



Wambui v Amica Savings and Credit Limited & 3 others (Civil Case E034 of 2024) [2025] KEHC 7633 (KLR) (29 May 2025) (Ruling)

Neutral citation: [2025] KEHC 7633 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL CASE E034 OF 2024
FN MUCHEMI, J
MAY 29, 2025**

BETWEEN

DORCAS WAMBUI PLAINTIFF

AND

AMICA SAVINGS AND CREDIT LIMITED 1ST DEFENDANT

PAUL MUNGAI MUCHIRI 2ND DEFENDANT

FORTUNE AUCTIONEERS 3RD DEFENDANT

THE LAND REGISTRAR MURANG'A 4TH DEFENDANT

RULING

Brief Facts

1. The application for determination is dated 16th December 2024 seeks for orders of injunction restraining the 1st, 2nd & 3rd defendants from advertising for sale, selling by public auction or otherwise transferring or otherwise dealing in all of that property known as LR. No. LOC.16/KIGORO/2334 or any part thereof, whether by themselves, their agents, their assigns, their servants or employees in enforcement of the charge registered over the said property in favour of the 1st defendant on 22nd February 2018, pending the hearing and determination of the suit.
2. In opposition to the application, the 1st respondent filed a Replying Affidavit dated 27th February 2025.

The Applicant's Case.

3. The applicant avers that she is married to the 2nd respondent and together they have two children. On or about 21st February 2017, she and the 2nd respondent acquired the parcel of land known as LR. No. LOC.16/KIGORO/2334, registered it under the 2nd respondent's name and built their matrimonial home where they reside together with their two children.



4. On 5th December 2024, the applicant avers that she learnt from a friend that there had been placed in the Daily Nation newspaper dated 3rd December 2024, an advertisement for sale of the property by public auction by the 3rd respondent. Upon inquiring at the Lands Registry, the applicant found out that the property had been charged to the 1st respondent on 22nd February 2024 to secure a loan facility of Kshs. 4 million.
5. The applicant avers that she was not issued with any notice prior to the property being advertised for sale. She further states that she was not aware of the transaction culminating in the registration of the charge and neither did she consent to the making of the charge over the property on which the matrimonial home sits. Thus the said process is irredeemably tainted with fraud and breach of express provisions of law.
6. The applicant is apprehensive that unless the orders sought are granted, the scheduled public auction for 20th December 2024 will proceed rendering her and her children homeless and destitute on account of a transaction that she was neither party nor privy to. Further, the suit herein shall be rendered nugatory. The applicant avers that the respondents shall not suffer any prejudice if the orders sought are granted.

The 1st Respondent's Case.

7. The 1st respondent states that the application is an afterthought and an abuse of the court process for the dispute is a co-operative dispute pursuant to the *Co-operative Societies Act*.
8. The 1st respondent states that the 2nd respondent is a bonafide member of the 1st respondent and pursuant to the provisions of the by laws he applied for and was advanced a loan sum of Kshs. 4 million on 1st May 2018 to which he furnished his title for land parcel LOC.16/KIGORO/2334 as security for the said loan amount.
9. The said parcel of land was accordingly charged and the 2nd respondent defaulted to repay the said loan as per the terms and conditions of borrowing. As at September 2024, the 2nd respondent had a loan balance of Kshs. 5,964,997.54/-.
10. The 1st respondent states that it instructed the 3rd respondent to issue 45 days redemption notice to the defaulter after previously issuing him with the three months statutory notice as per the law provided.
11. The 1st respondent avers that the applicant is not being truthful as she was aware the 2nd respondent borrowed funds to put up a family house where the couple stays. As such, the applicant has been aware of the 2nd respondent's indebtedness all along. Additionally, she was aware of the 1st respondent's statutory power of sale from the loan application form and agreement form.
12. The 1st respondent argues that the application ought to be dismissed for the reasons that the applicant has no locus standi to file the suit.
13. The applicant filed a Further Affidavit dated 11th March 2025 and avers that the funds advanced by the 1st respondent to the 2nd respondent were not expended on putting up their family house, as the house was put up in the year 2017, before the property was charged. The applicant further avers that the applicant for the loan was an institution known as Tahidi Daima Sacco Limited and the loan purpose was indicated as "revolving capital" therefore the 1st respondent cannot argue that the sum advanced to a third party as revolving capital is similar to that used to develop their home.
14. Parties disposed of the application by way of written submissions.



