Kang'ethe & another v Co-operative Bank of Kenya Limited & 4 others (Civil Case E017 of 2024) [2026] KEHC 2941 (KLR) (24 February 2026) (Ruling)

Neutral citation: [2026] KEHC 2941 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL CASE E017 OF 2024

NIO ADAGI, J

FEBRUARY 24, 2026

BETWEEN

CHARLES KEPHA KANG'ETHE ..... 1ST PLAINTIFF

CATHERINE SERAH RUGURU ..... 2ND PLAINTIFF

AND

THE CO-OPERATIVE BANK OF KENYA LIMITED ..... 1ST DEFENDANT

LONEVIEW DEVELOPERS LIMITED ..... 2ND DEFENDANT

SURAYA PROPERTY GROUP LIMITED ..... 3RD DEFENDANT

ETWONS PROPERTY CONSULTANTS ..... 4TH DEFENDANT

SURAYA SALES LIMITED ..... 5TH DEFENDANT

RULING

1. This ruling is on the Plaintiffs'/Applicants' Notice of Motion dated 13.08.2024 and a Preliminary Objection dated 13.05.2025.

2. The application at this point seeks for an interim order of injunction to issue against the 1st & 4th Defendants/Respondents whether by themselves or through their servants, agents and/or employees restraining them from interfering with or in any manner dealing with or entering the premises owned by the Plaintiffs/Applicants at Loneview Estate being maisonette No. B33 and maisonette B48 or in any manner attempting to alienate the suit properties from the Plaintiffs/Applicants pending hearing and determination of this suit.

3. The application is based on the grounds on the face of the application and supported by the supporting affidavit and further affidavit sworn by the 1st Plaintiff/Applicant Charles Kepha Kang'ethe on 13.08.2024 and 13.05.2025 respectively.

4. In opposing the application, the 1st and 4th Respondents filed a Replying Affidavit sworn on 14.10.2024 and a further Replying Affidavit sworn on 01.07.2025 by Florence W. Njuguna.

5. The Applicants in addition, filed a Preliminary Objection dated 13.05.2025 challenging the 1st & 4th Respondents' Replying Affidavit dated 14.10.2024 on the following grounds:-

    a. The Replying affidavit is incompetent, bad in law and fatally defective in the following respects.

    b. The Replying affidavit is not a valid affidavit and is in flagrant violations of the peremptory requirements of Order 19 Rule 3 (l) and (2) of the Civil Procedure Rules.

    b. The affidavit is made up and consists of submissions, arguments, postulations, presumptions and conclusions, which is contrary to the law.

    b. The affidavit contains in Paragraphs 8, 9, 10, I l, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, matters which are scandalous, irrelevant and oppressive, contains matters of hearsay or argumentative or rely on copies or extracts that are unnecessary.

    e. That the affidavit is meaningless and infructuous, consists of irredeemable inconsistencies, approbations and reprobation beyond the scope of the Oaths and Declarations Act.

    f. The postulations, arguments presumptions and conclusions at paragraphs 44(a), (b), (d) and (e) should be struck out.

    g. The conclusions at paragraphs 52 (a) (b) (c) are null and void while paragraph 53 is scandalous, oppressive and irrelevant.

    g. Consequently, the affidavit is not a valid affidavit.

6. The 2nd, 3rd and 5th Defendants/Respondents did not file any responses and their Counsel Mr. Abiero informed court on 01.10.2025 that they had been served with the Applicants' application dated 13.08.2024 which the 2nd, 3rd and 5th Defendants/Respondents are not opposed to.

7. The application and Preliminary Objection were canvassed through written submissions.

8. I have carefully considered the application dated 13.08.2024, the Preliminary Objection dated 13.05.2025, the affidavits and rival submissions filed by the 1st & 4th Respondents and the 2nd, 3rd & 5th Respondents. It is my considered view that I first need to address the Preliminary Objection before I can embark on the application dated 13.08.2024.

Preliminary Objection dated 13.05.2025

9. The Appellants filed a notice of preliminary objection dated 13.5. 2025 against the Replying affidavit dated 14.10. 2024 filed by the 1st and 4th Defendants. The Applicants cited Order 19 Rules 3 (l) and (2) of the Civil Procedure Rules states as follows;

    3. Matters to which affidavits shall be confined [Order 19, rule 3]

        (l) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents, shall (unless the court otherwise directs) be paid by the party filing the same.

10. The Applicants contend that the Deponent did not demonstrate in writing whether she had capacity to swear the affidavit on behalf of 1st and 4th Defendants. That the Deponent describes herself as the Legal Manager at the Co-operative Bank of Kenya, the Ist Defendant and by virtue of the 4th Defendant being the property manager appointed by the Ist Defendant and that she being conversant with the proceedings and duly authorised, that she is competent to swear the Affidavit on behalf of the Ist and 4th Defendants.

