

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MOMBASA**

**ELC CASE NO. 158 OF 2021**

**JAMES MBURU KIMANI ..... 1<sup>ST</sup> PLAINTIFF**  
**PAUL WAWERU MWANGI ..... 2<sup>ND</sup> PLAINTIFF**  
**ROBINSON MAINA KABUGI ..... 3<sup>RD</sup> PLAINTIFF**  
**HELTAN MNJAMA MAGANGA ..... 4<sup>TH</sup> PLAINTIFF**  
**PENINAH MWELU MNJAMA..... 5<sup>TH</sup> PLAINTIFF**

**VERSUS**

**DAVID MUREITHI KANYI ..... 1<sup>ST</sup> DEFENDANT**  
**STANBIC BANK KENYA LIMITED ..... 2<sup>ND</sup>**  
**DEFENDANT**

**JUDGMENT**

**Background**

1. By a plaint dated 13<sup>th</sup> August 2021, James Mburu Kimani and 6 others (hereinafter “the Plaintiffs”) pray for judgment against the two (2) Defendants for the following:

- 1) An order of mandatory injunction compelling the 1<sup>st</sup> Defendant to issue the Plaintiffs with duly registered certificate titles for their respective Maisonettes situate on the property known as Sub - Division No. 1528 Section IV/Mainland**

**North described as Maisonette No. 11b in the name of the 1<sup>st</sup> Plaintiff; Maisonette No. 5 in the names of the 2<sup>nd</sup> Plaintiff, Maisonette No. 19 in the name of the 3<sup>rd</sup> Plaintiff; Maisonette No. 7 in the joint names of the 4<sup>th</sup> and 5<sup>th</sup> Plaintiffs; and Maisonette No. 21 in the joint names of the 6<sup>th</sup> and 7<sup>th</sup> Plaintiffs within 14 days of this Judgment;**

**2) A declaration that any charge and all the charges created by the 1<sup>st</sup> Defendant in favour of the 2<sup>nd</sup> Defendant over the property known as Sub Division No. 1528 Section IV/Mainland North are illegal, null and void;**

**3) A permanent injunction be and is hereby issued restraining the 2<sup>nd</sup> Defendant, its agents, officers, employees, assigns or any other person acting for in the legal place of and on authority of the 2<sup>nd</sup> Defendant from realizing the securities and more specifically from selling, auctioning, disposing of or in any other manner interfering with the Plaintiffs occupation and use of the property known as Sub Division Number 1528 Section IV/Mainland North;**

**4) Costs of this suit to be paid by the Defendants jointly and severally; and**

**5) Any other and further relief this Court may deem fit to grant.**

2. Those prayers arise from the Plaintiff's contention that on diverse dates in the years 2015 to 2018, the Plaintiffs and the 1<sup>st</sup> Defendant entered into various sale agreements for the sale of various maisonettes erected and built on the property known as Sub Division No. 1528 Section IV /Mainland North.
3. It is the Plaintiffs' case that despite paying the full purchase price, the 1<sup>st</sup> Defendant has failed to transfer to them their respective maisonettes and issue them with duly registered certificates of lease/titles in their names. The Plaintiffs assert that the 1<sup>st</sup> Defendant charged the suit property to the 2<sup>nd</sup> Defendant on 25<sup>th</sup> September 2017 and 1<sup>st</sup> August 2018 to secure loans of Kshs 21,000,000 and Kshs 25,000,000 respectively without the consent or knowledge of the Plaintiffs.

4. The Plaintiffs aver that the 1<sup>st</sup> Defendants breached terms of the sale agreements and that the charge by the 1<sup>st</sup> Defendant in favour of the 2<sup>nd</sup> Defendant is illegal, null and void.
5. David Mureithi Kanyi (the first Defendant) is opposed to the suit. In his Statement of Defence dated 24<sup>th</sup> September 2023, the 1<sup>st</sup> Defendant avers that he entered into sale agreements for the sale of five (5) houses to be built on off plan basis on sub division No. 1528 Section III Mainland North and not on the property described as sub-division No. 1528 Section IV Mainland North. It is his case that the process of issuance of leases for the Plaintiffs has not crystallized under the sale agreement.
6. It is the 1<sup>st</sup> Defendant's case that he allowed the Plaintiffs and other third parties to occupy constructed units pending completion under the sale agreements, which occupation does not entitle them to leases. He asserts that the Plaintiffs have not come to Court with clean hands as their agents contributed to the delay in achieving completion.
7. The 1<sup>st</sup> Defendant further avers that he charged the suit property to finance the construction of the real estate

development on the property. In addition, he avers that none of the houses occupied by the Plaintiffs or their agents had been constructed by the time the charge in favour of the 2<sup>nd</sup> Defendant was perfected. It is therefore his case that the charge created in favour of the 2<sup>nd</sup> Defendant is proper and valid.