The Plaintiff's/Applicant's Submissions

15. The applicant submits that the suit property was acquired during the subsistence of the marriage and therefore constitutes matrimonial property yet she did not give her consent to the encumbrance as required under Section 12 of the Matrimonial Property Act and Section 79(3) of the Land Act. Thus the applicant argues that she has a prima facie case with a high probability of success and thus it is paramount that the suit property is preserved pending the determination of the suit. To support her contentions, the applicant relies on the case of Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] eKLR.
16. Relying on the case of Nguruman Limited vs Bonde Nielsen & 2 Others (2014) eKLR, the applicant submits that the 3rd respondent will alienate the suit property vide sale by public auction in the event the orders sought are not granted. The 3rd respondent has already placed an advertisement for sale in the Daily Nation newspaper issue of 3rd December 2024. The applicant submits that if the orders sought are not granted, she and her children will be rendered homeless and destitute on account of a transaction she was neither privy to or gave her consent.
17. The applicant argues that the balance of convenience tilts in her favour as she stands to suffer grave prejudice whilst the respondents do not stand to suffer any substantial harm.
18. On the issue of the jurisdiction of the co-operative tribunal, the applicant argues that she is neither a member of the 1st respondent nor is her claim based on such membership. She argues that the instant case touches on the parcel of land known as LR. LOC.16/KIGORO/2334 over which the 1st respondent irregularly registered a charge without her consent thus falling outside the purview of the Co-operative Tribunal's jurisdiction.

The 1st Defendant's/1st Respondent's Submissions

19. The 1st respondent submits that the 2nd respondent gave his title to the suit property as security for a loan which was advanced to Tahidi Daima Sacco Limited, who are not parties to the case. The 1st respondent submits that it and the borrower are co-operative societies and operate pursuant to the provisions of the Co-operative Societies Act. Thus, the dispute herein is a co-operative dispute which must be referred to the Co-operative Tribunal for hearing and determination pursuant to Section 76 of the Co-operative Societies Act. The 1st respondent cites the arbitrated case of Gatanga Coffee Growers Co-operative Society Ltd vs Gitau and submits that it advanced the 2nd respondent's loan to Tahidi Daima Sacco Ltd within the ambit of its by-laws and the applicant who is the wife of the 2nd respondent is claiming through a borrower of the society. Thus the proper forum for the dispute is the Co-operative Tribunal.
20. The 1st respondent submits that its statutory power of sale crystallized when the borrower defaulted to repay the loan. Further, the 1st respondent refers to the case of Kebogo & Another vs KCB Bank Kenya Limited & Another (Commercial Case E218 of 2023) (2023) KEHC 19422 and submits that even if the applicant was not served with the notice, it is not automatic that she will get an injunction.

Issues for determination

21. The main issues for determination are:-
 - a. Whether the court has jurisdiction to hear and determine the application.
 - b. Whether the applicant has locus standi to file the instant suit.



- c. Whether the applicant has met the requisite conditions to warrant the granting of a temporary injunction.

The Law

Whether the court has jurisdiction to hear and determine the application.

22. The 1st respondent argues that the current court does not have jurisdiction to entertain the matter as the dispute ought to be ventilated in the co-operative tribunal.
23. The law on the question of jurisdiction was enunciated in the case of *Owners of the Motor Vessel "Lilian S" vs Caltex Kenya Limited* [1989] KLR 1 where the court held:-

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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

24. In the case of *Samuel Kamau Macharia vs KCB & 2 Others*, Civil Application No. 2 of 2011, it was 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."

25. The 2nd respondent, a bona fide member of the 1st respondent took out a development loan for a sum of Kshs. 4 million. The 2nd respondent secured the loan amount by charging his property LR. No. LOC.16/KIGORO/2334 which charge was registered on 22nd February 2018 at the Ministry of Lands, Thika Office. It is further not disputed that the dispute arises from the failure to repay a loan that the 2nd respondent took from the 1st respondent, a co-operative society which is registered and operates pursuant to the provisions of the *Co-operative Societies Act*. Thus pursuant to Section 76 of the *Co-operative Societies Act*, the co-operative tribunal is the proper forum to ventilate the suit.
26. Section 76 of the Cooperative *Societies Act* provides as follows:-

If any dispute concerning the business of a co-operative society arises-

- a. among members, past members and persons claiming through members, past members and deceased members; or
- b. between members, past members or deceased members, and the society, its committee or any officer of the society; or
- c. between the society and any other co-operative society, it shall be referred to the Tribunal.