11. It is argued that no board resolution or any other authority was exhibited to demonstrate her capacity to bind the 1st and 4th Defendants in these proceedings. It is trite law that corporate entities act through its directors and duly authorised officers. Reliance was placed on the case of Bilgerere Coffee Growers Limited v Sebaduke & Another [1970] EA 147, where the court held as follows:

> "When companies authorise the commencement of legal proceedings a resolution or resolutions have to be passed either at a company or board of directors; meeting and recorded in the minutes; no such resolution had been passed authorizing t/lese proceedings"

12. Similarly, in Alcon international limited and others v Kenva commercial Bank limited and others Nairobi (Milimani) High Court civil case number 735 of 2003, the court held that ;

> "A person who is not a director of the company should show how he acquired the competence to swear and affidavit on behalf of the company"

13. The Applicants stated that the deponent having no authority or not having demonstrated any authority to swear the Replying affidavit dated 14.10.2024 on behalf of the 1st and 4th Defendants renders the affidavit incompetent and irrelevant and it should be struck out with costs.

14. That the Replying affidavit is made up and consists of submissions, arguments, postulations, presumptions and conclusions, it also contains statements not within the Deponents knowledge which is contrary to the law and offends the provisions of Order 19 Rule l) of the Civil Procedure Rules which requires the affidavit to be confined to facts within the Deponent's knowledge. For instance, by stating that "the Plaintiffs lack a legal or proprietary interest", the Deponent is alluding a matter which is not factual and incapable of being given under oath. It is improper for an Advocate to depone as to disputed matters of fact. Reference was made to the case of Kisva Investments Ltd and another vs Kenpa Finance Corporation Ltd and Others Court held that Advocates should not swear to contested matters in place of their clients. Affidavits which contain arguments or conclusions of law are defective and ought to be struck out.

15. It was submitted that an affidavit is a sworn testimony on facts and as such the provisions of the *Evidence Act* have been applied to affidavits and therefore hearsay evidence and legal opinions should be excluded. In this regard, reference was made to the decision in Mapers and another v Akira Ranch Limited [19741 EA 169 opined that

> "where an affidavit contains argumentative and expressions of opinion, it would be oppressive to allow such matters to masquerade as factual depositions and since Order XVII Rule 6 donate the power to strike out scandalous, irrelevant, or oppressive matters and as the three categories are to be read disjunctively the said portions are struck out."

16. The Plaintiffs/Applicants submitted that they have sufficient reasons to have the Preliminary objection allowed and to warrant this Honourable Court to allow the Application dated 13th August 2024 with costs to be borne by the Defendants.

17. On the other hand, the 1st & 4th Respondents argued that the Plaintiffs'/Applicants' contention that the deponent of the Replying Affidavit lacks authority to swear the affidavit on behalf of the 1st Defendant Bank is misconceived, an afterthought, and a deliberate attempt to divert this Honourable Court's attention from the substantive issues in dispute.

18. The 1st & 4th Respondents stated that the deponent is the Legal Manager of the 1st Defendant Bank and by virtue of that office, has full authority, through a Board Resolution, to swear affidavits and represent the Bank in the conduct of these proceedings. (Reference was made to Annexure "FN-15" in the 1st Defendant's Further Affidavit)

19. That it is therefore evident that the 1st Defendant Bank duly authorized the deponent to execute the affidavit. The Plaintiffs' arguments to the contrary are not only unmerited but also raised without any basis in law.

20. Further, it is submitted that Affidavits do not offend the best evidence rule as provided for under Order 19 Rule 3 of the Civil Procedure Rules. Contrary to the Plaintiff's assertions, the deponent, being duly authorized, swore the Replying Affidavit and Further Affidavit which raise issues of law and fact which are within her knowledge being an authorized officer of the 1st Defendant Bank on whose behalf the affidavit is sworn.

21. Reliance was placed on the decision of the High Court in Consolata Muthoni Kariuki v Martin Mutembei Kaburu & 2 Others [2020] KEHC 8976 (KLR) wherein the court stated that-

> " Furthermore, there is no law expressly prohibiting an advocate from swearing an affidavit on behalf of his client, on matters the said advocate has personal knowledge of, whether informed by his client or arising from the proceedings in the cause. Provided the matters deponed are not controversial and are within the knowledge of the counsel, swearing an affidavit on behalf of the client is in order."

22. It was submitted that this line of argument is an attempt by the Plaintiffs/Applicants to sidestep the central issue before this Court, namely; their failure to establish any valid or registered title to the Suit Units. Rather than responding to the substantive questions regarding ownership and title, the Plaintiffs are raising technical objections which are intended to obfuscate the real issues for determination.

