

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ELC NO. E048 OF 2025

STEPHEN ANANDA AMWAYI-----
PLAINTIFF/APPLICANT

VERSUS

JAMES MWAURA KARUIGI-----1ST
DEFENDANT/RESPONDENT

CO-OPERATIVE BANK OF KENYA-----2ND
DEFENDANT/RESPONDENT

**LAND REGISTRAR,
TRANS NZOIA COUNTY-----3RD**
DEFENDANT/RESPONDENT

AND

MARGARET EKUYI AMWAYI-----
INTERESTED PARTY

RULING

1. Through an application dated **23/9/2025**, the court is asked to issue a temporary injunction barring and restraining the respondents, their agents, employees, assignees, representatives, servants, or any other person from advertising for sale, selling, transferring, disposing of, or in any way dealing adversely with Title No. **L.R. No. Kitale Municipality Block 17/Bidii/1047**, hereinafter the

suit land, pending hearing and determination of this suit. The reasons are contained on the face of the application and in a supporting affidavit sworn by Stephen Ananda Amwayi, on **23/9/2025**.

- 2.** The plaintiff/applicant deposes that he is the owner of the suit land measuring approximately **4.4 Ha** valued at **Kshs. 80,000,000/=**, which is a subdivision of **L.R. No. Kitale Municipality Block 17/Bidii/23**, pursuant to a grant of letters of administration that was confirmed in **High Court Nairobi Succession Cause No. 2345 of 1995** on **27/4/2016**, in the matter of the estate of his father, John Ottenyo Amwayi (deceased). The plaintiff/applicant attached a copy of the title in his name, a copy of the grant, and a confirmation of the grant as annexure marked **SAA-(1), 2A, and 2 B**.
- 3.** The plaintiff/applicant deposes that his mother, who is the interested party herein, and he have resided on the suit land for over four decades together with his late father, until he passed on in **1995**, as per annexed photographs marked **SAA-(3)**.
- 4.** Again, the plaintiff/applicant deposes that his mother's house and his own sit on the suit land and have a unique historical and ancestral value to them, and that its sentimental value is

immeasurable, which, as the elder son, he has the responsibility to protect for the family lineage.

5. The plaintiff/applicant deposes that on or about **December 2024**, the 1st defendant/respondent approached him with an idea to run a joint venture business, and before they could execute the joint venture agreement, he requested that he surrender his original title deed to him for interim custody, due diligence, and as a sign of commitment for the intended joint investment deal.
6. Further, the plaintiff/applicant deposes that in good faith, he acceded to the request, but never sold or intended to sell or otherwise transfer the property to the 1st defendant/respondent.
7. The plaintiff/applicant deposes that a week later, the 1st defendant informed him that the 2nd defendant/respondent, from whom they were to borrow the money for the joint venture, had proposed that the property be transferred into the 1st defendant's name for ease of access to the credit, for he had a higher credit score than him. The plaintiff/applicant deposes that he resisted the transfer proposal and requested the 1st defendant/respondent to return the original title, which request he ignored.

- 8.** Equally, the plaintiff/applicant deposes that without his knowledge, consent, or participation, the 1st defendant/respondent, through fraud, misrepresentation of facts, and a corrupt scheme, transferred the suit property under his name, and secured a loan facility of **Kshs. 15,000,000/=** from the 2nd defendant/respondent as per the current official search annexed as **SAA-(4)**.
- 9.** The plaintiff/applicant deposes that the 1st defendant/respondent misled him, refused to execute the joint venture agreement, or other documents for the intended business, transferred the property to his name without consent, knowledge or approval, obtained a loan facility and reused to transfer the suit land back to him, despite expression of disinterest in the intended joint venture business as per annexed mobile phone communication marked **SAA-(5)**.
- 10.** The plaintiff/applicant deposes that the 1st defendant/respondent has since refused, neglected, and ignored to execute the joint venture agreement or any other document with terms of engagement as earlier intended, and his attempts to get hold of the 1st defendant/respondent have proved futile. The

intended joint venture agreement is attached as **SAA-(6)**.

- 11.** The plaintiff/applicant deposes that on or about **1/8/2025**, the 1st defendant/respondent, in the company of strangers, visited the suit land demanding it the occupants including the interested party and him to vacate, an act which was reported to the area chief for interrogation, and later to the Directorate of Criminal Investigations Kitale Police Station, as per a lawyer's letter marked **SAA-(7)**.
- 12.** The plaintiff/applicant deposes that the 1st defendant/respondent has threatened not to repay the loan facility to redeem the property, hence exposing him to public auction or otherwise disposal of the suit property by the 2nd defendant/respondent, to his detriment and that of the interested party.
- 13.** The 1st defendant/respondent opposes the application through a replying affidavit of James Mwaura Karuigi, sworn on **8/10/2025**, insisting that he is the registered owner of the suit land, as per a title deed issued on **13/12/2024**, attached as **JMK-(1)**, after the plaintiff/applicant's brother introduced them to each other (David Atuti Amwayi), who was using the title in the name of the plaintiff/applicant

as security to secure a loan of **Kshs. 20,000,000/=** from Discount Capital Limited, as per annexure marked **JMK-(2)**.

