REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. E116 OF 2024

ZAKARIA MOHAMED LUKMAN::::::::::::1ST PLAINTIFF/APPLICANT

ANAB MAALIM MOHAMED::::::::::::::::::2ND PLAINTIFF/APPLICANT

JELLE DUBO ABDI::::::::::::::::::::::::::::3RD PLAINTIFF/APPLICANT

VERSUS

KENYA COMMERCIAL BANK LTD:::1ST DEFENDANT/RESPONDENT

PETER KAMAU MUGO::::::::::::::::::2ND DEFENDANT/RESPONDENT

RULING

The application is dated 18th February 2025 and is brought under Section 3A of the Civil Procedure Act, Order 40 Rule 1, 2 and 4 of the Civil Procedure Rules, 2010, Section 68 of the Land Registration Act; Article 40 & 60(1) (b) of the Constitution of Kenya seeking the following orders;

1. This application be certified as extremely urgent and be heard forthwith and *exparte* in the first instance and service thereof be dispensed with.
2. Pending the hearing and determination of this application, this court be pleased to grant a temporary injunction restraining the Defendants and each of them, whether jointly or severally, by themselves, servants, agents or assigns or any other agency from proceeding with the

advertised regularization programme on the parcels of land comprised in L.R. Numbers 8786 and 8784/654 Mavoko Municipality Machakos County, or in any other manner interfering with the Plaintiffs' possession of their respective plots on the said land or otherwise in any other manner whatsoever interfering with the *status quo* until full registration of the Plaintiffs and all terms of the proposed sale of the properties are disclosed and agreed upon.

3. Pending the hearing and determination of this suit, this Honourable Court be pleased to grant a temporary injunction restraining the Defendants and each of them, whether jointly or severally, by themselves, servants, agents or assigns or any other agency from proceeding with the advertised regularization programme on the parcels of land comprised in L.R. Numbers 8786 and 8784/654 Mavoko Municipality Machakos County, or in any other manner interfering with the Plaintiffs' possession of their respective plots on the said land or otherwise in any other manner whatsoever interfering with the *status quo* until full registration of the Plaintiffs and all terms of the proposed sale of the properties are disclosed, explained and agreed upon.
4. This court be pleased to order that the regularization period advertised by the 1st Defendant be extended and/or suspended until Plaintiffs and all other *bona fide* occupants of L.R. Numbers 8786 and 8784/654 Mavoko Municipality Machakos County (hereinafter "the suit properties") are

registered and accorded priority to purchase the plots they respectively occupy and that the Defendants do set payment terms that objectively reflect the market value of the properties.

5. That this Honourable Court do make an order compelling the 1st Defendant to compensate the Plaintiffs for any and all developments erected on their respective parcels of land if the 1st Defendant defaults in registering them for purchase of the plots for any reason other than the Plaintiffs failure to pay.
6. The costs of this application and the suit be provided for.

It is based on the following grounds that the Plaintiffs and over 1,000 other residents are occupants, investors and residents of identifiable respective plots within the suit properties under various registered community societies within Athi River Sub County. By an advertisement carried out in the Daily Newspapers on 1st November 2024, the 1st Defendant advertised what it described as “Sale and Ownership Regularization of parcels of land known as L.R. Numbers 8786 and 8784/654 Mavoko Municipality Machakos County” and appointed the 1st Defendant as its agent in the proposed sale. Under the aforesaid advertisement, the 1st Plaintiff made it clear and explicit that it would accord “first and preferential priority to parties in current physical occupation of identifiable portions of the referenced properties” and promised to “engage the occupants of the inhabited parcels within the properties through a site office”

