



REPUBLIC OF KENYA



**Kaburu & 17 others v Kanyi & 5 others (Environment & Land Case
E009 of 2024) [2025] KEELC 1159 (KLR) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1159 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E009 OF 2024**

JM ONYANGO, J

MARCH 6, 2025

BETWEEN

MARGARET NJERI KABURU 1ST PLAINTIFF
MESHACK NJUGUNA NJOROGE 2ND PLAINTIFF
PENINAH MUCHIKU MUIGAI 3RD PLAINTIFF
CHARLES TUNGANI MUCHIRI 4TH PLAINTIFF
ZIPPORAH WAMERU WANG'OMBE 5TH PLAINTIFF
WILSON NJOGU KWEVERIA 6TH PLAINTIFF
MONICA WARUINU NJUGUNA 7TH PLAINTIFF
JAYNE WASHU NGENYE 8TH PLAINTIFF
DOREEN GATWERI MACHARIA 9TH PLAINTIFF
PAULINE S. WAMBETI MUNYASYA 10TH PLAINTIFF
MARIO MUNENE MEEME 11TH PLAINTIFF
ISABELLE WACHERA MURIU 12TH PLAINTIFF
DAVID GITHINJI MAINA 13TH PLAINTIFF
MAUREEN ANASTASIA DIENYA 14TH PLAINTIFF
PETER MAGONDU MUHINDI 15TH PLAINTIFF
RHODA WANJIRU KINYUA 16TH PLAINTIFF
BADI AYUB MOHAMED 17TH PLAINTIFF
MERCY MUTHONI WAINAINA 18TH PLAINTIFF

AND



DAVID MUREITHI KANYI	1ST DEFENDANT
RAFIKI MICROFINANCE BANK	2ND DEFENDANT
PHILLIPS INTERNATIONAL AUCTIONEERS	3RD DEFENDANT
SIDIAN BANK	4TH DEFENDANT
LAND REGISTRAR, RUIRU	5TH DEFENDANT
HON. ATTORNEY GENERAL	6TH DEFENDANT

RULING

1. The Plaintiffs /Applicants approached the court vide 2 Notices of Motion dated 11th September 2023 and 27th November 2023. In the first application the Applicants seek a temporary injunction restraining the Respondents herein whether by themselves, their employees, agents, assigns, legal representatives or any other person acting under their authority from selling, transferring, charging, leasing, taking possession of or dealing in any manner howsoever with all those consecutive properties as from Ruiru Kiu Block 2/15195 to Ruiru Kiu Block 2/15204 pending the hearing and determination of the main suit. In the alternative the Applicants sought an order of inhibition, preventing any further dealings with all those properties as from Ruiru Kiu Block 2/15195 to Ruiru Kiu Block 2/15204 pending the hearing and determination of the main suit.
2. In the application dated 27th November 2023 the Applicants sought orders preserving all those properties known as Ruiru Kiu Block 2/15195 and Ruiru Kiu Block 2/15198 pending the hearing and determination of the interlocutory Notice of Motion application dated 11th September 2023.
3. In support of the application dated 11th September 2023, Monica Waruinu Njuguna the 7th Applicant swore an affidavit of even date on her own behalf and on behalf the other Applicants in which she stated they are the owners of the maisonettes /houses erected on all those properties known as Ruiru Kiu Block 2/15195 to Ruiru Kiu Block 2/15204 being houses No. A2, A7, A9, A11, A12, A14, A17, A19, B2, B4, B6, B11, A31, A28, A29 and A24 respectively herein referred to as the suit properties.
4. She deponed that each of them purchased their respective maisonettes/ houses through off-plan purchase agreements which were entered into with the 1st Respondent on diverse dates between 2016 and 2018. The said agreements were entered into with a view to establishing an estate known as K.P Properties Estate consisting of at least four maisonettes on each of the ten resultant properties. The Applicants were required to pay the full purchase price before taking possession of their respective houses.
5. It is the Applicant's further deposition that in consideration of payment of the full purchase price, the 1st Respondent would facilitate the transfer of the houses to the Applicants by way of long term leases of 99 years. The 1st Respondent would then issue a share in and transfer a reversionary interest in the management company formed to manage the affairs of K. P Properties Estate on behalf of the owners of the maisonettes.
6. She deponed that pursuant to the said respective agreements each of the applicants completed paying the purchase price and subsequently occupied their respective houses. It is her contention that by virtue of having purchased the said houses, they acquired a beneficial interest in the respective suit properties on which the houses were erected even though the suit properties were registered in the name