- 14.** The 1st defendant/respondent deposes that David Atuti Amwayi said that the plaintiff/applicant was willing to give him his title deed to secure a loan, part of which he would clear a loan of **Kshs. 887,000/=**, owed by David Atuti Amwayi to Adan Mustafa Dina, as per an agreement dated **22/11/2024**, annexed as **JMK-(3)**.
- 15.** Again, the 1st defendant/respondent deposes that on **29/11/2024**, the plaintiff/applicant sent him a text message through his phone, asking to know how much the bank was willing to offer as a loan, and after the agreement was signed on **22/11/2024**, he sent him a copy of the title deed via WhatsApp, showing the discharge of the charge of the **Kshs. 20,000,000/=** as per annexed copies marked **JMK(4)** and **(5)**.
- 16.** The 1st defendant/respondent deposes that by a contractual agreement dated **26/9/2023**, David Atuti Amwayi's company, Aster Millers & Commodities Ltd, and Kabansora Millers Ltd, a copy marked **JMK-(6)**, showed that the plaintiff/applicant was to receive **Kshs. 10,000/=**, Adan Mustafa Dina

Kshs. 887,000/=, and **Kshs. 9, 113,000/=** was to be retained by him for the production of the wheat flour by Kabansora and any other wheat producer that they could engage.

- 17.** In pursuance of the verbal understanding, the 1st defendant/respondent deposes that he applied for a loan of **Kshs. 20,000,000/=**, but the bank only approved **Kshs. 15,000,000/=**, as per the attached application and its approval marked **JMK-(7)** and **(8)**.
- 18.** The 1st defendant/applicant deposes that, following the approval of **Kshs. 15,000,000/=** instead of **Kshs. 20,000,000/=**, parties had another verbal agreement to have the **Kshs. 15,000,000/=** disposed to the plaintiff/applicant at **Kshs. 4,000,000/=**, **Kshs. 887,000/=** to Adan Mustafa Dina, **Kshs. 10,113,000/=** to himself for the wheat flour business, to be liquidated from the profits obtained after selling the wheat flour, while David Atuti Amwayi will secure a market for the wheat flour and use his trucks to transport it to customers. All loan repayments were to be remitted to his account to repay the bank.
- 19.** The 1st defendant/respondent deposes that with the above clear understanding, he proceeded to charge

the subject property with the 3rd defendant, Limuru Branch. Otherwise, as per the agreement dated **22/11/2024**, the plaintiff was to surrender the original title deed to him to be registered under his name to secure the loan.

- 20.** The 1st defendant deposes that it is out of the foregoing that the plaintiff followed all the necessary steps to transfer the land to them as per the attached Land Control Board consent, transfer form, and title deed transferred to his name, annexed as **JMK-(9), (10), and (11)**.
- 21.** The 1st defendant deposes that to facilitate obtaining the consent, the plaintiff was sent via his bank account **No. 1297838696**, Kenya Commercial Bank, Kitale Branch, **Kshs. 450,000/=**, as per a bank statement and transfer form, attached as **JMK-(12)**.
- 22.** Further, the 1st defendant/respondent deposes that once the title deed was duly registered to his name, it was released to him, and the plaintiff sent him a text annexed as **JMK-(13)**.
- 23.** The 1st defendant/respondent deposes that after obtaining the title under his name, he charged it with the 3rd defendant/respondent, caused the property to be valued and obtained a Land Control

Board consent, forwarded the bill and fee note to the plaintiff/applicant as per the annexed fee note, bills, valuation report and a receipt marked **JMK-(14), (15), (16), (17), and (18)**, all with the knowledge of the plaintiff/applicant as per WhatsApp messages marked **JMK-(19) and (20)** respectively.

- 24.** The 1st defendant/respondent deposed that after the charge process was completed, the 3rd defendant/respondent released **Kshs. 14,277,438/=** to his account on **21/3/2025**, to which he notified the plaintiff, who requested **Kshs. 140,000/=** via WhatsApp message dated **21/3/2025**. Attached are bank statements and messages marked **JMK-(21) and (22)**.
- 25.** Equally, the 1st defendant/respondent deposes that the plaintiff/applicant visited Limuru town on **25/3/2025**, to urgently meet on his farm, to which he requested **Kshs. 4,000,000/=** which he did by a bank transfer, attached as **JMK-(23)**. Equally, the 1st defendant/respondent deposes that he also paid fee notes and bills raised by the advocates through two Mpesa transactions of **Kshs. 39,290/=** and a further **Kshs. 179,800/=**, as per annexures marked **JMK-(24) and (25)**.