8. Stanbic Bank Kenya Limited (the 2<sup>nd</sup> Defendant) is equally opposed to the suit. In its Statement of Defence dated 2<sup>nd</sup> March 2022, the 2<sup>nd</sup> Defendant avers that it is a stranger to the dealings between the Plaintiffs and the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant avers that from the Plaintiff's bundle of documents, what was being sold was sub division No. 1528 Section III Mainland North and not the suit property.
9. The 2<sup>nd</sup> Defendant further avers that the suit property was offered to it by the 1<sup>st</sup> Defendant as security by way of a charge and further charge for two (2) separate loan facilities and that the said loans were advanced after due diligence which confirmed that the property is registered in the name of the 1<sup>st</sup> Defendant and that there were no encumbrances thereon. In addition, the 2<sup>nd</sup> Defendant avers that the sale agreements between the Plaintiffs and the 1<sup>st</sup> Defendant

were entered into after the charge was created over the suit property.

10. Before the trial commenced, the 4<sup>th</sup> and 5<sup>th</sup> Plaintiffs withdrew their respective claims against the Defendants. The remaining Plaintiffs called as their sole witness James Mburu Kimani (the 1<sup>st</sup> Plaintiff) who testified on their behalf. The 1<sup>st</sup> Defendant did not testify at the trial while the 2<sup>nd</sup> Defendant Bank testified through Ms. Angela Njeri its Manager Non -Performing Loans.
11. I have carefully perused and considered the pleadings filed by the parties herein, the testimonies of their witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the parties herein.

### **Analysis and determination**

12. By their suit as filed herein, the Plaintiffs seek an order of mandatory injunction to issue compelling the 1<sup>st</sup> Defendant to issue them with duly registered certificates of title to their respective maisonettes situated on the property described as sub-division No. 1528 Section IV Mainland North within 14

days from the date of this judgment. The Plaintiff's further pray for a declaration that any charge and all the charges created by the 1<sup>st</sup> Defendant in favour of the 2<sup>nd</sup> Defendant over the said property are illegal, null and void. In addition, and ultimately, the Plaintiffs urge the Court to issue a permanent order of injunction restraining the 2<sup>nd</sup> Defendant, its agents and /or anyone acting on their behalf from selling, auctioning, disposing off or in any other manner interfering with the Plaintiffs' occupation and use of the suit property.

13. It is the Plaintiffs' case that on diverse dates between the years 2015 and 2018, they had entered into various and separate sale agreements with the 1<sup>st</sup> Defendant for the purchase of various maisonettes that the 1<sup>st</sup> Defendant had erected on the suit property. The Plaintiffs assert that despite the fact that they had since paid the full purchase price, the 1<sup>st</sup> Defendant had failed to transfer to them their respective maisonettes and to issue them with duly registered certificates of title thereto. They told the Court that they had since discovered that the 1<sup>st</sup> Defendant had without their knowledge and/or consent charged the entire

suit property to the 2<sup>nd</sup> Defendant to secure loans in the sum of Kshs. 46,000,000/=.

14. In his Statement of Defence filed more than two (2) years after this suit was filed, the 1<sup>st</sup> Defendant conceded that he had entered into some sale agreements to sell some houses to be built on an off plan basis. It was however the 1<sup>st</sup> Defendant's case that the said houses were to be erected on a parcel of land known a sub-division No. 1528 Section III Mainland North and not on the suit property herein. The 1<sup>st</sup> Defendant further asserted that the process of issuance of leases for the Plaintiffs had not crystallized under the terms of the Sale Agreement.
15. In addition, the 1<sup>st</sup> Defendant pleaded that while he had allowed the Plaintiffs and other parties to occupy the constructed units pending their completion, that alone did not entitle the Plaintiffs to the leases. It was his case that he had lawfully charged the suit property to the 2<sup>nd</sup> Defendant in order to finance the construction of the real estate and that at the time of doing so, none of the houses occupied by the Plaintiffs had been constructed on the property. The 1<sup>st</sup>

Defendant did not however testify herein in support of those assertions.