- of the 1st Respondent. She deponed that despite having paid the full purchase price the 1st Respondent fraudulently failed to register the leases in their favour contrary to the express provisions of the sale agreements.
7. She deponed that unbeknownst to them, the 1st Respondent took loans from the 2nd and 4th Respondents which were secured by charges over the suit properties as follows; A charge in favour of the 1st Respondent dated 17.7.2020 and 7.9.2020 against Ruiru Kiu Block 2/15196 and Ruiru Kiu Block 2/15203 to secure the sum of Kshs. 3,000,000/= and 3,900,000/= respectively. Another charge was registered in favour of the 4th Respondent on 27th February, 2020 against parcel no. Ruiru Kiu Block 2/15197 and Ruiru Kiu Block 2/15198 to secure a loan of Kshs. 7,000,000.
 8. It is her deposition that at the time the charges were registered in favour of the 2nd and 3rd Respondents, the Applicants had already occupied their houses yet their consent was never sought before the said charges were registered. She is therefore of the view that the said charges are invalid, irregular and incapable of forming the basis for the proper exercise of the chargee's remedies under section 90 of the Land Act.
 9. She deponed that having paid the full purchase price and entered into their respective houses prior to the creation of the charges, the Applicants' interests in the suit properties rank in priority over the charges created in favour of the 2nd and 3rd Respondents.
 10. The 1st Applicant deponed that on 4th September 2023, she and the other Applicants were shocked to learn of an advert by Phillips International Auctioneers advertising for sale by public auction land parcels no. Ruiru Kiu Block 2/15196 and Ruiru Kiu Block 2/15203. The proposed auction affects the 1st, 2nd and 3rd Applicants who currently reside in and have established their homes in the maisonettes erected on the two suit properties and unless the sale is stopped, they stand to suffer irreparable loss as they will be evicted and left destitute.
 11. She further deponed that they should be allowed to access the records of the loan facilities advanced to the 1st Respondent by the 2nd and 3rd Respondents as they are challenging the validity of the charges registered in favour of the 2nd and 3rd Respondents.
 12. The application was opposed by the 2nd and 4th Respondents. The 2nd Respondent filed a Notice of Preliminary Objection dated 18th October 2023 in which he raised the following grounds:
 - i. That the application is misconceived, mischievous, bad in law and together with the entire suit amounts to a gross abuse of the court process and the same ought to be dismissed with costs.
 - ii. That there is no proper suit by the 2nd to the 18th plaintiffs as they have not attached a signed letter of authority which is a mandatory requirement under the Civil Procedure Act on which this suit has been founded as regards the 17 Plaintiffs/Applicants.
 - iii. The entire suit as regards the 17 Co-plaintiffs/ Applicants is fatally incompetent, a non-starter in law and should be struck out for failure to comply with the provisions of Order 1 Rule 13 (2) of the Civil Procedure Rules, 2010.
 13. The 4th Respondent filed a Replying Affidavit sworn by Jackline Ndungu, the Senior Legal Officer of the 4th defendant in which she deponed that sometime in 2019, the 4th Defendant/Respondent agreed to grant Mr. Ali Abdalla Ragude as the principal debtor, a loan facility of Kshs. 7,000,000 which was secured by a duly registered third party charge dated 10th February 2020 over property title no. Ruiru Kiu Block 2/15197 and Ruiru Kiu Block 2 (GITHUNGURI)/15198 in the name of David Mureithi