23. The 1st & 4th Respondents urged this court to disregard the Plaintiffs' objections as a red herring and to instead direct its focus to the Plaintiffs' inability to demonstrate any lawful title or proprietary interest in the Suit Units.

24. I have considered the arguments and the legal authorities quoted from both sides on the Preliminary Objection.

25. In the instant case, the Applicants' Preliminary Objection is based on the major ground that the deponent of the Replying Affidavit lacks authority to swear the affidavit on behalf of the 1st Defendant Bank. In order that the court may establish whether or not the deponent has the authority to swear the Replying affidavit, this will invite the court to get evidence to ascertain the same. The only way the deponent is able to respond to the contentions by the Applicants that she did not demonstrate in

writing whether she had capacity to swear the affidavit on behalf of 1st and 4th Defendants or that she is the Legal Manager of the 1st Defendant is through the processes of adducing evidence.

26. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The famous case of Mukisa Biscuits Manufacturing Ltd v West End Distributors (1969) EA 696 expounded on the locus classicus of what merits as a preliminary objection, where the court observed thus;

> " ...a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit."

27. Also, in the Supreme Court decision in Hassan Ali Joho & another v Suleiman Said Shabal & 2 Others SCK Petition No 10 of 2013 [2014] eKLR it was held that: -

> " ...a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit."

28. The principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.

29. It is my considered view that where a Court needs to investigate facts as is in this case, a matter cannot be raised as a preliminary point.

30. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues.

31. Accordingly, I find the Preliminary Objection dated 13.05.2025 to lack in merit

Notice of Motion application dated 13.08.2024

32. The application at this point seeks for an interim order of injunction to issue against the 1st & 4th Defendants/Respondents whether by themselves or through their servants, agents and/or employees restraining them from interfering with or in any manner dealing with or entering the premises owned by the Plaintiffs/Applicants at Loneview Estate being maisonette No. B33 and maisonette B48 or in any manner attempting to alienate the suit properties from the Plaintiffs/Applicants pending hearing and determination of this suit.

Applicants' case

33. The Applicants submitted that on 21st June 2010, the Plaintiffs/Applicants, pursuant to a letter of offer signed by the 5th Defendant/Respondent and the Plaintiffs/Applicants dated 13th July 2010, purchased two maisonettes known as No. B33 and B48 from the Vendor Suraya Property Group the 5th Defendant/Respondent. The commencement of the offer was June 2010.

34. That the property was specified as L.R Number 12916, where the purchaser was granted a sub-lease of the two maisonettes No. B33 and B48 and one (l) share in the management company. An Agreement

for sale and the sub-lease were to be prepared by the Vendor's Advocates to incorporate the Law Society conditions of sale in so far as they were not inconsistent with the letter of offer. On 17th November 2014, a lease agreement was signed between the 2nd, 3rd and 5th Defendants and the Plaintiffs/Applicants.

35. That the construction of the units was completed in 2010. The Plaintiffs/Applicants took possession and enjoyed peaceful and quiet possession from 2014 until 2024 when they were served with a notice to demand that they pay rent or face eviction allegedly on the grounds that the Property known as LR 12916 was the property of the 1st Defendant/Respondent.

36. The 2nd Defendant/Respondent is the registered proprietor as the Lessee from the Government of Kenya of all that parcel of land known as LR 12916 registered in the Land Titles Registry at Nairobi as I.R 130518.

37. That unknown to the Plaintiffs/Applicants, the 2nd Defendants/ Respondents through the agency of the 5th Defendant offered the parcel of Land known as LR 12916 and created a debenture dated 8th July 2011, an escrow account dated 8th July 2011, Charge dated 18th July 2011, a further Charge dated 4th April 2014. The Ist Defendant agreed to grant the borrower financial accommodation by way of loan, time credit banking facilities, overdraft advances, bank guarantee and other financial facilities and as a condition precedent to the granting of the loan, the 2nd Defendant agreed to create an escrow account over which the 1st Defendant shall create a lien in accordance with the terms and conditions of the agreement.

38. On 5th August 2024, the 1st Defendant/Respondent wrote a letter to the managing directors of the 4th Defendant/Respondent stating that the Units B33 and B48 were not sold and allegedly belonged to the 1st Defendant/Respondent.

39. The 4th Defendant shortly after the receipt of the letter issued a notice to pay rent and a tenancy agreement to the Plaintiffs/Applicants, to be paid an account held by the 2nd Defendant. The notice was endorsed by a warning that upon failure, the Plaintiffs/Applicants would be required to vacate the premises within 14 days and sign a tenancy agreement.

40. That it is noteworthy that the property has had partial discharges from 30.3.2014 but the charge was created on 18.7.2011. The partial discharges are undoubtedly an ongoing process with entries being made as recently as 2023 as evidenced by the Exhibit FN-I. The 1st Defendant, 2nd and 5th Defendants in frill knowledge that the suit property ought to be discharged failed to or refused to have the same discharged, making this exercise unnecessary had the said Defendants performed their obligations in the first place.

