



**Masila v Kithome & 2 others (Family Originating Summons
E012 of 2024) [2025] KEHC 5119 (KLR) (25 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5119 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY ORIGINATING SUMMONS E012 OF 2024**

G MUTAI, J

APRIL 25, 2025

IN THE MATTER OF SECTIONS 2, 6, 7, 9, 12 & 17 MATRIMONIAL PROPERTY ACT, 2013

AND

IN THE MATTER OF SECTIONS 104, 105 AND 106 OF THE LAND ACT, 2012

AND

**IN THE MATTER OF TITLE NO MAINLAND NORTH
SEC I/17219(ORIG NO. 17179) (CR NO. 52254)**

BETWEEN

REBECCA KALONDU MASILA CLAIMANT

AND

PETER MULEI KITHOME 1ST RESPONDENT

ABSA BANK KENYA PLC 2ND RESPONDENT

TREVO AUCTIONEERS 3RD RESPONDENT

RULING

1. Before this honourable court is a Notice of Motion application dated 27th November 2024, vide which the Claimant/Applicant seeks the following orders: -
 - a. Spent;
 - b. Spent;
 - c. That this honourable court be pleased to grant a temporary injunction restraining the 1st, 2nd and 3rd defendants, whether by themselves, their servants, agents, workers, employees, proxies and/or any other person howsoever acting through them from advertising for sale, disposing



off, selling by public auction and/or private treaty Mainland North Sec 1/17219 (Original No. 17179) (C.R No.52254) and/or in any other manner howsoever interfering with the Plaintiff's possession and quiet enjoyment thereof pending the hearing and determination of this suit; and

- d. That the costs of the application be borne by the 1st and 2nd defendants jointly and severally.
2. The application is premised on the grounds stated in the body of the Motion and the supporting affidavit of the Applicant, sworn on 27th November 2024.
3. Briefly, the Claimant/Applicant stated that she got married to the 1st Defendant/Respondent in the year 2002 under the customary laws of the Akamba people and that their marriage was blessed with four children.
4. She further averred that during coverture, she contributed to the acquisition and improvement of the property on Mainland North Sec 1/17219 (Original No. 17179) (C.R No.52254) (which property I shall hereafter refer to as the "suit property"). In November 2024, the 1st Defendant/Respondent informed her that he had taken a loan facility of Kes.7,500,000/- with the 2nd Defendant/Respondent for his business, and used the suit property as a collateral. Ms Masila stated that the 1st Defendant/Respondent informed her that he had failed to service his loan fully, and as a result, the suit property would be auctioned. She averred that she was not informed of the loan facility, nor did she give her consent to the charge on the property.
5. She stated that the 2nd Defendant/Respondent had instructed the 3rd Defendant/Respondent to proceed and proclaim, attach and sell the suit property, and if that happened, she and her children would be rendered destitute.
6. She stated that she stands to lose her matrimonial home, and her children would suffer irreparable loss and damage, which an award of damages cannot compensate, as the property is their residential home, and they have no alternative residence. She also urged the court to invalidate the charge for want of informed consent.
7. In response, the 2nd Defendant/Respondent filed a replying affidavit sworn by Mr Samuel Njuguna, its Legal Counsel, Recoveries, on 23rd January 2025.
8. Mr Njuguna termed the application unmerited and misconceived because the subject matter herein is the same as that filed before the Magistrates' Court by the 1st Defendant/Respondent in Mombasa CMELC No. E096 of 2023 Peter Mulei Kithome vs Absa Bank Plc & another, and for that reason, should be dismissed. He also questioned the Claimant/Applicant's marriage to the 1st Defendant/Respondent and stated there is no proof of the alleged union.
9. He stated that any property offered as security for a loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender in case of default in payment of the debt secured.
10. He averred that the charge, registered on 28th September 2011, was done under the repealed Registered Land Act, which did not provide for spousal consent. He stated that the Claimant/Applicant had no locus standi for reasons that spousal rights to matrimonial property were not overriding interests under the Registered Land Act(repealed).
11. He further averred that this court has no jurisdiction as the issue in question is related to the 2nd defendant's exercise of the statutory power of sale and not a division of matrimonial property. He urged the court to strike out the suit and dismiss the application with costs.