that it stated it would develop within the properties. On 13th November 2024, the 1st Defendant alongside the 2nd Defendant conducted a public participation exercise with the occupants on the parcels of land and promised to accord them priority, register them under the Regularization Programme and set terms of payment that were fair, open and favourable to the occupants. The Plaintiffs duly applied to be registered for purchase of the respective plots they occupy within the parcels of land and filled the necessary forms but the Defendants have refused, declined, neglected or ignored the applications despite the Plaintiffs meeting all the requirements of registration. The period advertised for registration is scheduled to expire on 17th December, 2024 and the Plaintiffs risk losing their respective parcels of land as well as all investments and developments erected therein unless the Honourable Court compels the Defendants to register and to offer them fair purchase terms as advertised in the regularization programme. The regularization programme is also dogged by lack of proper information and guidance, discriminatory registration, discriminatory pricing of plots, threats of political interest by influential personalities and other unexplained underhand activities that have left the Plaintiffs and other residents confused, intimidated and unable to meet the terms of the programme. Unless the injunctive orders are granted, the Plaintiffs shall be deprived of their property and suffer irreparable damage and loss as the said plots would be offered to other third parties who have not invested in the plots.

No significant prejudice would be suffered by the Defendants on the grant of the injunctive orders sought.

This court has considered the application and the submissions therein. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of Giella vs Cassman Brown (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of Nguruman Limited vs Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that;

> *"in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.*
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> *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 states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially".*

Consequently, the Plaintiff ought to, first, establish a prima facie case. In Mrao Ltd vs First American Bank of Kenya Ltd (2003) EKLR the Court of Appeal gave a determination on a prima facie case. The court stated that;

> *"... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."*

In support of his application, the Plaintiff/Applicant stated the Plaintiffs and over 1,000 other residents are occupants, investors and residents of identifiable respective plots within the suit properties under various registered community societies within Athi River Sub County. By an advertisement carried out in the Daily Newspapers on 1st November 2024, the 1st Defendant advertised what it described as "Sale and Ownership Regularization of parcels of land known as L.R. Numbers 8786 and 8784/654 Mavoko Municipality Machakos County" and appointed the 1st Defendant as its agent in the proposed sale.

Secondly, The Plaintiffs have to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision of Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) eKLR provides an explanation for what is meant by irreparable injury and it states;

> *"Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima*

facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.

The Applicants stated that they duly applied to be registered for purchase of the respective plots they occupy within the parcels of land and filled the necessary forms but the Defendants have refused, declined, neglected or ignored the applications despite the Plaintiffs meeting all the requirements of registration. The period advertised for registration is scheduled to expire on 17th December, 2024 and the Plaintiffs risk losing their respective parcels of land as well as all investments and developments erected therein

Thirdly, the Plaintiffs have to demonstrate that the balance of convenience tilts in their favour. In the case of Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) EKLR which defined the concept of balance of convenience as:

'The meaning of balance of convenience will favour of the Plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them

will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting".

In the case of Paul Gitonga Wanjau vs Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR, the court dealing with the issue of balance of convenience expressed itself thus;

"Where any doubt exists as to the Applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies."

The Applicants contend that the balance of convenience tilts in their favour because if the orders sought herein are not granted there is risk of the Plaintiffs losing their respective parcels of land as well as all investments and developments erected therein unless the Court compels the Defendants to register and to offer them fair purchase terms as advertised in the regularization programme.

The decision of Amir Suleiman vs Amboseli Resort Limited (2004) eKLR where the learned judge offered further elaboration on what is meant by "*balance of convenience*" and stated;

> *"The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice."*

The 1st Defendant/Respondent submitted that the Plaintiffs have no recognisable rights in the suit property that is capable of infringement. That in case of Machakos ELC No. 155 of 2016 East African Portland Cement vs Sammy Kathilu and 72 others the court determined that only the 1st Defendant has exclusive entitlement and unhindered right of possession and occupation of the suit property. That the court found that the Defendants and Interested Parties in that suit had trespassed on the suit land by building houses, schools and churches knowing fully well that the property did not belong to them.

Bearing this in mind, I am convinced that there is a risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its

merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the current situation on the ground. I have also not had the opportunity to interrogate the annexures therein.

In Robert Mugo wa Karanja vs Ecobank (Kenya) Limited & Another (2019) eKLR where the court in deciding on an injunction application stated;

> *"circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts..."*

In view of the foregoing, I find that the application is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 16TH DAY OF DECEMBER 2025.

N.A. MATHEKA

JUDGE