- 26.** The 1st defendant/respondent deposes that on **1/4/2025**, he met the plaintiff/applicant at Limuru, where he requested **Kshs. 2,500,00/=**, to pay for chicks that he had ordered, to which he issued him two cheques dated **1/4/2025**, which were cashed on **2/4/2025** as per annexure marked **JMK-(26)**. Similarly, the 1st defendant/respondent deposes that on **15/4/2025**, he paid **Kshs. 500,000/=** to clear Adan Mustafa Dina's debt as per a bank transfer attached as **JMK-(27)**.
- 27.** The 1st defendant deposes that the suit property is not about to be sold by either him or the 2nd defendant/respondent, in whose joint names it was registered after it was charged as per the attached copy of the title annexed as **JMK-(28)**.
- 28.** The 1st defendant/respondent deposes that on **16/4/2025**, the plaintiff/applicant came to his shop and left an agreement dated **13/4/2025**, signed by David Atuti Amwayi and himself, requiring his signature, which he declined to sign because he found that their verbal agreement had not been captured in this agreement marked as **JMK-(29)**.
- 29.** The 1st defendant/respondent deposes that upon reading the agreement on how the distribution of the loan money was stipulated, he became

suspicious and more so because of how aggressive the plaintiff had become in demanding more money from him, to which he decided to travel to Kitale on **12/4/2025** to view the projects that the plaintiff had alleged he had started on the subject land namely a very large poultry farming and green horticulture farming for tomatoes together with breeding insects for animal feeds; only to find none of the alleged projects evident on the farm.

30. The 1st defendant/respondent deposes that he then called the plaintiff/applicant, demanding to know how he intended to repay the loan he had taken from him, amounting to **Kshs. 6,600,000/=**, to which he told him that he did not need to worry, as he was going to repay. The 1st defendant/respondent deposed that David Atuti Amwayi then started demanding his share of the loan, which he refused, for he sensed that none of them had the capacity or willingness to repay the loan.

31. The 1st defendant/respondent deposes that he informed both of them that he was not willing to sign the agreement they had brought to him since he was not willing to release any other money to them unless another agreement was drawn between the plaintiff/applicant and himself to the exclusion of

David Atuti Amwayi, which agreement should also indicate his willingness to service the loan plus interest and costs to the tune of the money he had received, and that he would also return the title deed to him after he had repaid his share of the loan, costs and interest.

- 32.** Again, the 1st defendant/respondent deposes that the date for the payment of the first loan premium was **5/5/2025** at **Kshs. 561,282.55/=** as per the repayment schedule attached as **JMK-(30)**, showing that the plaintiff was supposed to pay **Kshs. 240,000.50/=**, while he was supposed to pay **Kshs. 321,018.05/=**, which the plaintiff/applicant has refused to pay, for he does not pick up his phone calls.
- 33.** The 1st defendant/respondent deposes that he decided to reach out to the plaintiff through the local chief Bidii location, Kitale, which office he visited on **21/7/2025**, alongside his friend Daniel Kioni, and presented his grievances, who summoned the plaintiff/applicant for a meeting on **24/7/2025**. At the meeting, the 1st defendant/respondent deposes that the plaintiff, Daniel Kioni, Adan Mustafa Dina, and Daniel Atuti Amwayi were present.

- 34.** It was deposed by the 1st defendant/respondent that the plaintiff/applicant did not attend, to which he area chief directed the mother to inform the plaintiff/applicant to attend the next meeting scheduled for **29/7/2025** as per minutes attached as **JMK-(31)**.
- 35.** The 1st defendant/respondent deposes that on the meeting of **29/7/2024**, again the plaintiff/applicant did not show up, and David Atuti Amwayi proposed to speak on behalf of the whole family. He said that it was unanimously agreed that the plaintiff/applicant should be given time to repay his share of the loan, which was agreed to start with effect from **September 2025**, together with the arrears that had accrued on his share of the loan from **May 2025**.
- 36.** Again, the 1st defendant/respondent deposed that he has continued repaying the loan premium without fail with effect from **May** to **October 2025** as per the bank statement marked **JMK-(32)**, which has put a strain on his business.
- 37.** The 1st defendant/respondent deposed that on **14/9/2025**, David Atuti Amwayi called him on phone explaining that the plaintiff/applicant was unable to repay his share as he had promised before the chief

on **29/7/2025** and was therefore proposing to sell **2** acres out of the suit land to liquidate the loan, interest and costs due to him as per the WhatsApp communication print out attached **JMK-(33)**.