41. The Applicants contend that as evidenced by the letter of offer dated 11.07.2010 (marked as CKKI in the supporting affidavit dated 13th August 2024, the Lease Agreements marked as CKK5 and CKK6, the prepayment Recharge statements from Kenya Power (CKK3), Mavoko water and sewerage transactions (CKK4), the occupation by the Plaintiffs/Applicants since 2014 has not been disputed by the Ist Defendant/Respondent. That, the Plaintiffs/ Applicants have demonstrated proprietary, legal interest and equitable interest in the suit property Maisonette B33 and B48. The Plaintiffs/Applicants having paid in full the purchase price to the vendors (the 2nd and 3rd and 5th Defendants/Respondents), took possession since 2014, performed all their obligations on the said suit property, all this as they awaited registration of the Lease and partial discharge of the suit property. The delay which can only be explained by the 2nd, 3 d and 5th Defendants.

42. The Plaintiffs/Applicants submits that they have clearly shown that they do have a right to the suit property, that right has been infringed or is in danger of being infringed, there is indeed a probability of success upon trial.

43. On the second limb, the Plaintiffs/Applicants stated that they acquired the property in 2010, purchased at full value, took possession, paid their dues, leased out B48 to another party. For over 14 years the Plaintiffs knew and rested in the fact that they had two Maisonettes in their name, for a period of 99 years, the duration of the lease, and this, unless they breached the terms of the lease, could not be taken away from them.

44. That the harm in this case goes well beyond money. That the Plaintiffs/Applicants when they entered into the lease agreement knew, and it was a legitimate expectation that this was a long-term tenure formed on the basis of life and business decisions. They settled in with their family, invested in improvements and treated the premises as a source of their livelihood. Dispossession therefore would result in permanent loss of property that they were entitled to for 99 years. That there is no reasonably quantifiable measure or market value for the right to occupy the property as a long-term lease, the loss of a home, the loss of a community, social and emotional security, and the financial burden on the sudden uprooting of the lives of the Plaintiffs/Applicants.

45. The Applicant argue that it should also be born in mind that the property has also greatly increased in value and should the 1st and 2nd Defendants/Respondents be allowed to continue with their illegal actions, it would be to the financial detriment of all the parties involved. Reliance was place on the case Neuruman Limited versus Jan Bonde Nielsen & 2 others where it was held:-

> "On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately " be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

46. The Applicants submitted that that the balance of convenience does lie in favour of the granting of the injunctive reliefs pending the hearing and determination of the application and the suit. That this Honourable Court has the duty to protect the legitimate expectations and prevent the abuse of rights by the Ist and 4th Defendants/Respondents, they implored this Court to allow the Application.

1st & 4th Respondents' case

47. The 1st & 4th Respondents submitted that it is trite law that before an interlocutory injunction can issue, the Plaintiff's Application must be subjected to the test set out in Giella -v- Cassman Brown & Co Ltd [1973] EA 358.

48. This test was affirmed by the Court of Appeal in Mrao Ltd V First American Bank Of Kenya Ltd & 2 Others [2003] KECA 175 (KLR) in the following terms: -

    i. Has the Plaintiff advanced a prima facie case with a probability of success?

ii. Will the Plaintiff suffer irreparable loss which would not be adequately compensated by an award of damages? and

iii. With which party does the balance of convenience lie?

49. That in consideration of this test, the Court of Appeal in paraphrasing the Supreme Court of India in Dalpat Kumar & Another v. Prahlad Singh & Others, Air 1993 Sc 276 In Margaret Njoki Migwi V Barclays Bank Of Kenya Ltd [2016] KECA 675 (KLR) observed:

> " ...that the phrases "prima facie" case, "irreparable harm" and "balance of convenience" are not mere rhetoric or incantations but rather important factors to be carefully weighed upon and considered in all applications where an interlocutory injunction is applied for."

50. Therefore, in the absence of establishing a prima facie case, this Court must be guided accordingly as the failure to do so does not merit the Plaintiff to "leapfrog" to an injunction in favour of satisfying the other hurdles in between.

51. That as affirmed by the Court of Appeal in Nguruman Limited -v- Jan Bonde Nielsen & 2 Others [2014] EKLR, where the Plaintiff fails to establish a prima facie case:-

> " The issue of "irreparable harm" and "balance of convenience" need no consideration. The failure to establish of a prima facie case does not permit the Applicant to "leapfrog" the first hurdle in favour of satisfying the other requirements that are in between.
>
> These three conditions must be applied as separate, distinct and logical hurdles which the Applicant must surmount sequentially."