- Kanyi, the 1st Respondent herein to secure the said loan. She added that prior to the security perfection being conducted, the 1st Defendant attended the Land Control Board meeting and gave his consent.
14. She deponed that the 4th Respondent conducted proper due diligence and established that the titles were free from any encumbrances. In addition to the said charge, the 1st Respondent executed a personal guarantee and indemnity dated 13th February 2020 for the loan facility advanced to Mr. Ali Abdalla Ragude.
 15. She added that sometime in the year 2021, the 4th Respondent agreed to grant Mr Ali Abdalla Rugade as the principal debtor an invoice discounting line facility of Kshs. 9,500,000 which was secured by the existing securities and the Guarantee and Indemnity issued by the 1st defendant.
 16. She deponed that the 4th Respondent conducted its due diligence and confirmed that there was no encumbrance on titles no. Ruiru Kiu Block 2/15197 and Ruiru Kiu Block 2 (GITHUNGURI)/15198 at the time of perfecting the securities.
 17. She further deponed that house no. A9 allegedly purchased by one Charles Tung'ani Muchiri is in fact not erected on property title no Ruiru Kiu Block 2/15197 and is instead erected on title no Ruiru Kiu Block 2/12814 as evidenced in the addendum agreement. She deponed that house No. A11 allegedly purchased by one Zipporah Wameru Wang'ombe is not erected on parcel number Ruiru Kiu Block 2/15197 and is instead erected on parcel number Ruiru Kiu Block 2/15195. Further that House No. 14 allegedly purchased by one Monica Waruinu Njuguna is not erected on parcel no 15198 as alleged by the Applicants but is instead erected on parcel number 12814.
 18. She deponed that the 4th Respondent will only relinquish its interest in the suit properties once Ali Abdalla Ragude repays his loan in full. It is her deposition that the fact that some of the Applicants claim to have entered into sale agreements with the 1st Defendant does not give them superseding rights over the 4th Respondent who is a secured creditor and the Applicants therefore have no legal interest in titles no. 15197 and 15198.
 19. She is therefore of the view that the Applicants have not established a prima facie case with a probability of success.
 20. The application was canvassed by way of written submissions and the Applicants and 4th Respondents filed their written submissions together with their lists of authorities.

Applicant's Submissions

21. In their submissions dated 31.10 2023 learned counsel for the Applicants maintained that the Applicants had established a prima facie case with a probability of success. She placed reliance on *East African Industries v Trufoods (1972) E.A 420*, *Giella v Cassman Brown & Company Ltd (1973) E.A 358*, *Mrao Ltd v First American Bank of Kenya & 2 Others (2003) KLR 125*.
22. She further relied on the decision in *Kenleb Cons Ltd v New Gatitu Service Station Ltd & Another (1990) eKLR* for the proposition that to succeed in an application for injunction, an applicant must not only make full and frank disclosure of all relevant facts to the just determination of the application but he must also show that he has a right, legal or equitable which requires protection by injunction.
23. She pointed out that the 1st defendant was in breach of his obligations under various agreements with the Plaintiffs as he failed to register the long term leases for the units purchased by the Plaintiffs and transfer the reversionary interest in the suit properties to the management company.



24. It is her submission that the plaintiffs had completed paying the purchase price and were already in occupation of their respective houses on suit properties by the time the 2nd and 4th Respondents registered charges over the suit properties.
25. She faulted the 2nd and 4th Respondents for failing to conduct due diligence prior to registering the charges against the suit properties which would have revealed that the plaintiffs were in occupation of the suit properties and therefore had a legitimate claim in respect thereof so their approval ought to have been sought before the charges were registered.
26. She relied on the case of *Rivalene Limited & 3 Others v KCB Bank Kenya Limited & 2 Others* (Environment and Land Case E283 of 2021 [2022] KEELC 3402 (KLR) (26 May 2022) (Ruling).
27. In the said case the Applicants had entered into off-plan agreements with the 2nd Defendant and the 2nd defendant had the sub-leases registered in its name before charging the said sub-leases to the 1st defendant. The court held that since the applicants had purchased the apartments and started staying in them before the 2nd defendant charged the sub-leases in respect thereof to the bank, the Applicants had a beneficial interest in the said apartments and they were therefore entitled to an order of injunction to restrain the bank from selling them. The court was of the view that disposing of the apartments before the case was heard would occasion the Applicants irreparable damage as they would be rendered homeless it would destroy the substratum of the suit.