- 38.** Further, the 1st defendant/respondent deposed that on **23/9/2025**, he sent his friend Daniel Kioni to view the portion which was shown to him by Mama Jimmy, a farm worker, as per the attached video marked **JMK-(34)**, only to be served with a summons to enter an appearance on **29/9/2025**.
- 39.** The 1st deponent denied that the intention was to evict anybody, as alleged by the plaintiff. The 1st defendant/respondent deposes that he has not plotted and or executed any fraudulent deals concerning the subject land or in transactions therein. Similarly, the 1st defendant/respondent denies the alleged fraud, misrepresentation, and or corrupt schemes; otherwise, from the annexures hereto, one thing is obvious that the plaintiff is the one who actually planned to obtain money from him, amounting to **Kshs. 6,600,000/=**, by falsely pretending he would repay his share of the loan, costs, and interests, and now was claiming that he had not participated in the processes leading to

having the tile registered under his name to enable him to obtain the loan.

- 40.** The 2nd defendant/respondent opposes the application through a replying affidavit sworn by Anderson Korir, a business banker, on **8/10/2025**. It is deposed that he 2nd defendant/applicant advanced a loan facility of **Kshs. 15,000,000/=** to the 1st defendant/respondent, secured by a charge over title No. **Kitale Municipality Block 17/Bidii/1047**, as per a letter of offer dated **27/7/2025**, and a charge instrument attached as annexure **AK-(1)** and **(2)**.
- 41.** Again, the 2nd defendant/respondent deposes that before advancing the loan facility, the bank had conducted its own due diligence confirming the 1st defendant/respondent as the registered owner of the suit land, as per official searches marked **AK-3(a)** and **(b)**, together with a valuation report to ascertain ownership and value through a licensed valuer, marked **AK-(4)**.
- 42.** In addition, the 2nd defendant/respondent deposes that the bank further obtained a Land Control Board consent authorising the charge as per annexure marked **AK-(5)**. The 2nd defendant/respondent deposes that it acted in good faith, for valuable

consideration, and had no notice of any fraud or irregularity in the transfer of the suit property to the 1st defendant/respondent.

- 43.** The 2nd defendant/respondent deposed that the plaintiff/applicant's allegation of forgery and fraud against it were without basis, and unsubstantiated since no acts or omission have been attributed to it since it had no role in the transfer of the suit property to the 1st defendant/respondent, otherwise, it entirely relied on official government records and cannot be faulted for prior dealings unknown to it and which were not reflected on the register.
- 44.** The 2nd defendant deposed that the plaintiff/applicant has not met the threshold for the grant of the reliefs sought, which could unjustly curtail its statutory and contractual right under the charge instrument and the Land Act **2012**.
- 45.** The plaintiff relies on written submissions dated **30/9/2025**. Reliance is placed on **Giella -vs- Cassman Brown Co. Ltd [1973], Mrao Ltd -vs- First American Bank of (K) Ltd [2003] eKLR, Silvester Momanyi Marube -vs- Gulzar Ahmed Motors & Another [2013] eKLR**, Halsbury's Law of England 3rd Edition Volume 21, paragraph 739,

Amir Suleiman -vs- Amboseli Resort Ltd [2004]
eKLR.

- 46.** The 2nd defendant/respondent relies on written submissions dated **8/10/2025**. It is submitted that the 2nd defendant/respondent, as a regulated financial institution licensed under the Banking Act, was a lawful chargee of the suit property, having advanced a loan facility of **Kshs. 15,000,000/=** to the 1st defendant/respondent, and the repayment is secured by a charge.
- 47.** The 2nd defendant/respondent submits that the bank interest was lawful, created, and registered after a comprehensive due diligence, including verification of title, searches, consents, valuation, and registration formalities.
- 48.** The 2nd defendant submits that no cause of action lies against it, and the allegations of fraud directed at the transfer between the plaintiff and the 1st defendant/respondent were concluded before its involvement in the land, hence it was neither a party nor privy to that transfer, and that it only relied on official records at the land office as documentation provided by competent public authorities.
- 49.** The 2nd defendant/respondent submits that upon being approached by the 1st defendant, it conducted

a thorough legal and credit due diligence exercise confirming the 1st defendant/respondent as the registered owner of the suit land, procuring a valuation report from a licensed valuer, securing a Land Control Board consent, and receiving a transfer instrument duly registered in favour of the 1st defendant/respondent and registering a charge over the suit land title, in line with the land laws.