52. The 1st & 4th Respondents cited the Court of Appeal in Mrao Limited -v- First American Bank Of Kenya Ltd And 2 Others (supra) defined a prima facie case in a civil application 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, so as to call for an explanation or rebuttal from the latter."

53. That it is therefore clear that a prima facie case is more than an arguable case. It is not sufficient to merely raise issues. The 1st and 2nd Plaintiffs must demonstrate the infringement of a right by the 1st Defendant Bank, supported by material evidence, so as to call upon the latter for an explanation or rebuttal on the same.

54. In submitting on the 1st and 2nd Plaintiffs failure to establish a prima facie case to merit an injunction order, the 1st Defendant Bank affirms as follows: -

> " The Plaintiffs lack of a legal or proprietary interest over the suit units"

55. The 1st Defendant Bank draws the Court's attention to the case of William Muthee Muthami V Bank Of Baroda [2014] KECA 591 (KLR) which has been further cited by the High Court in Aineah Liluyani Njirah v Aga Khan Health Services [2013] which highlighted that:

> " The general rule; the destine of privity of contract is that, as a general rule at common law, a contract cannot confer rights or impose strangers to it. The parties to a contract are those people who reach agreement and whilst it may be clear in a simple case who those parties are.
>
> However, if the contract only impliedly benefits a third party, there is no such presumption, and the third party has no rights unless the contract expressly gives that third party a right to enforce the contract. This creates certainty for, and protects, contracting parties, in that third parties cannot enforce contracts which only incidentally benefit them unless the contract expressly states that they may do so."

56. Therefore, the existing Charge over the secured properties was only drawn to govern the parties in the contract and not any other 3rd party including the Plaintiffs from any legal interest over the Suit Units.

57. As a result of the foregoing, the 1st Defendant Bank avers that the 1st and 2nd Plaintiffs lack the legal or proprietary interests over the Suit units. Further, the production of offer letters and undated Sale Agreements do not equally stand as proof of ownership demonstrating a registered legal interest over the Suits.

58. That in reliance on this, the 1st and 2nd Plaintiffs cannot therefore claim that they were discharged from their obligations to remit the purchase price for the Suit Units by being offered separate purchase agreements that the 1st Defendant Bank was not a party to or consented to.

59. Moreover, in any event, the 1st Defendant Bank was not a party to the agreements for sale entered between the 1st and 2nd Plaintiffs and the 2nd Defendant on or about 2013 to 2014 and the 1st Defendant Bank cannot respond to the same save to state that the property was charged to the Bank in 2011 and any disposition of the same without payment of the consideration would have required the Bank's consent which consent was neither obtained and/or granted.

60. Reliance was placed on the High Court decision in Erdeman Properties Limited V Kcb Bank Limited [2023] KEHC 26954 (KLR) observed that-

> " The relationship between the parties herein was established by the lending documents including the offer letters and charge documents securing the facilities offered. None of these documents envisage and or purport to cover the right of third parties who might purchase the Units in the properties offered by the Plaintiff/ Applicant as security to the loan."

61. The Letter of Offer dated and drawn on 13th July 2010 for sale of Maisonette No. B33 was ostensibly signed on 8th July 2010 before the Letter of Offer even existed hence it is a demonstration of the intent of the Plaintiffs to defraud the 1st Defendant.

62. In addition, the 1st and 2nd Plaintiffs are yet to avail the purported Sale Agreement and Certificate of Lease for Maisonette No. B33. Notably, the unregistered lease agreement over the aforesaid unit availed was dated 2014, 3 years after the 1st Defendant Bank charged the property to itself. As such, it is evident that the 1st Defendant Bank security rights over the Suit property existed before the purported purchases as alleged by the 1st and 2nd Plaintiffs herein.

63. That pursuant to Section 38 (1) of the *Land Act* and Section 3(2) of the Law of Contracts Act which outline the validity of contracts of sale in land which ought to be in writing and signed by all the parties thereto.

64. The same position has been recognized in the case of Grain Bulk Handlers Limited V Juja Coffee Exporters Limited [2017] KEELC 1425 (KLR) which declared that-

> " Unfortunately, the relevant provisions of the law herein are couched in mandatory terms and where there is no signed document no legitimate expectation can be derived therefrom in which case the Court can issue the declaratory order. "

65. The Court in Grain Bulk Handlers Limited V Juja Coffee Exporters Limited (supra) went on to state that

> " In the case of Patricia Bini vs Melivia Investments Ltd and 3 others (2015) eKLR, Angote J quoted at paragraph 188 the case of A.G of Belize et al vs Belize Telecom Ltd & Another (2009) I WLR 1980 at page 1993 quoting Lord Person in Trollope Colls Ltd vs N. West Metropolitan Regional Hospital Board (1973) I WLR 601 at 609 as follows:
>
> "The Court does not make a contract for the parties. The Court will not even improve the contract which the parties have made for themselves."

