



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
MILIMANI ENVIRONMENT AND LAND COURT
ELCLC SUIT NO. E 352 OF 2025

NANCY WANGARI MAINA1ST
PLAINTIFF/APPLICANT
DUNCAN MUCHINA2ND
PLAINTIFF/APPLICANT

-VERSUS-

JOHN MUIGAI WACHIRA1ST
DEFENDANT/RESPONDENT
THE REGISTRAR OF TITLES2ND
DEFENDANT/RESPONDENT

RULING

1. The Court is called upon to determine the Plaintiffs/Applicants' Notice of Motion dated 20th July 2025, brought **under Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act, and Sections 13, 26 and 80 of the Environment and Land Court Act**, as well as all other enabling provisions of the law.
2. The application seeks the following orders:
 - a) Spent
 - b) **THAT** pending the hearing and determination of this Application inter partes, this Honourable Court be pleased to issue an interim declaration that the sale agreement for the beneficial interest in Apartment Number A2-2 Situate on the Second Floor, Block A of the Buildings Erected on Land Reference Number 1/395 (Original Number 1/385/5) between the Plaintiffs and the 1st Defendant, JOHN

MUIGAI WACHIRA, is hereby provisionally cancelled due to the 1st Defendant's fundamental and persistent breach of contract.

- c) **THAT** pending the hearing and determination of this suit, this Honourable Court be pleased to issue an interim mandatory injunction compelling the 2nd Defendant, THE REGISTRAR OF TITLES, to forthwith cancel and/or vacate any and all entries, interests, or encumbrances registered in the name of the 1st Defendant, JOHN MUIGAI WACHIRA, pertaining to Apartment Number A2-2, Land Reference Number 1/395, so as to clear the title for immediate disposition by the Plaintiffs.
- d) **THAT** following the cancellation/vacation of the 1st Defendant's interest as per prayer 3 above, this Honourable Court be pleased to issue an interim mandatory injunction compelling the 2nd Defendant, THE REGISTRAR OF TITLES, to forthwith facilitate the registration of a new Lease Agreement for Apartment Number A2-2, Land Reference Number 1/395, in favour of a new bona fide purchaser identified by the Plaintiffs.
- e) **THAT** the costs of this Application be provided for.
3. The application is supported by the grounds appearing on its face, and by the Supporting Affidavit of Nancy Wangari Maina, sworn on 20th July 2025, together with the annexures thereto.
4. The Applicants' position, as set out in the Supporting Affidavit is that they are the beneficial owners of Apartment A2-2, L.R. No. 1/395, by virtue of a Deed of Acknowledgment of Debt & Repayment executed on or about 3rd September 2024 between themselves and the developer, Fathudin Ali Mohammed, through which the beneficial interest in the Apartment was assigned to them in full and final settlement of an agency commission of

Kshs. 13,000,000/=. They state that, prior to the execution of that Deed, they had entered into an informal arrangement with the 1st Defendant to sell the same beneficial interest to him for Kshs. 13,000,000/=: and, for convenience, instructed the developer to execute a Lease dated 1st December 2021 in the 1st Defendant's name solely to avoid further transfer and stamp duty costs, without intending to relinquish their beneficial ownership or entitlement to the purchase price.

5. The Applicants aver that the 1st Defendant agreed to settle the purchase price by paying Kshs. 4,000,000/= from an alleged escrow arrangement managed by advocates for the parties, and by securing financing from SBM Bank for the balance of Kshs. 9,000,000/= through a professional undertaking. They complain that the Kshs. 4,000,000/= has never been remitted, no valid professional undertaking has been issued in their favour, and the 1st Defendant continues to be in fundamental breach of the agreement despite repeated demands and a final ultimatum issued on 14th July 2025.
6. They emphasise that they remain in physical possession of the Apartment, hold the original registered Lease in the 1st Defendant's name, and that the continued existence of the 1st Defendant's interest on the register, in the face of his alleged persistent default, has frustrated their ability to realise the value of their beneficially owned asset.
7. The Applicants further state that they have now procured a new bona fide purchaser who is ready, willing, and able to complete the transaction, but whose commitment is time-sensitive and wholly dependent on the immediate availability of an unencumbered title. They contend that unless this Court urgently intervenes by provisionally cancelling the agreement with the 1st Defendant and directing rectification of the register, they will continue to suffer irreparable financial prejudice and an unjust restriction on their

proprietary rights, and therefore urge the Court to grant the interim mandatory and declaratory reliefs sought.