- 50.** Again, the 2nd defendant/respondent submits that at the time of advancing the loan facility, no caveat, caution, or pending dispute existed on the register; hence, the bank acted in good faith, for valuable consideration, and without notice of any alleged irregularities.
- 51.** In the circumstances, the 2nd defendant/respondent submits that the plaintiff/applicant has failed to meet the conditions for the grant of a temporary injunction as there are no materials before the court linking the 2nd defendant/respondent with the alleged fraud between it and the 1st defendant/respondent.
- 52.** Reliance is placed on **Giella -vs- Cassman Brown** (*supra*), **Nguruman Ltd -vs- Jan Bonde Nielsen & Others [2014] eKLR, Kenya Commercial Finance Co. Ltd -vs- Afraha Education Society**

[2001] eKR, Arthi Highway Developers Ltd -vs- West End Butchery Ltd [2015] eKLR, and Diamond Trust Bank Ltd -vs- Said Hamad Shamisi [2023] eKLR.

53. The 2nd defendant submitted that under **Section 26 1(b)** of the Land Registration Act, it has to be proved that the bank was a party to the fraud or transfer of the land, and that as held in **Diamond Trust Bank (K) Ltd -vs- Said Hamed Shamisi (supra)**, a charge is protected if it had conducted due diligence and acted in good faith.
54. Further, the 2nd defendant, relying on **Housing Finance Company of Kenya -vs- Njiru [2022] KEHC 15478**, submits that a lawful charge cannot be faulted for a prior fraud to which it was not a party and to which it had no notice. The 2nd defendant/respondent, relying on **Dina Management Ltd -vs- County Government of Mombasa & Others [2023] KESC 30**, submits that innocent lenders are stripped of protection where it is demonstrated that a bank conducted due diligence and acted in good faith.
55. The 2nd defendant/respondent submits that there is no evidence on the allegation that there was no demonstration of irreparable loss or damage since

courts have held that the creation of a charge is ordinarily a loss that is compensable by damages. Reliance is placed on **Kenya Commercial Finance Co. Ltd -vs- Afraha Education** (*supra*).

56. On balance of convenience, the 2nd defendant/respondent submits that to grant the injunction will prevent it from enforcing lawfully and commercially acquired rights, hence cause immediate prejudice to a registered financial institution, which is an innocent stakeholder. Reliance is placed on **Kenya Commercial Bank Limited -vs- Osebe (1982) KLR 29.**

57. **Section 63(e)** of the Civil Procedure Act as read together with **Order 40 Rules 1 and 2** of the Civil Procedure Rules provides that a court may in a suit for restraining the defendant from committing a breach of contract or other injury of any kind, upon application by the plaintiff restrain the defendant from committed the breach of contract or injury complained of, or any injury, of a like kind arising out of the same contract or relating to the same property or right.

58. The cause of action by the plaintiff against the defendants is captured in the plaint dated **23/9/2025**. He contends that in **December 2024**,

the 1st defendant approached him with an idea to operate a joint venture business, which while pending execution of a joint venture agreement, he surrendered the original title deed to the 1st defendant as a sign of commitment to the intended joint investment deal, in good faith and trust with no intention to sell or transfer the suit property to him, said to be ancestral and matrimonial home of sentimental value to both the plaintiff and the interested party, together with the entire family of the deceased.

- 59.** The plaintiff avers that later, the 1st defendant called to say that he intended to borrow money for the joint business venture using the suit land, only if it could be transferred to his name, to access credit, since he had a higher credit score than the plaintiff, which he later avers he declined and demanded that the original title be returned to him.
- 60.** The plaintiff avers that through fraud, misrepresentation of facts, and a corrupt scheme, the 1st defendant transferred the suit property into his name and proceeded to secure a loan facility of **Kshs. 15,000,000/=** from the 2nd defendant and has since refused, neglected, or ignored to execute the joint venture agreement or any other document.

- 61.** The plaintiff blames the 2nd defendant for colluding with the 1st defendant to secure a loan facility using the suit property by not conducting due diligence over the suit property to determine its true owners, occupants, and users before the charge was registered.
- 62.** The plaintiff prays for a declaration that he is the true owner of the property. Invalidation of the transfer and registration of title in the name of the 1st defendant, invalidation of the charge, cancellation of the title and the charge, to revert the title to his name, return of the title and for general damages for trespass.
- 63.** The 2nd defendant opposes the suit by a statement of defence dated **21/10/2025**. It avers that it is a stranger to the alleged ownership, succession history, or familial occupation of the suit property. Further, the 2nd defendant denies any alleged fraud before it was approached to offer a loan facility to the 1st defendant, which, after conducting the necessary due diligence, established the title to the land as validly issued, conducted an official search, confirming the ownership of the title free of any encumbrances, and duly obtained and executed the consent to charge, obtained valuation reports,

caused the charge to be drawn and registered in accordance with the law.