16. His position was however supported by the 2<sup>nd</sup> Defendant Bank which asserted that the suit property was offered to it by the 1<sup>st</sup> Defendant as security by way of a Charge and Further Charge for two (2) separate loan facilities. The 2<sup>nd</sup> Defendant told the Court that it had advanced the loans after conducting due diligence which confirmed that the property is registered in the name of the 1<sup>st</sup> Defendant and that the same was free of any encumbrances. The 2<sup>nd</sup> Defendant further asserted that the sale agreements between the Plaintiffs and the 1<sup>st</sup> Defendant were entered into after the charge was created over the suit property.
17. As it were, there was no dispute that the Plaintiffs had at different times bought various maisonettes from the 1<sup>st</sup> Defendant. In support of that position, James Mburu Kimani (PW1) who testified on behalf of the Plaintiffs produced various Sale Agreements between themselves and the 1<sup>st</sup> Defendant. The Agreement between the 1<sup>st</sup> Defendant and Paul Waweru Mwangi (the 2<sup>nd</sup> Plaintiff) dated 29<sup>th</sup> October 2015 was the first in time. The same like all the others that

followed described the land at the preamble as an Agreement for sale of maisonettes named Royal Palm Villas constructed on “Sub division No 1528 Section III Mainland North.”

18. According to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, that was the property that the Plaintiffs had acquired and not the property charged to the 2<sup>nd</sup> Defendant which is described as “sub division Number 1528 Section IV Mainland North.” It was noteworthy that in regard to the said description, the Plaintiffs have pleaded as follows at Paragraph 5 of the Plaint dated 13<sup>th</sup> August 2021:

**“5. The suit property was erroneously described in the Sale Agreement as Sub Division Number 1528 section III Mainland North instead of Sub Division Number 1528 section IV Mainland North which was sheer typographical error.”**

19. From the material placed before the Court, it was difficult to dismiss the Plaintiffs’ assertion that there was an error in the description of the property sold to them by the 1<sup>st</sup> Defendant. While the 1<sup>st</sup> Defendant pleaded at Paragraph 3

of his Statement of Defence that he had only sold the houses on Sub-Division No. 1528 Section III Mainland North and not the suit property, the 1<sup>st</sup> Defendant did not provide any evidence whatsoever that he owned or had constructed any houses on the said parcel of land.

20. Indeed, in contradiction to that averment at Paragraph 3, the 1<sup>st</sup> Defendant admitted at Paragraph 9 of the same Statement of Defence that he allowed the Plaintiffs and other third parties to occupy the units already constructed under the sale agreement pending completion. Further, while denying that he had an obligation to seek the Plaintiffs' consent before charging the suit property to the 2<sup>nd</sup> Defendant, the 1<sup>st</sup> Defendant admits at Paragraphs 12 to 15 of the Statement of Defence that the Plaintiffs are the occupants of the suit property.

21. It was apparent that around the same time the 1<sup>st</sup> Defendant sold the land to the Plaintiffs and put some of them in occupation, he was also in the process of charging the suit property to the 2<sup>nd</sup> Defendant. That was clear from the fact that the First Charge over the property was executed between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant on 25<sup>th</sup>

September 2017 while the Further Charge was executed on 1<sup>st</sup> August 2018.

22. Arising from the foregoing, it was clear that as at the time the First Charge was registered over the suit property, both the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs had not only entered into the Sale Agreements with the 1<sup>st</sup> Defendant but had also completed payments for their respective maisonettes. The 2<sup>nd</sup> Plaintiff executed the first Sale Agreement with the 1<sup>st</sup> Defendant on 29<sup>th</sup> October 2015 and was in occupation of the same at the time of the First Charge. The 1<sup>st</sup> Plaintiff (PW1) executed the Sale Agreement on 14<sup>th</sup> February 2017 while the other Plaintiffs executed their Agreements in 2018 shortly before the Further Charge was executed between the two Defendants.

23. All the agreements executed between the Plaintiffs and the 1<sup>st</sup> Defendant provided in part as follows;

**“WHEREAS:**

**A. The Vendor has erected or is in the process of erecting one maisonette and other facilities which comprise part of the estate on the land;**

**B. The Vendor will sell and the Purchaser will purchase the property for the purchase price subject to the terms and conditions hereinafter provided; and**

**C. The transfer of the property from the Vendor to the purchaser is in consideration of the payment of the purchase price and shall be by way of the lease.”**

24. In my considered view, having allowed the Plaintiffs to not only purchase but occupy the suit property prior to the First and Further Charge, it was apparent that the 1<sup>st</sup> Defendant was holding the titles to the suit property in trust for the Plaintiffs pending the issuance of the certificates of titles for their respective houses.