2nd Respondent's Submissions

28. Learned counsel for the 2nd Respondent submitted both on the Preliminary Objection and the application for injunction. With regard to the P. O he submitted that Order 1 Rule 13 of the Civil Procedure Rules provides that where there is more than one plaintiff in a suit, one of them may plead and appear on behalf of the others subject to having acquired a written authorization to act for them.
29. Additionally, Order 4 Rule (2) and 3 provides that where there are several plaintiffs, the Verifying affidavit ought to be filed along with a written authority empowering the deponent to swear the affidavit on behalf of his co-plaintiffs. He submitted that rule 6 empowers the court to strike out a plaintiff for failing to comply with sub-rules 2 and 3. He relied on the case of *Ndungu Mugoya & 473 Others v Stephen Wangombe & 9 Others* (2005) eKLR for the proposition that a Verifying affidavit by one plaintiff without the written authorization of the other plaintiffs is bad in law and it invalidates the Plaintiff.
30. He also cited the case of *Eunice Njeri Njambi Kamau & another v Kenya Highways Authority & 3 Others* (2022) where the court held that each plaintiff is mandated to swear the verifying affidavit individually or alternatively one of the plaintiffs may swear the verifying affidavit upon receiving the co-plaintiffs' authorization.
31. On another note, counsel challenged the Court's jurisdiction to hear and determine this matter. He relied on the authorities of *Cooperative Bank of Kenya Limited v Patrick Kangethe* (2017) eKLR, *Bank of Africa & Another v TSS Investment Ltd & 2 Others* (2024) KECA410 KLR and *Kinuthia & Stanbic K Limited* (2024) KEELC 1625 KLR for the proposition that charges are of a commercial nature as opposed to land use and therefore the environment and land Court lacks the jurisdiction to entertain cases touching on charges. He urged the court to uphold the Preliminary Objection and strike out the suit.



4th Respondents’ Submissions

32. On his part learned counsel for the 4th Respondents submitted that Sidian Bank had conducted due diligence prior to charging the suit property and established that the titles were registered in the name of the 1st Respondent and had no encumbrances. He relied on the decisions in Paul Gatete Wangai v Capital Realty Ltd & Anotehr [2020] eKLR, Monica Waruguru Kamau & Another v Innercity Properties Ltd & 2 Others [2020]eKLR and China Wu-yi Company Limited V Suraya Property Group Limited & 2 Others [2020] eKLR for the proposition that the bank’s interest as chargee was an overriding interest which was superior to any other interest.
33. He submitted that the bank could only relinquish its interest in the suit properties once Ali Abdallah Ragude as the principal debtor fully repays the loan advanced to him. He submitted that the Plaintiffs did not have any legal right to the suit properties and whatever beneficial interest they had was not superior to that of the bank which was a secured creditor.
34. Relying on the case of China Wu-yi (supra) counsel submitted that the Applicants had failed to demonstrate that they had a prima facie case with a probability of success or that they would suffer irreparable harm which could not be compensated by an award of damages.