- 64.** The 2nd defendant averred that it acted *bona fide*, without any notice of any alleged defect in the title, fraud, or adverse claim by the plaintiff, and relied on the indefeasibility of title conferred by **Sections 24, 25, and 26** of the Land Registration Act **2012**.
- 65.** The 2nd defendant averred that it lawfully processed the loan facility after the lawfully registered owner with a genuine and unencumbered title surrendered it to them that it had no legal duty to investigate the internal or familial ownership history of the property beyond the official land record and that at no time did the plaintiff or the interested party raised any claim, objection or caution over the suit property before the creation of the charge.
- 66.** The 2nd defendant averred that it has not taken possession, trespassed or interfered with the suit property in the manner alleged by the plaintiff and that any intended realization of the security would only occur lawfully and in the exercise of its statutory power of sale in the event of default by the 1st defendant, otherwise, it was not aware of the alleged demand notice, otherwise it was a bon fide chargee for value without notice entitled to

statutory protection and the doctrine of indefeasibility of title.

- 67.** The 2nd defendant averred that the plaintiff's remedy, if any, lies against the 1st defendant, the alleged fraudster, unlike a third-party lender for value who lawfully acquired the charge without any notice of impropriety.
- 68.** The 2nd defendant averred that it would be unjust and prejudicial to cancel the title and or nullify the charge, hence interfering with its proprietary right and vested interest lawfully obtained in good faith.
- 69.** The 2nd defendant terms the suit as raising no reasonable cause of action, mischievous, frivolous, vexatious, incompetent, and an abuse of the court process.
- 70.** The granting of an interim injunction is an exercise of judicial discretion. A party seeking such orders has to establish a prima facie case with a probability of success, show irreparable injury incapable of compensation by award of damages, and lastly that the balance of convenience tilts in favour of granting the injunction. See **Giella -vs- Cassman Brown Co. Ltd** (*supra*).
- 71.** In **Mrao Ltd -vs- First American Bank of (K) Ltd** (*supra*). A *prima facie* case was defined as

established, where, looking at the material before a tribunal, a genuine and arguable case has been established, to 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.

- 72.** Irreparable harm was defined in **Nguruman Ltd - vs- Jan Bonde Nielsen** (*supra*), as an injury that is actual, subsistent, and demonstrated with no standard by which the amount can be measured with reasonable accuracy or where it cannot be monetarily adequately as a remedy. It must be real, apparent, and not imagined.
- 73.** Balance of convenience refers to the measure of hardship or inconvenience likely to be suffered by each party if the court grants or refuses the interim relief. See **Pius Kipchirchir Kogo -vs- Frank Kimeli Tenai [2018] eKLR** and **Pius Gitonga -vs- Gathuthi Tea Factory Co. Ltd & Others [2016] eKLR**.
- 74.** An applicant, in an application for a temporary injunction, to succeed must not only make a frank and full disclosure of all referenced facts to the just determination of the application but must also show that he has a right, legal or equitable, which

requires protection by an injunction. See **Kenleb Construction Ltd -vs- New Gatitu Service Station Ltd & Another [1990] KLR 557.**

- 75.** To establish if the three conditions have been met, a court is not required to conduct a mini-trial or make definitive findings of both law and facts, but to see to it who is to be believed or not, based on the interlocutory affidavits. In **Silvester Momanyi Marube -vs- Gulzar Ahmed** (*supra*), Odunga J, as he then was, said that a court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true.
- 76.** The court again in **Mrao Ltd -vs- First American Bank Ltd** (*supra*), observed that an applicant need not establish title, so long as he can show that he has a fair and bona fide question to raise regarding the existence of the right which he alleges.
- 77.** In this application, it is not disputed that the suit land, before the transfer and registration in the name of the 1st defendant/respondent, belonged to the plaintiff, which he acquired out of a succession process.
- 78.** The plaintiff/applicant raises issues of fraud, misrepresentation of facts, collusion, and illegality in the manner the 1st defendant/respondent obtained

the title, contrary to the intended purpose of securing a loan facility for an intended joint venture.

- 79.** The 1st defendant/respondent, on the other hand, relies on annexure marked **JMK-(3)** dated **22/11/2024** as the primary basis of the agreement with the plaintiff/applicant, who voluntarily handed over his original title deed to secure a loan whose proceeds he would use, inter alia, to repay on behalf of his brother a debt of **Kshs. 887,000/=**, owed to Adan Mustafa Dina.
- 80.** The 1st defendant/respondent maintains that he is a *bona fide* owner of the land as per a title deed issued on **13/12/2024**, which, according to him, was legally, procedurally, and lawfully transferred to him by the plaintiff. The 1st defendant/respondent relies on annexures **(8)**, **(9)**, and **(10)** as the paper trail that he used to obtain the title. The letter of consent dated **14/11/2024** is silent on the consideration which the 1st defendant/respondent paid to the plaintiff/applicant.
- 81.** The application for Land Control Board consent has an unsigned alteration on the dates when it was executed by the parties, which are not countersigned. Item numbers **3** and **4** do not indicate the nature of the transaction and the term.