12. The Claimant/Applicant, through her advocates, Odour Siminyu & Company Advocates, filed written submissions dated 18th February 2025. Counsel submitted on four issues, which I shall deal with seriatim in the preceding paragraphs of this decision.
13. On whether the suit property qualifies as matrimonial property and the Claimant/Applicant's consent was required for the charge, counsel submitted that the applicant's marriage to the respondent was solemnised under Kamba customary law, a system which has long been recognised as forming a valid basis for marriage in Kenya. The 1st Defendant/Respondent had not refuted the same, and therefore the Claimant/Applicant was entitled to an equitable interest in the suit property and the legal right to be consulted before any transaction affecting the same was undertaken.
14. Counsel submitted that Article 45(3) of *the Constitution* recognizes equal rights of spouses in matrimonial property and that the 1st defendant's unilateral act of charging the property without the Claimant/Applicant's consent was not only unlawful but also a direct violation of the principles of fairness and spousal rights enshrined in the law.
15. On whether the charge over the suit property was lawfully created and enforced, counsel submitted that the Claimant/Applicant, having not consented to the creation of the charge, cannot be subjected to the consequences of unlawful encumbrance on the matrimonial home. The charge was unlawfully created as it violated Article 45(3) of *the Constitution* and the relevant statutory provisions. Counsel urged the court to declare the charge null and void and restrain the 2nd defendant from enforcing it against the suit property.
16. On whether the Claimant/Applicant had met the legal threshold for the grant of a temporary injunction, counsel submitted that she had established a prima facie case by demonstrating that the charge was unlawfully created in violation of Article 45(3) of *the Constitution*, without her consent. Further, the applicant stands to suffer irreparable harm if the orders sought are not granted, as the 2nd Defendant/Respondent will enforce the charge, which would inevitably result in her eviction and loss of a matrimonial home, which cannot be compensated. The same would have financial implications for her, causing emotional and psychological distress, which cannot be compensated by an award of costs. Counsel urged the court to grant the orders sought.
17. On who should bear the costs of the suit, counsel submitted that costs follow the event as per Section 27 of the *Civil Procedure Act* and urged the court to allow the application with costs.
18. The 2nd and 3rd Defendants/Respondents, on the other hand, through their advocates, Muriu Mungai & Company Advocates LLP, filed their written submissions dated 6th March 2025. Counsel submitted on two issues, namely, whether this application and suit is res judicata Mombasa CMELC No. E096 of 2023 Peter Mulei Kithome vs Absa Bank PLC & another, and whether the Claimant/Applicant had met the threshold for a temporary injunction.
19. On the first issue, counsel relied on Section 7 of the *Civil Procedure Act* and submitted that previous applications were filed in Mombasa CMELC No. E096 of 2023 Peter Mulei Kithome vs Absa Bank PLC & another by the 1st Defendant/Respondent seeking to restrain the bank from exercising its statutory right to sell the suit recover the sums owed. The same was heard and determined on 30th November 2023 and 19th September 2024, respectively. That the applications in the said matter dealt with similar issues as those raised herein was based on the same cause of action and subject matter. Therefore, the same is res judicata, and this court lacks jurisdiction to hear and determine the same.
20. On the second issue, counsel relied on the case of *Giella vs Cassman Brown & Co Ltd* [1973] EA 358 and submitted on the three conditions set therein.



21. On whether there was a prima facie case, counsel submitted that no evidence was placed before the court to prove that the Claimant/Applicant is the 1st respondent's wife, that there is a home on the suit property and that the applicant and the children have been in occupation of the same as their family home. Further, no proof had been provided that under the law applicable at the time the impugned charge was executed, a consent of the spouse was required before execution of the charge.
22. On irreparable harm and balance of convenience, counsel submitted that the existence of a prima facie case is the foundation of the application for injunction and that the other two conditions cannot stand on their own.
23. In conclusion, counsel urged this Court to dismiss the application with costs.
24. I have considered the application and the affidavits and annexures in support thereof as well as the response of the 2nd and 3rd Defendants/Respondents. Has a case been made for the issuance of injunctive relief? What orders should be issued in the instant case?
25. I must first consider the issue of jurisdiction since it has been raised by the 2nd and 3rd Defendants/Respondents. It is trite law that jurisdiction is everything and that without it the court must lay down its tools.
26. In the case of Owners Of The Motor Vessel "Lillian S v Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR) Nyarangi, JA stated that:-

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."
23. Further, the Supreme Court of Kenya, in the case of Macharia & another vs Kenya Commercial Bank Limited & 2 others [2012] KESC 8 (KLR) stated:-

