal C.A No. E055 of 2022, [\*Bank of Africa K Ltd and another v TSS Investment Ltd and others\*](#) Nairobi Civil Appeal No. 154 of 2018, [\*Abdikadir Arap Mohammed and another v First Community Bank Ltd\*](#) (2020) eKLR, [\*Mrao Ltd v First American Bank of Kenya Ltd\*](#) (2003) eKLR, Kajiado High Court No. E015 of 2021 [\*Ronald Ratemo Moturi and another v Credit Bank Ltd and another\*](#)
8. The jurisdiction of this court arises from Article 162 2 (b) of the [\*constitution\*](#) and is expounded in Section 13 of the [\*Environment and Land Court Act\*](#), the [\*Land Act\*](#) and the [\*Land Registration Act\*](#). The framers of our constitution left no doubt in donating the power to handle disputes falling under the [\*Land Act\*](#) and the [\*Land Registration Act\*](#) to this court.
9. In [\*Bank of Africa Ltd & another v JSS Investment Ltd & others\*](#) (Civil) Appeal E055 of 2022) (2024) KECA 410 (KLR) April 26, 2024 (Judgment) at issue was whether tenants are recognized under Sections 103 of the [\*Land Act\*](#) 2012 and the issue of interest in Section 25 (1) (a) of the [\*Land Registration Act\*](#). The issue of enforceability of the lease agreement acquired by the bank was raised under Section 59 of the [\*Land Registration Act\*](#) and Section 87 of the [\*Land Act\*](#).
10. A preliminary objection on jurisdiction had been raised that the application was res judicata and was an invitation to overturn various decisions by courts of competent or concurrent jurisdiction seeking to stop the auction sale.
11. On appeal was the question of jurisdiction to hear and entertain both the application and the suit filed by parties by virtue of being tenants or lessees on the suit properties and granting an injunction on the basis that they had not been served with statutory notices.
12. The court said & the disposition of land is different from land use which is the utilization and the natural resources found above or below the land. The court said land use connotes the alteration on as the environmental conditions prevailing on the land and has nothing to do with the disposition of land.
13. The court said the jurisdiction of the ELC to deal with disputes related to contracts under Section 13 of the [\*ELC Act\*](#) sought to be understood within the context of the court's jurisdiction to deal with disputes connected to the "use" of land. The court said that contracts ought to be incidental to the "use" of land and do not include mortgage charges collection of dues and rent which fall under the civil jurisdiction of the High Court.



14. The court affirmed *Joel Kyutah Mbaluka t/a Mbaluka & Associates v Daniel Ocheing Ogola t/a Ogolla Okello & Co. Advocate* (2019) eKLR and *Cooperative Bank of (K) Ltd v Patrick Kang'ethe Njuguna* that in constructing whether the ELC has jurisdiction in a matter, consideration must be the dominant issue in dispute and whether the issue relates to the environment and the use and occupation of and title to lands. The court said the dominant issue before the trial court was to forestall an impending statutory power of sale on the basis of alleged tenancy relationships.
15. Applying the caselaw and its tests, the dominant issue raised by the appellant is her spousal rights of the suit land now threatened with auction sale alleged to have been charged with the 2<sup>nd</sup> respondent without regard to her spousal rights were ignored.
16. To my mind some of the issues raised regarding use and occupation incident are issues, lying under the Environment and Land Court. However, the claim is also based on whether the subject land is matrimonial or not. The husband out of design or not, disowned her by swearing an affidavit that he is single. Such questions on marriage do not fall under the jurisdiction of this court. Similarly, under the *matrimonial property act*, this court lacks jurisdiction to entertain matrimonial property causes. The preliminary objection relates to the jurisdiction of the court to hear the appeal. The discretion to grant an injunction pending appeal is governed by order 42 Rule 6 *Civil Procedure Rules*.
17. The discretion to grant an injunction pending appeal is governed by Order 42 Rule 6 of the *Civil Procedure Rules*. The principles to appeal were expounded in *Patricia Njeri v National Museum of Kenya and in Madhupaper v Kerr* (1985) KLR 840.
18. In *Julius Musili Kyunga v KCB & another* (2012) eKLR the court cited *DJ Lowe and Co. Ltd v Credit Agricole Indosuez & others* MSA HCC 235 of 2010 that the purpose of an injunction pending appeal was to preserve the subject matter to ensure that if the appeal is successful the same will not be rendered nugatory but the discretion must be exercised judiciously and carefully in the light of the circumstances of each case, depending on whether the appeal is frivolous to grant the application would inflict greater hardship that it would avoid and when damages would be a suitable alternative.
19. In *Kamindi self Fridges Supermarket Ltd v Kiambu Murutani Co Ltd* (Civil Application E 360 of 2022 (2024) KECA 10 (KLR) (25<sup>th</sup> January 2024) (ruling) that the court cited *Stanley Kangethe Kinyanjui v Tony Keter & others* (2013) eKLR that an arguable appeal was not one capable of succeeding but one which was not frivolous and the establishment of a single bonafide ground of appeal was enough.
20. The court has looked at the memorandum of appeal. There is no doubt that has been raised by the 2<sup>nd</sup> respondent as to whether or not the applicant is a spouse of the charger, the 3<sup>rd</sup> respondent. There is no record from the registrar of marriages denouncing the existence of the marriage between the applicant and the 3<sup>rd</sup> respondent. Without getting into the merits of the appeal, I think the issue of spousal consent over matrimonial property should be determined first. Consequently, I direct that the file be transferred from this court and be placed before the Presiding Judge Meru High Court forthwith for further orders.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 6<sup>TH</sup> DAY OF JUNE, 2024**

In presence of

C.A Kananu

Miss Maina for Mutuma for appellant

Appellant



Mr. Muriuki for 2<sup>nd</sup> respondent

**HON. C K NZILI**

**JUDGE**