Analysis and Determination

35. Having considered the Notice of Motion, Replying Affidavit and rival submissions the issues that fall for determination are:
 - i) Whether the Plaintiffs suit is incompetent and ought to be struck out for failing to comply with the provisions of Order 1 Rule 13 (b)of the Civil Procedure Rules.
 - ii) Whether the Plaintiffs are entitled to the orders of injunction.
36. Order 1 Rule 13 (1) and (2) of the Civil Procedure Rules provides as follows:
 - “(1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.
 - (2) The authority shall be in writing signed by the party giving it and shall be filed in the case.”
37. In the instant suit, Monica Waruinu Njuguna who swore the supporting affidavit annexed an authority signed by the 4th, 5th 6th and 15th Applicants. Although the said authority ought to have been signed by all the 16 Applicants, failure to do so is not fatal as it can be cured by an amendment. This is in line with the spirit of Article 159 2(d) of *the Constitution* which mandates the Court to render substantive justice.
38. On the question of the court’s jurisdiction, I note that the same was not among the points raised in the Notice of Preliminary Objection served on the Applicants and was only raised by learned counsel for the 2nd Respondent in his submissions. Surprisingly, learned counsel for the plaintiffs did not address the question of jurisdiction in her submissions. It is not clear whether the 2nd defendant served the Applicant with their submissions.



39. Granted that the question of jurisdiction can be raised any time including by the court on its own motion, the principles of procedural fairness and due process require that parties be accorded an opportunity to be heard. By failing to include it in the Notice of Preliminary Objection, I am of the considered view that the Applicants were denied an opportunity to defend the jurisdictional point of law raised by the 2nd Respondent.
40. Given the fundamental nature of the court's jurisdiction, it is in the interest of justice that this issue be raised in a proper manner before the case is fixed for hearing so that it can be determined at the earliest possible opportunity.
41. I will now proceed to determine if the Plaintiffs have met the conditions for injunction set out in the case of *Giella V Cassman Brown & Company Ltd* 1973 EA 358 which are as follows:
- “First, the applicant must show that he has 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 damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”
42. In the case of *Mrao V First American Bank of Kenya Limited* (2003) eKLR Bosire JA (as he then was) stated as follows:
- “A prima facie case is one 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 as to call for an explanation or rebuttal from the latter”.
43. Additionally, the principles guiding the grant of an interlocutory injunction were discussed in the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 others* (2014) eKLR where the Court of Appeal held that:
- “...these are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... 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 are 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.”
44. In the instant suit, the Applicants have alleged that they purchased their respective maisonettes/houses constructed on the suit properties through off-plan purchase agreements which were entered into with the 1st Respondent. However, a perusal of the sale agreements annexed to the Applicant's supporting affidavit indicates that contrary to what is stated at paragraph 16 of her supporting affidavit, House No. A14 purchased by Monica Waruinu Njuguna is not constructed on title no. Ruiru Kiu Block 2 (Githunguri)/15198 as alleged but instead it is erected on land title no. Ruiru Kiu Block 2/ Githunguri) / 12814. Similarly, House No. A12 allegedly purchased by Wilson Njogu Kweveira is not erected on parcel number Ruiru Kiu Block 2 (Githunguri)/15198 as alleged but the same is erected on parcel number Ruiru Kiu Block 2 (Githunguri)/15204.



45. It is noteworthy that even after this was pointed out by the 4th Respondent in their Replying Affidavit, the Applicants did rebut the assertion. Moreover, none of the Applicants has annexed evidence of full payment of the purchase price for the said apartments. It is therefore not possible for the court to ascertain the nature and extent of the Applicants' interest.

46. Additionally, there is no indication that the bank was made aware of the Applicant's interest in the suit property at the time the charge was registered. This is evident from clause (i) of the Covenants at page 7 of the Charge Instrument which provides as follows:

“The Borrower will not create any encumbrance or permit any encumbrance to subsist, arise or be created or extended over its assets to secure any present or future indebtedness of the borrower for these purposes, an encumbrance includes any mortgage, charge, pledge, lien and hypothecation, assignment by way of security, security interest and title retention, preferential rights of set off, counterclaim, banker's lien or other encumbrances securing any obligation of any person.”

