



REPUBLIC OF KENYA



**Kirigo & 9 others v Kanyi & 2 others (Environment & Land Case E022 of 2023) [2025] KEELC 4988 (KLR) (25 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4988 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE E022 OF 2023**

**EK MAKORI, J**

**JUNE 25, 2025**

**BETWEEN**

**MARY MUTHONI KIRIGO ..... 1<sup>ST</sup> PLAINTIFF**  
**DENNIS JILANI MWAMUYE ..... 2<sup>ND</sup> PLAINTIFF**  
**VERONICA WANJERI OGOLLA WAYAYI ..... 3<sup>RD</sup> PLAINTIFF**  
**GRACE WAVINYA KIAMBA ..... 4<sup>TH</sup> PLAINTIFF**  
**ABDI RAZAK YUSUF ..... 5<sup>TH</sup> PLAINTIFF**  
**SIMON MWANIKI MWATHI ..... 6<sup>TH</sup> PLAINTIFF**  
**DINAICE MALEMBA MWANIKI ..... 7<sup>TH</sup> PLAINTIFF**  
**CHARLES MAINA ..... 8<sup>TH</sup> PLAINTIFF**  
**TONNY KIMUTAI CHERUIYOT ..... 9<sup>TH</sup> PLAINTIFF**  
**SUSAN MENGO WANJUHI ..... 10<sup>TH</sup> PLAINTIFF**

**AND**

**DAVID MUREITHI KANYI ..... 1<sup>ST</sup> DEFENDANT**  
**STANBIC BANK KENYA LIMITED ..... 2<sup>ND</sup> DEFENDANT**  
**THE LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. Before the court for determination is the Notice of Motion dated 2 April 2025, supported by the affidavit sworn by Mary Muthoni Kirigo on the same date and the accompanying annexures, as well as the 2nd defendant's Notice of Preliminary Objection dated 30 April 2025, challenging the court's



jurisdiction and seeking the dismissal of the plaintiff's claim. Reliance is placed upon the grounds stated on the face of the motion, the supporting affidavit, the annexures attached thereto, and the arguments advanced herein in support of the motion and in opposition to the Preliminary Objection.

2. The application is opposed by the replying affidavit sworn by Angela Njeri, the manager of non-performing loans for the 2nd defendant.
3. The court directed that the motion application and the preliminary objection be addressed through written submissions. Counsels complied.
4. The matter pending before the court concerns its jurisdiction to hear this case in response to the preliminary objection, as well as the advisability of granting prayers 2 and 3 of the motion, which seek a temporary injunction. The proposed injunction would prevent the 2nd defendant, including its agents, assignees, and employees, from auctioning—whether by public sale, private treaty, or other means—or offering for sale the properties of the 1st, 4th, and 10th applicants: Maisonette No. A15 (Lease Number CR.71153) on subdivision number 343 of Section 1, Mainland North; Maisonette Number 15 (Lease Number CR.71567) on subdivision number 343 of Section 1, Mainland North; Maisonette Number 8 (Lease Number CR.71568); and Maisonette Number 2 (Lease Number CR.71569) on subdivision number 454 of Section IV, Mainland North. These properties have already been advertised by the 2nd defendant through Garam Investments Auctioneers for an upcoming public auction scheduled for July 4, 2025. Prayer 3 relates to costs. The court has issued an order to maintain the status quo until further orders from the court.
5. For order, the court will initially address the preliminary objection regarding jurisdiction. The principles upon which this court is invited to determine the merit of a notice of PO were set out in the oft-cited case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. This case established the criteria for a PO, which include raising a pure point of law, demonstrating the correctness of all the facts pleaded by the other side, and the absence of any fact that needs to be ascertained. The court will consistently adhere to these principles in its ruling.
6. The Court of Appeal in *Attorney General & Ministry of State for Immigration & Registrar of Persons v Andrew Maina Githinji & Zachary Mugo Kamunjiga* [2016] KECA 817 (KLR) reiterated the same position on what would constitute a PO and held as follows:

“The test to be applied in determining whether the appellants’ Preliminary Objection met the threshold or not is what Sir Charles Newbold set out above in the *Mukisa Case* (supra). That is first, that the Preliminary Objection raises a pure point of law, second, that there is demonstration that all the facts pleaded by the other side are correct; and third, that there is no fact that needs to be ascertained.”