66. The Sale Agreement for Maisonette No. B48 was ostensibly entered into in 2013, two years after the 1st Defendant Bank had registered its interest in the Suit Property. Therefore, this occurred without the Bank's interest as a financier being noted on the Sale Agreement.

67. The 1st Defendant does take note that although various courts have recognized leases as contract inter-parties hence creating a binding effect over the parties, the sale was defective from the start without the consent of the Financier.

68. The purported actions stand in contravention of Section 59 of the *Land Registration Act* read together with Section 87 of the *Land Act* which state that-

> " If a charge contains a condition, express or implied that Chargee prohibits the Chargor from, transferring, assigning, leasing, or in the case of a lease, subleasing the land, without the consent of the Chargee, no transfer, assignment, lease or sublease shall be registered until the written consent of the Chargee has been produced to the Registrar."

69. The 1st Defendant submitted that the claim by the 1st and 2nd Plaintiffs in paragraph (b) of their application that they have been in occupation of the Maisonette B33 and B48 from 2014 to 2024 without proof of the payment of the purchase price nor the payment of any rent are unfounded and cannot be ascertained to be proof of ownership.

70. Reference was made to Section 107 (1) of the *Evidence Act* in relation to burden of proof which outlines that-

> " Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

71. The 1st Defendant Bank further relies on the case of Hellen Wangari Wangechi v Carumera Muthini Gathua [2005] eKLR which was quoted with approval in Stanley Maira Kaguongo V Isaac Kibiru

Kahuthia [2022] KEHC 1950 (KLR), highlights the provisions of Section 107(1) of the *Evidence Act* declaring that-

> " It is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed."

72. In Erdeman Properties Limited V Kcb Bank Limited [commercial Case No. E209 OF 2022] ruled in relation to the breach of charge the following terms:

> " In my view, from the onset, it is common ground that the Defendant advanced the Plaintiff loan facilities and the subject suit properties were offered as security thereto. As regards the 100 units, it is not disputed that they were offered as security, and the charge document precluded any sale without the consent of the Defendant. It follows that the sale of the 100 units without consent was outright breach of the charge document which cannot be mitigated by any explanation that the sale was honest mistake."

73. As regards whether the Applicants will suffer irreparable damage, the 1st & 4th Respondents submitted that the general rule of thumb is that a Court of equity can only grant an interlocutory injunctive relief where an award of damages for harm is said to be inadequate.

74. In respect to the security properties, the prevailing state of affairs is that the 2nd Defendant's loan facilities continue to accrue a contractual and default interest due its failure to service the facility in the manner contractually agreed.

75. Therefore, if the 1st Defendant Bank is precluded from finalizing its contractual power of sale of the security properties without a legal or justifiable cause, the 1st Defendant Bank shall be placed in a precarious situation where it shall undoubtedly be the party that shall suffer irrecoverable loss.

76. As observed by the Court in Elite Intelligent Transport Systems Limited -v- Gulf Africa Bank Limited & Another [2020] EKLR: -

> " With respect to the charged properties, parties always contemplate that suit properties will be sold in the event of default; hence damages are an adequate remedy. In view of admitted indebtedness, the balance of convenience is against the Plaintiff as the debt will continue to escalate thus eroding the value of the Defendant's security."

77. The security Suit Units are easily quantifiable by a liquidated value and any contention if at all, that the property whose loss cannot be adequately satisfied by an award of damages is sentimental at best and a misplaced notion overall.

78. Reference was made to the holding in Nguruman Limited Vs. Jan Bonde Nielsen & 2 Others [2014] EKLR where is was observed that: -

> " ...the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant."

79. Further, with the subject matter of the suit entailing charged properties, the Chargee is entitled to the remedies outlined in Section 90 of the *Land Act* which include:

a. Suing the Chargor for any money due and owing under the charge.

b. Appoint a receiver of the income of the charged land

c. Lease the charged land, or if the charge is of a lease, sublease the land

d. Enter into possession of the charged land

e. Sell the charged land

80. However, the remedy sought against the Chargor is upon the discretion of the Chargee as outlined in the case of Peter Mwari Daniel & Nancy Nyambura Mwara v KCB Bank Kenya Limited [2024] where the High Court noted that:

> " The choice of a remedy for the recovery of an unpaid loan under a mortgage is that of the mortgagee, and the mortgagor cannot tell the mortgagee to take such action as may suit the mortgagor."

81. If any injury will be suffered, the same can be restituted by way of damages and by virtue of charging the property by the 2nd Defendant, it demonstrated a clear sign that the secured Suit Units would be commodities for sale.