Item No. **6** is not filled to show the purchase price, value of the land, amount of loan, full description, and value of the improvements on the land. Annexure marked **JMK-(10)**, which is the transfer form, does not indicate the consideration paid and the acknowledgement receipt by the transferor.

- 82.** It appears that the parties applied for the Land Control Board on **14/11/2024**, appeared before the Board the same day, and were issued with the consent the same day. Similarly, it appears that the parties presented the transfer form on **13/12/2024** and obtained a title deed the same day.
- 83.** It is a trite law that when a land title is under challenge, every paper trail to its acquisition must be made available to show it was acquired legally, formally, and free from any encumbrances. See **Munyu Maina -vs- Hiram Gathiha Maina [2013] eKLR.**
- 84.** In this suit, the plaintiff vehemently denies the 1st defendant's version of events that he voluntarily transferred the suit land to the 1st defendant. Instead, he alleges that the transfer and registration in favour of the 1st defendant was fraudulent and illegally obtained through misrepresentation of facts.

- 85.** In *Mobil Kitale Service Station -vs- Mobil Oil (K) Ltd & Another [2004] eKLR*, Warsame J, as he then was, observed that an interlocutory injunction is given on the court's understanding that the defendant is trampling on the rights of the plaintiff.
- 86.** Similarly, the 1st defendant alleges he is a bona fide title holder from the plaintiff. Payment of and proof of any consideration paid to acquire the title is critical under **Section 87** of the Land Act and **Section 3(3)** of the Law of Contract Act. Evidence of a formal application for the issuance of a new title, a requirement under **Section 30(1)** of the Land Registration Act and Regulation **30** of the Land Registration General Regulation **2017**, payment of stamp duty, and the verification of all documentation by the Land Registrar before issuance of a title deed are key. Non-disclosure of the consideration for purposes of stamp duty is critical.
- 87.** In *Daudi Kiptugen -vs- Commissioner of Lands & Others [2015] eKLR*, the court said that acquisition of title cannot be construed as an end result, and a title must be acquired through a proper process. In *Mwangi James Njehia -vs- Janetta Wanjiku Mwangi & Another [2021] eKLR*, the

court said that no legitimate owner of property should be divested of their property unlawfully.

- 88.** Fraud refers to a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his detriment. See *Black's Law Dictionary 11th Edition*, **Vijay Morjaria -vs- Nansingh Madhusingh Darbar & another [2000] eKLR.**
- 89.** The plaintiff has invoked the grounds set out in **Section 26(1)** of the Land Registration Act to defeat the title held by the 1st defendant on account of fraud or misrepresentation, illegality, and unprocedurally acquiring it, so that the court can, under **Section 80(1)** of the Land Registration Act, cancel the title and amend the register. The 2nd defendant, on the other hand, invokes the doctrine of innocent lender for value without notice for any adverse claims by both the plaintiff and the interested party.
- 90.** In **Torino Enterprises Ltd -vs- Attorney General, SCOK Petition No. 5 (E006) of 2022,** the court said that an innocent purchaser for value would denote one who was aware of what they were purchasing by inspecting the suit premises, and that if the suit premises were occupied by the military

must have sounded a warning “the buyer be aware”.

91. In **Consolidated Bank of (K) Ltd -vs- Ndungu & Others ELC Appeal 5063 of 2022 [2024] KEELC 4456 [KLR] (29th May 2024) (Judgment)**, the court cited **Kenya Pipeline Co. Ltd -vs- Glencore Energy (K) Ltd [2015] eKLR**, the law seeks to deny a perpetrator of fraud or illegality from benefiting from his fraud or illegal conduct.
92. In this suit, the plaintiff has brought a multi-claim covering forgery, fraud, illegality, breach of contract, bank/lender relationship, conversion, right to interest in property, and breach of trust. The law is that a banker has a *lien* to retain the subject matter of the lien until an indebtedness of the customer is paid or discharged. See *Halsbury Laws of England 4th Edition*.
93. The 2nd defendant, on the other hand, invokes the doctrine of an innocent chargee without notice or defects in the title. In **Patrick Kivai Nduva -vs- Noah Moneria Ole & others (2021) eKLR**, the 2nd respondent had relied on the Central Bank of Kenya Prudential Guidelines on due diligence. The court cited **Alice Chemutai Too -vs- Nickson Kipkurui Korir & others (2015) eKLR**, that although a title

is protected, protection is removed and can be impeached on account of fraud, misrepresentation, illegality, procurement through an unprocedural or corrupt scheme. The court also cited **Elijah Makeri Nyangwara -vs- Stephen Mungai Njuguna & Another, Eldoret ELC No. 50913 of 2012**, where a charge in favour of a bank was cancelled based on a fraudulent transaction to deny the applicant their rightful inheritance. The court held that the bank's remedy is to pursue the bank customer for the loan recovery.