"A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings."
27. There is no doubt that the Family Court has the jurisdiction to make declarations regarding matrimonial properties and to divide matrimonial properties between former spouses. I agree that this Court has no jurisdiction sitting as the Family Court to make a determination regarding the realisation of securities by banking institutions. My understanding of the matter before me is that an alleged spouse of the 1st Defendant/Respondent seeks to stop the sale of the security on the ground that she did not consent to its creation and that the sale would render her and her children destitute and homeless. In my view, the issues she has raised fall within the jurisdiction of this Court.
28. On whether this matter is res judicata, it is my view that it is not. The suit before the Court below is/was between the Defendants. The cause of action was different as this suit is founded on the premise that the



suit property is a matrimonial property. Based on the documents before me, I am not persuaded that the matter is res judicata. Consequently, the challenge to the application on the basis of jurisdiction fails

29. The three principles for granting an injunction were established in the case of *Giella vs Cassman Brown & Co Ltd* [1973] EA 358 where the Court of Appeal stated as follows:-

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

30. Does the Claimant/Applicant have a prima facie case? What amounts to a prima facie case has been settled by the Courts. In *In the case of Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, the Court of Appeal held as follows:-

“The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience...A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true that the Court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms “prima facie” case, and “genuine and arguable” case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words “prima facie” are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant’s interest to adopt a genuine and arguable case standard rather than one of a prima facie case, the former being the lesser standard of the two...In civil cases a prima facie case is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

31. The Claimant/Applicant claims that the 1st Defendant/Respondent is her husband and that the suit property is her matrimonial home in which she resides with their children. It is a common ground that no spousal consent was obtained before the creation of the charge. The 2nd Defendant/Respondent avers that there was no such requirement in the law that was applicable at the time. I note that the charge is dated 28th day of September 2011, more than a year after *the Constitution* of Kenya, 2010 was promulgated. I further note that the issue of matrimonial property is emphasised in *the Constitution*, particularly in Articles 45 and 68 (c)(iii) thereof. This Court is required by Article 259 of



the Constitution to interpret *the Constitution* (and by extension the statutory laws) in a way that, inter alia, promotes its purposes, values and principles. Section 7(1) of the Sixth Schedule of *the Constitution* (Transitional and Consequential Provisions) provides that:-

“(1) (1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.”

32. It is therefore my view that whether or not a spousal consent was required is not an idle point. It is an arguable one. There is, therefore, in my view, a prima facie. Further, the issues raised by the 2nd defendant can only be dealt with finality in the main suit and not at this stage.

33. As regards the second condition, whether the applicant stands to suffer irreparable loss, the Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] KECA 606 (KLR) stated:-

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

34. There is no doubt in my mind that the sale of the suit property will occasion the Claimant/Applicant an irreparable loss. If what she states is correct, she will lose her home on account of a credit facility she didn't consent to or know about. She and her children will be rendered destitute. That being the case, the second condition has been satisfied.

35. On the issue of balance of convenience, the court in the case of *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* [2018] KEELC 2424 (KLR) held as follows:-

“The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.”

36. Flowing from the above decision, it would seem to me that the balance of convenience tilts in favour of maintaining the present status quo until the case is heard and determined on merit. Permitting the sale at this point will cause the Claimant/Applicant a greater inconvenience. Thus, I find and hold that the third condition has been satisfied.



37. The upshot of the foregoing is that the application has merit and is allowed. I therefore issue a temporary injunction a temporary injunction restraining the 1st, 2nd and 3rd defendants, whether by themselves, their servants, agents, workers, employees, proxies and/or any other person howsoever acting through them from advertising for sale, disposing off, selling by public auction and/or private treaty Mainland North Sec 1/17219 (Original No. 17179) (C.R No.52254) and/or in any other manner interfering with the Plaintiff's possession and quiet enjoyment thereof pending the hearing and determination of this suit.
38. I order that the costs of the application be costs in the cause.
39. In the interest of justice and so that the court process is not misused, the hearing of the originating summons shall be fast-tracked.
40. It is so ordered.

DATED AND SIGNED IN MOMBASA THIS 25TH DAY OF APRIL 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Ms M'mbaka for the Claimant/Applicant;

Ms Diru, holding brief for Ms Muthee, for the 2nd and 3rd Respondents;

Ms Mwakizozo, for the 1st Respondent; and

Arthur - Court Assistant.