7. The thrust of a PO in this matter rests squarely on the jurisdiction of this court, as held by Nyarangi J.A. in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR:

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

8. A PO is based on the idea that when raised, its key achievement will influence the case because it presents clear points of law. It also emphasizes the importance of efficient time management as a court



resource by quickly identifying weak or hopeless cases that, if allowed to proceed to full trial, would waste judicial time and not serve justice. There is no need to look elsewhere to determine whether a PO is sustainable; instead, one should review the pleadings and see that the suit is a non-starter – see the works of Ogola J. in DJC v BKL (Civil suit E021 of 2021) [2022] KEHC 10189 (KLR) (27 June 2022) (Ruling).

9. In the preliminary objection, the 2nd respondent asserts that the present matter relates to an issue originating from the exercise of the statutory power of sale by the second respondent concerning a loan facility provided to the first respondent, which is secured by a legal charge. Moreover, on this sole basis and without prejudice to the preliminary objection, the 2nd respondent further contends that there exists no privity of contract between itself and the applicants.
10. I concur with the plaintiffs that a preliminary objection concerns a point of law rather than a factual dispute that needs evidence. Claims based on facts requiring proof are not genuine preliminary objections. When factual issues are involved, they should not be raised as preliminary points. A valid preliminary objection should not involve contested facts or require evidence testing. If proving a matter necessitates an affidavit, the objection is invalid, as it violates procedural rules and might result in a detailed replying affidavit.
11. This court is asked to declare this application and suit as an abuse of the court process and dismiss both. The dispute concerns ownership rights, supported by evidence, not a charge. Some main plaintiff prayers seek cancellation of unregistered interests affecting the properties and orders for specific performance to transfer properties to the plaintiffs. Ownership, possession, and land interests fall within the jurisdiction of the Environment and Land Court, not the High Court. The facts behind the preliminary objection are disputed and not purely legal, and the objection is without merit.
12. This court, in its ruling dated July 24, 2024, discussed this issue as follows:

“I have considered the views taken by the 2<sup>nd</sup> Respondent on the issue of jurisdiction. I agree with the decisions cited as representing the correct position on reckoning the jurisdiction of this Court on matters relating to charges, mortgages, collection of dues, and rent, which fall exclusively within the jurisdiction of the High Court as stated in the two decisions The Court of Appeal in Co-operative Bank Limited v Patrick Kangethe Njuguna & 5 Others [2017] held thus:

“Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the ELC Act ought to be understood within the context of the court’s jurisdiction to deal with disputes connected to ‘use’ of land as discussed herein above. Such contracts, in our view, ought to be incidental to the ‘use’ of land; they do not include mortgages, charges, collection of dues, and rents which fall within the civil jurisdiction of the High Court.

In the case of Thomas Mutuku Kasue v Housing Finance Company Ltd (HFC) & another [2021] eKLR, Ombwayo J., having analyzed the averments in the plaint in a matter before him, stated as follows:

“The substratum of the suit therefore relates to the legal charges and the subsequent statutory power of sale. The court that has jurisdiction to deal with a dispute in which the predominant issue is the exercise of the statutory power of sale by the chargee has since been settled by the Court of Appeal in the case of Co-operative Bank of Kenya Limited vs.



Patrick Kangethe Njuguna & 5 others [2017] eKLR where the court held as follows.....”

He further proceeded to state:

“The Court of Appeal, whose decision is binding on this court, has held that where the predominant issue in a suit involves mortgages, charges, collection of dues and rents, it is the High Court, and not the Environment and Land Court, that has jurisdiction to deal with the dispute. That being so, and the predominant issue in this matter being the issuance of the statutory notices by the chargee, it is my finding that this court does not have jurisdiction to hear and determine this suit.”

From the plaint and the averment by the Plaintiffs- Applicants, whereas they seek injunctive orders restraining the 2<sup>nd</sup> Respondent from exercising its Statutory Power of Sale, they argue that they are legal and actual owners of houses erected on sub-division No. 454 Original No. 442/13 Mainland North and house erected on sub-division No. 343 located in Bamburi, the 2<sup>nd</sup> to 10 Plaintiffs are the legal owners of Maisonette No. 1,7,9,8, 24,6,21 and 2 respectively. The Plaintiffs bought those houses from the 1<sup>st</sup> Defendant. By the time the Plaintiffs bought those houses through off-plan payment from the 1<sup>st</sup> Defendant, the houses had not been developed. The Plaintiffs used their own money to have the houses built by the 1<sup>st</sup> Defendant for them. The copies of the agreement show purchases were made between 2015 and 2016. They state that the 1<sup>st</sup> Defendant fraudulently registered under his name the same properties he had sold and used to obtain credit facilities from various Banks. They claim that the interest of the 1<sup>st</sup> Defendant ceased to exist immediately after he received the purchase money from them and handed over possession to them. He had no colour of right to charge those properties. It amounted to fraud and theft on his part. He had no proprietary rights to transfer to himself or charge after 2018. Having received all the purchase monies by then. They live on those properties, and any intended eviction will be unlawful. They have joined the Land Register to cancel the illegal charges over their properties. The Plaintiffs believe that the planned sale will negate their property ownership rights as enshrined in Article 40 of the *Constitution* and that they will suffer irreparable damages if the orders sought are not granted; hence, the orders sought.