- 94.** In this matter, the 2nd defendant/respondent terms the reliefs sought as tantamount to interfering with its statutory and contractually protected rights; otherwise, it cannot be alleged not to have done due diligence to cover acts of how the 1st defendant/respondent had acquired title before they charged the suit property. Courts have held that, due to rampant cases of fraudulent transactions, a certificate of official search is not enough due diligence. See **Esther Ndeggi Njiru & Another -vs- Leonard Gatei [2014] eKLR**. In **Daniel Kipruto Meto -vs- Chase Bank (K) Ltd, Eldoret ELC No. 137 of 2015**, the court held that in the digital age, banks should go ahead and devise an innovative

way to curb any foreseeable compromise of their system.

- 95.** In this suit, the 1st defendant wants the court to believe that there was an arrangement between him and the plaintiff and other third parties to obtain the title, and that he holds a protected title. Forgery and uttering false documents are crimes under **Sections 349** and **253** of the Penal Code. Where a contract is immoral or illegal, or an action arises out of deceit, no court will lend its aid to a man who founds his cause upon such.
- 96.** A party that transgresses a positive law, as held in ***Holman -vs- Johnson [1775] 1 Comp 341***, has no right to be assisted by a court of law.
- 97.** In ***Kenya Ports Authority -vs- Fadhil Juma Kisuwa, Civil Appeal 76 of 2016 [2016] KECA 652 [KLR] (10th March 2017) (Judgment)***, the court said that *Ex turpi causa non oritur action* based on the doctrine that no legal remedy or benefit can form from an illegal act.
- 98.** The 2nd defendant holds a personal guarantee for the repayment of the loan by the 1st defendant, apart from the security used to secure the loan. In ***Robert Njoka Muthara & another -vs- Barclays Bank of Kenya Limited & another [2017] eKLR,***

a contract for a guarantee was termed as an accessory contract. Further, in **Fanikiwa Ltd & Others -vs- Sirikwa Squatters Group & Others [2023] KESC 105 [KLR] (1st December 2023) (Judgment)**, the Supreme Court of Kenya observed that financial institutions were not innocent purchasers but lenders.

- 99.** Guideline number **3-4** of the Central Bank of Kenya Prudential Guidelines obligates banks to indemnify and verify the identification documents of their customers. In **Beyond (K) Ltd & Another vs Gulf African Bank (K) Ltd [2019] eKLR**, and **Standard Chartered Bank Ltd -vs- Intercom Services Ltd & Another [2004] eKLR**, the court observed that in all cases of conversion, the bank's duty to act without negligence should be given reasonable consideration.
- 100.** Looking at the circumstances of this case, the bank had an opportunity through its licensed valuer to verify who the occupiers and developers were physically on the suit land.
- 101.** The valuation report would definitely have captured the details of who else, if not the 1st defendant, had overriding rights or interests on the suit land, if not the plaintiff whose permanent buildings were on the

suit property. Due diligence, as held in **Torino Enterprises Ltd -vs- Attorney General** (*supra*), includes a site visit and inquiry. A fair-minded banker paying due regard to the exigency of rampant fraudsters would have undertaken customer background checks and other screening processes as per **Regulation 2** of the Central Bank of Kenya Prudential Regulations. See **Mwangi James Njehia -vs- Janetta Wanjiku Mwangi** (*supra*).

102. Fraud could be participatory as held in **Katende -vs- Haridar & Co. Ltd (2008) 2 E.A 173.** The question after **Torino** (*supra*), **Dina** (*supra*), and **Sehmi & another -vs- Tarabana Company Limited & 5 others [2025] KESC 21 (KLR)** caselaw, is no longer who holds the title to land, but how it was acquired.

103. I think, going by the cited law, the plaintiff/applicant has established the ingredients of a temporary injunction. A right belonging to the plaintiff/applicant has been breached or violated. Irreparable loss or damage will result if there is no temporary injunction to preserve the subject matter. The applicant stands to suffer more in the absence of an injunction. The lower risk of injustice is to grant a

temporary injunction, barring and restraining the respondents, their agents, employees, assignees, representatives, servants, or any other person from advertising for sale, selling, transferring, disposing of, or in any way dealing adversely with Title No. L.R. No. **Kitale Municipality Block 17/Bidii/1047**, to last for **one (1) year**. The applicant is to offer an undertaking in writing as to the damages of **Kshs. 2,000,000/=** within **7** days from the **date hereof**; otherwise, the orders shall lapse.

104. Orders accordingly.

Dated, signed, and delivered via **Microsoft Teams/Open Court** at **Kitale** on this **26th** day of **November 2025**.

In the presence of:

Court Assistant - Dennis

Mwaura for the 4th defendant present

Nabwile for 2nd defendant present

Obuyi for the plaintiff present



**HON. C.K. NZILI
JUDGE, ELC KITALE.**