47. Indeed, it is the bank's contention that they conducted due diligence which confirmed that the suit properties were not encumbered. The Applicants on the other hand insist that they entered into the sale agreements with the 1st Defendant long before the suit properties were charged to the bank. Whereas it is not in dispute that the Applicants entered into sale agreements with the 1st Defendant for the purchase of the houses erected on suit properties the question that court must determine is whether the Applicants' interest supersedes the interest of the bank.

48. In the case of *Paul Gatete Wangai & 13 Others V Capital Realty Limited & Another* (2020) eKLR, the court pronounced itself as follows:

“Although the Plaintiffs have a beneficial interest in the suit property having purchased the same, the said interest is subordinate to the Bank's interest as Chargee. A charge is an overriding interest within the meaning of section 28(g) of the *Land Registration Act*, which means that the rights and interest of a chargee in the charged property are rights in rem and therefore remain superior to any other interest even where there is a sale, transfer or any other disposition in the property.

97. It is trite that the bank being the holder of the charge would have first priority over the suit property as long as the land remains charged. In HCCC No. E035 of 2020: *Monica Waruguru Kamau & Anor vs. Innerscity Properties Ltd., Tuiyott, J.* in dismissing the claim for an injunction quoted with approval the case of *Innerscity Properties Limited vs. Housing Finance & 3 others- HCCC No. E030 of 2020* where Majanja, J. held as follows:

“The Interested Parties' case is that they purchased their apartments from the plaintiff and that they have paid the purchase price and are in possession thereof. Quite apart from the fact that they do not have any claim to be litigated against the defendants which would entitle them to an injunction, they have not shown that they have a legal claim against the bank. Since the bank is the chargee, it must give consent to the Plaintiff to sell the property. The Interested Parties have not shown that they received the bank's consent to purchase the apartments or that they paid the Bank any money.



Since they have not established a legal claim against the bank, the court cannot issue an injunction in their favour...”

49. Similarly, in the case of Willow Park Ltd v Jamii Bora Bank Ltd & Another (2019) eKLR the Court declined to grant an injunction on the grounds that prima facie the Applicants’ beneficial interest in the units they had purchased off-plan could not rank pari passu with the interest of the bank.
50. Based on the principles established in the above-cited authorities, I am not persuaded that the Applicants have established a prima facie case with a probability of success.
51. With regard to the question of irreparable damage, the Applicants have contended that if the bank proceeds to exercise its statutory power of sale, they will be rendered homeless and destitute. Although I am not indifferent to the Applicants’ plight, the truth of the matter is that there is no privity of contract between them and the bank as their claim for breach of contract lies squarely against the 1st Defendant. If the suit proceeds to full trial and it is established that the Applicants will have suffered any damages as a result of the 1st defendant’s failure to honour the terms of the agreement between them, the same will be assessed accordingly.
52. Commenting on the issue of privity of contract, Justice Meoli in the Willow Park case observed as follows:

“34. We are further guided by the case of Agricultural Finance Corporation v Lengetia, 1982-88 I KAR 772 which stated:

“As a general rule, a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”

76. It is true of the off - plan claimants as it is for Gokul that the contracts entered into between them and the Developer appear to be confined to these parties, and prima facie, any rights or obligations arising therefore could not in the circumstances of this case be transposed upon the Bank. The certainty of financial transactions between banks and borrowers would be severely compromised if any and every kind of third party or debtor, who transacted with the borrower howsoever, were allowed to defeat the chargee’s statutory rights, especially in the realization of a security in the event of default by the borrower. For all these reasons I have found no merit in the application by Gokul. It is equally for dismissal”.

53. In view of the foregoing, I am constrained to find that the Applicants have failed to prove that they are entitled to an order of injunction or an order of preservation of the suit properties. Consequently, both the Preliminary Objection and applications are dismissed. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 6TH DAY OF MARCH 2025.

.....

J. M ONYANGO



JUDGE

In the presence of :

1. Miss Wangui for Ms Wambui Kuria for the Plaintiffs/Applicants
2. Miss Nambirige for the 2nd Respondent
3. Mr Oguye for Mr. Kimani for the 4th Respondent

Court Assistant: Hinga.