Response

8. The application is opposed. A replying affidavit sworn by John Muigai Wachira on 4th August 2025 which sets out the 1st Defendant's case in response. He avers that his contractual relationship was with the Vendor, Fathudin Ali Mohamed, pursuant to a Letter of Offer dated 2nd July 2020, and not directly with the Plaintiffs.
9. He states that the deposit was contractually payable to the Vendor's Advocates, S.O. Owino & Associates, and not to an escrow account held by his advocates as alleged; he places before the Court evidence that he remitted Kshs. 4,000,000/= to the Vendor's Advocates on 28th July 2020 and on 8th and 9th October 2020, that SBM Bank (his financier) issued professional undertakings and forwarded charge documents for the Kshs. 9,000,000/= balance, and that the Lease was lodged for registration and registered on 7th April 2022 (I.R. 245271).
10. The 1st Defendant further avers that after registration the Vendor's Advocates reported that the deed file cannot be traced at the Land Titles Registry, and that despite this the Plaintiffs are in possession of the original registered lease and completion documents and have refused to release them except upon receipt of Kshs. 4,000,000/=.
11. He contends that the Plaintiffs' later Deed of Acknowledgement of Debt & Repayment dated September 2024 was executed years after he paid the deposit and after lodgement of the lease and charge, and that clause(s) in that deed confirm the Plaintiffs were aware the deposit was in the custody of the Vendor's Advocates rather than in any escrow arrangement under his control.

12. Accordingly, the 1st Defendant says he remains ready, willing and able to complete the transaction if the original documents in the Plaintiffs' possession are returned to the 2nd Defendant so that the charge may be registered and an official search obtained; he warns that cancellation of the registered lease at this interlocutory stage would be unmerited and highly prejudicial, causing him to forfeit substantial sums already paid (deposit, fees, stamp duty, valuation and insurance). He therefore urges the Court to compel the Plaintiffs to return the documents to the Registrar and to dismiss the application with costs.

SUBMISSIONS

13. The Court notes that although the 1st Defendant was granted leave on 6th November 2025 to file written submissions, he did not file any submissions, nor did he offer any explanation for the non-compliance. Accordingly, the application proceeded on the basis of the Plaintiffs/Applicants' submissions dated 7th October 2025, together with the supporting affidavits and annexures on record.

14. Counsel for the Applicants submits that the 1st Defendant is in fundamental breach of the sale arrangement, having failed to remit the agreed deposit of Kshs. 4,000,000/= or provide a valid professional undertaking for the balance of Kshs. 9,000,000/=, and that his registration as lessee is therefore tainted by actual notice of the Applicants' prior beneficial interest.

15. They argue that the 1st Defendant acted neither as a bona fide purchaser nor as a party ready and willing to perform his obligations, relying on evidence from the Property Manager and the Vendor himself confirming that the Applicants held the earlier equitable rights and that the Defendant knew of those rights before registration.

16. They contend that in the circumstances the Court is empowered **under Section 80(1) of the Land Registration Act** to rectify the register, citing the equitable maxim *Nemo dat quod non habet*, and the principle that registration obtained in derogation of a superior equity is voidable at the instance of the equitable proprietor.
17. The Applicants further submit that equity favours the performing proprietor, asserting that the 1st Plaintiff has consistently borne the burdens of ownership, including payment of service charge, while the 1st Defendant has neither taken possession nor discharged ownership obligations.
18. They argue that a party who has never paid any consideration cannot assert a superior right over one who has fully performed, and rely on the doctrine that a major or fundamental breach entitles an innocent party to rescind. They therefore urge the Court to grant the declaratory and mandatory reliefs sought to prevent what they characterize as an unjust enrichment at the expense of the true beneficial owners

Issues for Determination

19. The following issues arise for determination in this application:
- a) Whether the Applicants have shown a sufficient basis for the interim declaratory relief sought.
 - b) Whether the Applicants have met the legal threshold for the interlocutory mandatory orders sought.

Analysis and Determination

Issue 1: Whether the Applicants have shown a sufficient basis for the interim declaratory relief sought