82. This was the Court's determination in Anthony Mbugua Njihia & 36 Others V Urithi Housing Co-operative Society Ltd & Another [2021] KEELC 1525 (KLR) while citing with reliance the case of Andrew Muriuki Wanjohi v Equity Building Society Ltd & 2 others [2006] eKLR stating that-

> " It is the view of the Court that if any injury will be suffered then the same can be assessed and compensated by way of damages. Further, that the 1st Defendant charged the suit property as security for loan, it is right to make an inference that the land became a commodity for sale in case of default and the value can be ascertained at market rates."

83. The Court's attention was drawn to the case of Paul Gatete Wangai & 13 Others V Capital Realty Ltd & Another [2020] KEELC 933 (KLR) where the court stated that Section 28 (g) of the *Land Registration Act* recognizes the charge as an overriding interest over land hence the rights of the Chargee are held to be in rem and therefore remain superior to any other interest in instances of a sale, transfer or any other disposition in the property.

84. The 1st Defendant Bank therefore had first property rights over the secured Suit Units as recognized in the case of Monica Waruguru Kamau & Anor v Innercity Properties Limited HCCC No. E035 of 2020 cited with approval in Paul Gatete Wangai & 13 Others V Capital Realty Ltd (supra) where the High Court held that-

> " 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..."

85. Similarly in Paul Gatete Wangai & 13 Others V Capital Realty Ltd (supra) para. 100, the court stated that-

> " 100. The Plaintiffs must have been aware that the suit property was charged, and that for any sale to be valid, the Chargee was required to give its consent. All the Plaintiffs were required to do was to conduct an official search on the suit property and insist on the consent of the Chargee before committing their money. They seem to have missed this crucial step, which is a basic requirement in this kind of transactions."

86. The 1st & 4th Respondents stated that while exercising its statutory and contractual rights of sale over the Suit property, the 1st Defendant Bank notified the 4th Defendant Property Manager to issue notices to occupants and tenants who had failed to remit rental arrears and demonstrate their ownership of the various units developed on the Suit property.

87. In doing so, the 1st Defendant Bank took note that the Suit Units had not been paid for by the Plaintiffs and were therefore available for sale to prospective purchasers.

88. To this end, on the 5th of August 2024, the 4th Defendant Manager issued a notice to the Plaintiffs requiring that they pay the accrued rental arrears due as the Suit Units had not been validly disposed to the Plaintiffs.

89. Further to this, the 1st Defendant Bank directed the Plaintiffs to:

a. Remit all rental arrears to the 2nd Defendant Developer's Escrow account held at the 1st Defendant Bank

b. In the event of the Plaintiff's failure to honour the rental notices over the Suit Units, the Plaintiffs vacate the premises within a period of fourteen (14) days from the date of the served notices.

90. It is on this basis that the 1st and 2nd Plaintiffs have approached this Honourable Court at the eleventh hour seeking inequitable injunctive relief over the 1st Defendant Bank's notices to vacate the Suit Units.

91. Reliance was made to the C.A NO. 13 OF 1987 Godfrey Ngumo Nyaga -v- Housing Finance Company of Kenya Limited as quoted with approval by the High Court in Lewis Nguyai Nganga Vs Madison Insurance Company Limited [1998] KEHC 219 (KLR) that describes the power of the court in relation to a party exercising its statutory right of action-

> " Where a party has a statutory right of action, the Court will not usually prevent that right being exercised except that the Court may interfere if there was no basis on which the right could be exercised, or it was being exercised oppressively."

92. It is therefore the 1st Defendant Bank's submission that in the absence of any effort by the 2nd Defendant to demonstrate how to liquidate the outstanding debt due and the absence of any proprietary interests by the 1st and 2nd Plaintiffs, the 1st Defendant Bank is surely assured of being gravely prejudiced against if the sale of the Suit Units is unjustly forestalled.

93. In addressing the balance of convenience, the 1st & 4th Respondents called upon this court to balance the scales of justice and address itself to the higher ideals of justice.

94. The above position was affirmed in the case of Pius Kipchirchir Kogo V Frank Kimeli Tenai [2018] KEELC 2424 (KLR) where the court observed as follows: -

> " Although it is called of convenience, it is really the balance of inconvenience, and it is for the Plaintiff to show that the inconvenience caused to them would be greater than that which may be caused to the Defendant.
>
> The Plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater that which is likely to arise from granting it"

95. It was submitted that noting that the 1st and 2nd Plaintiffs have no legal proprietary interest over the secured properties while the 2nd Defendant has continued in default past the agreed repayment period, the loan amount continues to accrue interest.