From the averments aforesaid, the predominant feature in the Plaintiffs’ case will not necessarily be the exercise of Statutory Power of Sale by the 2<sup>nd</sup> Defendant-Respondent but rather ownership of the suit properties, the Plaintiffs had purchased from the 1<sup>st</sup> Defendant who put them in possession before charging the same properties to the 2<sup>nd</sup> Defendant and whether the creation of the charge over those properties was illegal, null, and void, for overlooking the purchasers’ interest of the Plaintiffs-Applicants. In my humble view, that is the province of this Court.

13. Based on the foregoing, the issues in this case go beyond the statutory power of sale and relate to ownership. This is a matter that should be decided through trial in this court. Therefore, the preliminary objection is dismissed with costs.



14. This raises the question of whether an injunction should be granted. The applicants argue that the remedies they seek are meant to protect the core of the main case during the upcoming auction and are, in some ways, connected; therefore, if this court denies the orders now, it could lead to greater injustice and prejudice against the applicants. If that occurs, the entire substance of the main case might become meaningless, irreparable, and purely academic, making the issue pointless.
15. Conversely, the 2nd respondent contends and asserts that this court lacks jurisdiction, that there is no privity of contract with the applicants, and that the exercise of the statutory power of sale has arisen, in addition to the fact that the applicants never issued a caveat or caution to protect their alleged interests. Furthermore, when the 2nd respondent conducted due diligence, it was found that the suit properties were free from encumbrances; hence, the arrangement entered into with the 1st defendant. Therefore, the orders sought in this matter are deemed unattainable.
16. This court, in the application dated 24th July 2024, addressed this issue and declined to issue the orders because:

“But as correctly stated by the 2<sup>nd</sup> Defendant-Respondent, the various mandatory processes to be undertaken before sale have not been activated by the 2<sup>nd</sup> Defendant-Respondent. The Auctioneers’ 45-day the suit properties been undertaken, and the suit properties advertised for sale in the dailies. There is, therefore, no imminent threat currently to warrant the grant of the orders sought—the balance of convenience tilts in favour of the 2<sup>nd</sup> Defendant-Respondent. The Plaintiff-Applicants should, for now, sit pretty and move the Court when such process is put in motion.
17. The processes culminating in the crystallization of the power of sale are now finished; therefore, the application for an injunction is being renewed.
18. For an injunction to be issued, the threshold to be met prior to the grant thereof is as outlined in *Giella v Cassman Brown* [973] EA on page 358:

“The Applicant should satisfy the Court that he has a prima facie case with a probability of success. Secondly, he stands to suffer irreparable loss or injury which cannot be compensated by damages, and thirdly, if the Court is in doubt, it should decide on a balance of convenience.”
19. The first issue to determine then is whether the applicants have proved a prima facie case with the probability of success as held in *Mrao v First American Bank of Kenya & 2 others* [2003] KLR 125 as follows:

“A prima facie case in a civil application includes but is not confined to a ‘genuine and arguable case.’ It is a case 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 in rebuttal from the latter.”
20. The principles outlined in *Giella’s Case* shall be addressed sequentially, as upheld in *Kenya Commercial Finance Company Ltd v Afraha Education Society* [2001] 1 EA 86, as cited in *Karen Bypass Estate Ltd v Print Avenue and Company Ltd* [2014] eKLR.KLR:

“so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed.”



21. The applicants have established a prima facie case by citing the purchasers' interest in the suit properties. Furthermore, if the sale proceeds, they would incur irremediable loss—resulting in the nullification of their purchasers' rights.
22. I need not elaborate further; the application submitted to this court on April 2, 2025, is granted with costs.

**DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 25<sup>TH</sup> DAY OF JUNE 2025.**

**E. K. MAKORI**

**JUDGE**

In the Presence of:

Mr. Muthuri, for the Plaintiffs

Mr. Wafula for the 2nd Defendant

Ms. Ekiru, for the 3<sup>rd</sup> Defendants

Happy: Court Assistant