A dispute for the purpose of this section shall include:-

- a. A claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not; or



- b. A claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society whether such debt or demand is admitted or not;
- c. A claim by a sacco society against a refusal to grant or a revocation of licence or any other due, from the Authority.

27. In *Robert Gathigani vs John Mutual Manda* [2020] eKLR the court held:-

The plaint clearly reflects that the plaintiff's case is based on a Sacco loan at a time when both the plaintiff and the defendant have pleaded to have been members of the sacco. The defendant was sued as the one advanced the loan wherein the plaintiff is reflected as one of the guarantors. The plaintiff further pleaded that upon default in the repayment of the loan, the sum of Kshs. 410,027.37/- was deducted from his sacco account. It is therefore evident that the dispute herein involves a sacco loan and in my view falls within the business of the society and therefore falls within the ambit of Section 76 of the Sacco Societies.

28. Similarly in *Joyce Muthoni Njoroge & 2 Others vs Joshue Gachie & Another* [2021] eKLR the court held as follows:-

The applicant indeed invoked Sections 76 and 77 of the *Co-operative Societies Act*. Section 76 on settlement of disputes which provides:-

If any dispute concerning the business of a co-operative society arises-

- a. among members, past members and persons claiming through members, past members and deceased members; or
- b. between members, past members or deceased members, and the society, its committee or any officer of the society; or
- c. between the society and any other co-operative society, it shall be referred to the tribunal.

The provision is a mandatory provision that obligates members of co-operative societies to resolve their disputes through that forum and no other.

By Section 75(5) of that Act, that Tribunal has unlimited geographical and pecuniary jurisdiction in matters of co-operative disputes. Further, recourse during proceedings or in respect of orders and awards of the Tribunal can only be appealed to the High Court.

29. In her further affidavit, the applicant has denied that she is or was member of the 1st defendant. The 1st defendant has not adduced evidence of membership in respect of the applicant. Section 76 (a) of the Act provides that a dispute involving a person claiming through a member, falls under this Act and will be regarded as a Cooperative dispute. The applicant is not claiming through any member for her to fall in the said category. Her claim is against the four defendants and she has come to court as an independent party regardless of the indisputable fact that she is the spouse of the 2nd defendant. It is my considered view that this is not a Cooperative dispute under Section 76 of the Act.
30. The applicant is before the court in her capacity as the spouse of the 2nd defendant/respondent claiming that the property L.R. No. Loc.16/Kigoro/233 which is registered in the name of the 2nd defendant is a matrimonial property where her home is located and that her spousal consent was not obtained



as required by the law in order to give the land as security for the loan advanced to the 2nd defendant by the 1st defendant.

31. The 1st respondent has not produced any spousal consent in this application to show that it complied with the law. The 2nd respondent did not file a reply to this application for his own reasons unknown to this court. He has not denied that the applicant is his spouse. The land has been advertised for sale by the 3rd defendant. The applicant prays for injunctive orders to restrain the 1st, 2nd and 3rd defendant from selling the land in issue in recovery of the outstanding loan together with interests which stood at Ksh.5,964,997 at the time the replying affidavit by the 1st respondent was filed. Annexed to the application is a copy of the title, newspaper adverts for sale by the 3rd respondent, the official search and copy of register for the property herein.
32. The evidence adduced and not disputed by the defendants is that the applicant and her family live on the land. It is my considered view that the applicant has established before this court that she will suffer substantial loss should the land be sold by auction for recovery of the loan before her case is heard and determined
33. The applicant further contends that spousal consent require to be executed by the parties under Section 28 (a) and 79 (3) of the Land Act before selling or mortgaging matrimonial property was not obtained by the 1st defendant, or if it was obtained the applicant was not a party to it. Complying with this requirement ensures that matrimonial property is not alienated under Section 12 (5) of the matrimonial property Act.
34. In the event that the land is sold by public auction, the applicant has shown that he and her family are likely to suffer irreparable loss that cannot be compensated by way of damages. The eviction from her home following sale by the 1st respondent would adversely affect the family of the applicant.
35. I am of the considered view that the applicant has satisfied the requirements of granting an injunction pending hearing and determination of the suit which I hereby grant in terms of prayer 3 of the application dated 16th December 2024.
36. The costs shall abide in the suit.
37. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 29TH DAY OF MAY 2025.

F. MUCHEMI

JUDGE