96. Furthermore, the 1st and 2nd Plaintiffs herein have failed to demonstrate their legal proprietary interest over the Suit units hence no irreparable loss could be suffered that would require any legal justification for the consequences while the outstanding facility which is now in danger of outstripping the value of the 1st Defendant Bank's securities

97. On a balance inconvenience, it is the 1st Defendant Bank that shall undoubtedly suffer an inconvenience as its security in the Suit Units shall be outstripped by the escalating debt due from the 2nd Defendant developer with the loss being irrecoverable as outlined in the case of Andrew Muriuki Wanjohi V Equity Building Society Ltd & 2 Others [2006] KEHC 2727 (KLR)-

> " ....if the 1st and 2nd Defendants were restrained from selling off the suit property, there is a very real risk that the debt may outstrip the value of the suit property as the borrower has never made any repayments. ..... the stoppage of the intended sale by the Chargee would result in the continued growth of the debt and thus exposing them to potentially substantial irrecoverable loss".

98. Further, without the sale of its security, the 1st Defendant Bank would be subjected to financial inconvenience by having security over a property whose value cannot satisfy the debt owed.

99. That whereas, on the other hand, the 1st and 2nd Plaintiffs do stand to benefit from the intended sale as this shall effectively reduce its liability to the 1st Defendant Bank, and any excess recovery shall be remitted back to the Plaintiffs.

100. As affirmed by the Court in Northwest (k) Ltd V Kenya Deposit Insurance Corporation (official Receiver For Chase Bank Ltd) & Keysian Auctioneers [2019] KEHC 5995 (KLR)

> " It follows that even if the statutory power of sale is exercised, it is likely to be beneficial to the Applicant as it will alleviate his indebtedness and if there is a balance from the sale, the same will be given to the Applicant."

101. The 1st & 4th Respondents aver that this application has been brought in bad faith as what the 1st and 2nd Plaintiffs are asking this Honourable Court to do is to deprive the 1st Defendant Bank of its legal right to realize the benefit of all its security including those that are not in contestation without proof of any existing proprietary rights over the Suit Units.

The 1st & 4th Respondents pray that the application be dismissed with costs.

102. I have equally considered the arguments and the legal authorities quoted from both sides on the application for injunctive orders pending hearing and determination of the suit herein.

103. The submissions replicate the summary of the test set out in Giella -v- Cassman Brown & Co Ltd [1973] EA 358 before an interlocutory injunction can issue and I wish not to duplicate the same here.

104. It is my finding that the 1st and 2nd Plaintiffs have failed to apprise this Court of any right, legal or equitable, that has been infringed upon by the 1st Defendant Bank/Respondent.

105. Guided by Jatomy Supermarkets Limited & Another V Family Bank Limited & Another (civil Case E011 Of 2021) [2022] Kehc 10265 (klr) (11 May 2022) (ruling) where the Applicants sought a temporary injunction against the Respondents to prevent the auctioning or disposal of several parcels of land pending the hearing and determination of the main suit arguing that the properties were undervalued and that proper notices were not issued. The Court relied on the decision of Ringera J. (as he was then) in the case of Showind Industries V Guardian Bank Limited & Another (2002) 1 EA 284 where the Learned Judge stated as follows: -

> "...an injunction is granted very sparingly and only in exceptional circumstances such as where the Applicant's case is very strong and straightforward. Moreover, as the remedy is an equitable one, it may be denied where the applicant's conduct does not meet the approval of Court of equity..."
>
> The Court, further, found that the Applicants had failed to establish a prima facie case as the Applicants not only failed to furnish the Court with the sale agreement as to the alleged sale of the Suit Units but also failed to adduce any proof as to the payment of the purchase price".

106. It trite that "he who comes to equity must come with clean hands" thus the 1st and 2nd Plaintiffs cannot be said to have clean hands owing to their failure of conducting their due diligence prior to purchasing the Suit Units and seeking the consent of the 1st Defendant Bank.

107. The 1st and 2nd Plaintiffs/Applicant herein have failed to establish a prima facie case and are equally barred from coming to equity with unclean hands when seeking an injunctive relief by virtue of the fact that they have any existing proprietary interest which they have failed to satisfy.

108. It must also weigh upon this Court that the loan facility was a legal contractual agreement with the benefit of lawfully registered security willingly offered by the 2nd Defendant Developer. It is within these confines that the terms of the facility lie, and this is an action fait accompli.

109. Based on the above analysis, this court orders that :-

a. the Applicant's Notice of Preliminary Objection to the Replying Affidavit dated 13.05.2025 and the Notice of Motion dated 13.08.2024 be, and are hereby dismissed.

b. the costs occasioned by the said Notice of Preliminary Objection to the Replying Affidavit dated 13.05.2025 and the Notice of Motion dated 13.08.2024 be be borne by the Plaintiffs/ Applicants in any event.

It is so ordered.

RULING WRITTEN, DATED & SIGNED AT MACHAKOS THIS 24TH FEBRUARY 2026

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 24TH FEBRUARY 2026