25. Considering a similar matter in the case of ***Maina & 87 Others -vs- Kagiri, (Civil Appeal 6, 26 & 27 of 2011 (Consolidated)) [2014] KECA 880 (KLR) (22 January 2014)***, the Court of Appeal held as follows:

**“The evidence on record revealed that the Appellants were in possession of the suit property and as such, they came within the protection of Section 30(g) of the Registered Land Act. The Respondents having put the**

**Appellants in possession of the suit property created an overriding interest in favour of the Appellants in relation to the suit property. The Respondent had put the Appellants in possession of the suit property not as licencees but with the intention that he was to transfer the individual plots purchased by them. He had received the purchase price from the Appellants and thus created an implied and constructive trust in favour of the people who had paid the purchase price pending the sale of the suit property. Therefore, the doctrines of constructive trust and proprietary estoppels were applicable and the Respondent could not renege. A constructive trust was based on common intention which was an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the claimant. In the instant case, there was a common intention between the Appellants and the Respondent in relation to the suit property.”**

26. In the circumstance herein, having sold portions of the suit property to the Plaintiffs and put them in possession thereof, the 1<sup>st</sup> Defendant had created an overriding interest on the suit property in favour of the Plaintiffs and ceased to have

any rights or interests on the said portions capable of being charged to the 2<sup>nd</sup> Defendant.

27. At paragraph 9 of the its Statement of Defence, the 2<sup>nd</sup> Defendant asserted that before the loan facilities were advanced to the 1<sup>st</sup> Defendant, it had undertaken a robust and scrupulous due diligence exercise to confirm the ownership of the suit property and the existence of any encumbrance attached thereto. It was however clear to me that if any due diligence was done it was not as robust and scrupulous as the 2<sup>nd</sup> Defendant would want the Court to believe.

28. Ms. Angela Njeri (DW1), the Bank's Manager, Non-Performing Loans told the Court at the trial that as part of their robust due diligence, the 2<sup>nd</sup> Defendant conducted a valuation of the suit property prior to charging of the same. Asked in cross examination about the Valuation Report, DW1, testified as follows;

**“The valuation report informed us of what was on the land. The loan was to enable the 1<sup>st</sup> Defendant complete an on -going project.**

**There was a site visit and valuation of the land before the loan was advanced. The Title is No. 1528/IV/MN. It is true the Valuation Report refers to Royal Palm Villas Estate Maisonettes.”**

29. As it turned out, that testimony was not backed up by any material evidence. From the 2<sup>nd</sup> Defendant's own documents, it was evident that by a letter dated 25<sup>th</sup> October 2020, the Bank did instruct Ms. Axis Real Estate to conduct a valuation of the property. The Valuation Report (Dexh 6) dated 16<sup>th</sup> March 2022 shows that the firm carried out the valuation on 25<sup>th</sup> February 2021. That would mean that the valuation was undertaken by the Bank more than four (4) years after it had first advanced the facility to the 1<sup>st</sup> Defendant on 25<sup>th</sup> September 2017.
30. In my considered view, if the 2<sup>nd</sup> Defendant had done some simple due diligence site visit to the property, it would have easily discovered that the Plaintiffs were already in occupation of portions of the suit property and would not have charged the entire suit property without the Plaintiffs' consent as they had acquired an overriding interest thereon. The 2<sup>nd</sup> Defendant had an obligation to ascertain the status

of the property beyond carrying out an official search especially since it knew that the houses built on the suit property were intended for sale to third parties and in their own words “the loan was intended to be utilized to complete construction.”

31. None of the Defendants have presented any evidence before the Court to rebut the averments by the Plaintiffs that they are and have always been in occupation of the suit property. Having failed to undertake sufficient due diligence to ascertain the actual status of the suit property and having failed to obtain the consent of the Plaintiffs who were bonafide purchasers in occupation of sections of the suit property, the 2<sup>nd</sup> Defendant’s charge over those sections of the property were for all intents and proposes not only wrongful but null and void.

32. In the premises, I am satisfied that the Plaintiffs have proved their case on a balance of probabilities. Accordingly, I allow the same in terms of Prayers 1, 2, 3 and 4 of the Plaint dated 13<sup>th</sup> August 2021. The 1<sup>st</sup> Defendant has 45 days within which to comply with prayer No. 1.

33. The 1<sup>st</sup> Defendant shall bear the costs of this suit.

34. It is so ordered.

**Judgement dated, signed and delivered in open court and virtually at Mombasa this 23<sup>rd</sup> day of April, 2026.**

.....  
**J.O. OLOLA**  
**JUDGE**

In the presence of:

- a) Ms. Firdaus Court Assistant.
- b) Ms. Machogu Advocate for the Plaintiffs
- c) No appearance for the 1<sup>st</sup> Defendant
- d) Mr. Wafula Advocate for the 2<sup>nd</sup> Defendant