20. The Applicants seek an interim declaration that the sale agreement stands provisionally cancelled. This form of relief is exceptional, because an interim declaration necessarily involves a judicial pronouncement on the legal status of a disputed contract before trial. Kenyan appellate jurisprudence has consistently cautioned that courts must be slow to grant declaratory orders at the interlocutory stage, particularly where they risk determining the parties' substantive rights prematurely.
21. In this case, the Applicants' argument is anchored on allegations that the 1st Defendant committed a fundamental breach of the sale arrangement. However, the record reveals material and sharply contested factual issues, including the true structure of the payment arrangement, whether the KShs. 4,000,000 was payable from an escrow or to the Vendor's Advocates, whether the partial payments made constitute contractual performance, the effect of the Deed of Acknowledgement of Debt & Repayment, and the respective roles and obligations of the parties during completion. These matters cannot be resolved on affidavit evidence alone. They demand oral evidence and cross-examination, and are therefore issues reserved for the full trial.
22. To issue a provisional declaration at this stage would amount to pre-judging the validity, subsistence, or termination of the contract, and effectively concluding without hearing evidence that the 1st Defendant is in breach and that the agreement is lawfully repudiated. Such a finding would contravene the principles restated in **Nguruman Ltd v Jan Bonde Nielsen [2014] eKLR** and **Agnes Ndiritu v University of Nairobi [2012] eKLR**, both of which emphasise that interlocutory applications must not determine final rights.
23. Given the contested nature of the facts, the complexity of the contractual arrangements, and the risk of making premature findings, the Court is not

satisfied that the Applicants have established a basis upon which an interim declaratory order may properly issue. The question of whether the contract was breached or stands cancelled is a matter that must be interrogated at trial. Accordingly, Issue 1 is answered in the negative.

Issue 2: Whether the Applicants have met the legal threshold for the interlocutory mandatory orders sought

24. The Applicants seek several interlocutory mandatory injunctions, including orders compelling the 2nd Defendant to *cancel or vacate* entries on the land register in the 1st Defendant's name and to *facilitate the registration of a new lease* in favour of a third-party purchaser. These are far-reaching orders. A mandatory injunction at the interlocutory stage commands a party to take positive action which may fundamentally alter the status quo, and the courts have repeatedly held that such orders require a higher and more stringent standard than ordinary prohibitory injunctions.
25. The guiding principles were set out authoritatively by the Court of Appeal in **Kenya Breweries Ltd & Another v Washington Okeyo [2002] eKLR**, where it held that: "A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant has attempted to steal a march on the plaintiff, a mandatory injunction will be granted."
26. This test requires the Court to be satisfied that the case is not merely arguable but clear, exceptional, and free from serious factual controversy. The Applicants must show not only a prima facie case but circumstances so compelling that the Court can say, without hesitation, that the orders sought should issue immediately

27. Applying these principles to the present application, the reliefs sought would require the Court to order the cancellation of a registered interest, direct rectification of the register, and facilitate the creation of a new lease in favour of a new purchaser. These are not simple or reversible administrative steps; they would fundamentally reorder the parties' rights and would, in practical effect, amount to granting the Applicants substantive final relief before a trial has been conducted.
28. Moreover, the factual matrix underlying the dispute remains sharply contested, including whether the 1st Defendant performed his contractual obligations, whether the alleged escrow arrangement existed, whether payments were made to the Vendor's Advocates, and the legal consequences of the Deed of Acknowledgement of Debt & Repayment. These questions go to the merits and can only be resolved after a full trial.
29. The presence of such serious and unresolved factual controversies means the case cannot, by any measure, be described as "clear" within the meaning of **Kenya Breweries Ltd & Another v Washington Okeyo [2002] eKLR**, nor is the remedy sought "simple and summary"; cancelling a registered interest affects third-party rights, including those of the Vendor, the financier, and the management company none of whom were parties to this interlocutory application.
30. Mandatory orders that would disturb a registered title and facilitate a fresh transfer inevitably require the Court to engage in a level of factual and legal determination that is incompatible with interlocutory adjudication.
31. The Applicants have therefore not satisfied the stringent criteria necessary to justify the grant of interlocutory mandatory injunctions. These orders are best left for the trial court after full ventilation of evidence. Accordingly, Issue 2 is answered in the negative.

Final Orders

Having considered the application, the affidavits, the submissions on record, and the applicable law, and having found that the Applicants have not satisfied the threshold for the interim declaratory relief sought, nor the stringent test for the grant of interlocutory mandatory injunctions, the Court makes the following orders:

- a) The Notice of Motion dated 20th July 2025 is hereby dismissed in its entirety.
- b) The interim declaratory order sought is declined.
- c) The interlocutory mandatory injunctions sought are declined.
- d) For purposes of preserving the subject property pending trial, the parties shall maintain the status quo obtaining as at the date of this ruling.
- e) Costs of the application shall be borne by the Applicants.

It is so ordered.

DATED, SIGNED and DELIVERED virtually at **NAIROBI** on this **4th** day of **December, 2025.**

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

No Appearance for the Plaintiffs/Applicants

Mr. Kagimba..... for the 1st Defendant/Respondent

No appearance for the 2nd Defendant/Respondent

Philomena W...... Court Assistant