Ketel & another v Willy & another (Commercial Case E015 of 2025) [2026] KEHC 4325 (KLR) (3 March 2026) (Ruling)

Neutral citation: [2026] KEHC 4325 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

COMMERCIAL CASE E015 OF 2025

SM MOHOCHI, J

MARCH 3, 2026

BETWEEN

ERWIN YVO KETEL .... 1ST PLAINTIFF

KETEL STRUCTURES LTD .... 2ND PLAINTIFF

AND

DENNIS MICHULI WILLY .... 1ST DEFENDANT

BARAKA CRISPS PACKERS LTD .... 2ND DEFENDANT

RULING

Introduction

1. The Plaintiffs/Applicants, Erwin Yvo Ketel (1st Plaintiff) and Ketel Structures Limited (2nd Plaintiff), filed an Originating Summons against the Defendants/Respondents, Dennis Michuki Willy (1st Defendant) and Baraka Crisps Packers Ltd (2nd Defendant), seeking the determination of the following questions:

    i. Whether an agreement dated 8th April 2024 creates an informal charge over LR NO Nakuru Municipality/block 3/943 in favour of the plaintiffs jointly and severally?

    ii. Whether the defendants are in breach of the terms of the agreement dated 8th April 2024 wherefore the plaintiffs are entitled to realize the security by way of sale by public auction or private treaty?

    iii. Whether the court should grant leave to the plaintiffs to take possession of LR No Nakuru Municipality Block 3/943 and dispose of the same in exercise of the chargee's power of sale and exercise any other rights provided for under Section 90(3) Lands Act?

    iv. What other suitable orders may be made by this court?

v. Who should bear the costs of this suit?

2. Simultaneously with, the plaintiffs also filed the application dated 14th October 2025 seeking the following interim orders:

i. That, the application dated 14th October 2025 be certified as urgent and be heard exparte in the first instance (granted) .

ii. That, pending the hearing of this application and of the originating summons accompanying the same, an order of restriction be issued restricting any dealings on LR NO LR No Nakuru Municipality Block 3/943 and that the Registrar of Lands Nakuru County do register such restriction on LR NO LR No Nakuru Municipality Block 3/943

iii. That, pending the hearing of this application and of the originating summons accompanying the same, the defendants jointly and severally, by themselves, their agents, assignees , successors in title or anyone claiming through them be restrained from wasting, damaging, alienating or in any way dealing with that parcel of land known as LR No Nakuru Municipality Block 3/943 in a manner inconsistent with the interest of the plaintiffs as informal chargees, and in particular but without prejudice to the foregoing the defendants be restrained from ;

a. Entering any agreement to sell LR No Nakuru Municipality Block 3/943 save where the agreement specifically provides for the interest of the plaintiffs.

b. Leasing the LR No Nakuru Municipality Block 3/943 to any new tenants or terminating any of the current leases on the same.

c. Collecting rent from the tenants on the property.

d. Carrying out any further developments on the property.

iv. That, pending the hearing of this application and of the originating summons accompanying the same, possession of LR No Lr No Nakuru Municipality Block 3/943 be granted to the plaintiffs to enable them exercise such rights over the same as may be permitted by law and in particular, the plaintiffs be allowed to exercise all rights of a landlord appertaining to the property such as the creation of tenancies and the collection of rent and termination of tenancies for lawful cause.

3. The application for interim relief was based on the follow twelve (12) general grounds that;

i. That, the orders sought are intended to preserve the subject matter of this suit and to secure interests recognised by law.

ii. That, the orders sought are available to chargees without recourse to court but are only available to informal chargees with leave of the Court

iii. That, the plaintiffs have an informal charge over LR No Lr No Nakuru Municipality Block 3/943

iv. That, the defendants are in blatant and deliberate breach of the terms of the informal charge in circumstances reminiscent of fraudulent intent to obtain a colossal amount of money from the plaintiffs with no intention of paying the plaintiffs.

v. That, the charge over LR No Lr No Nakuru Municipality Block 3/943 is the only security the plaintiffs have to secure the payment of a colossal sum of Ksh 17,782,028 .00 fraudulently obtained from the plaintiffs.

vi. That, the defendants are presently dealing with LR NO LR No Nakuru Municipality Block 3/943 in a manner totally inconsistent with the interests of the plaintiffs as informal chargees by inter alia, collecting rent from the same and not using the rent to reduce the indebtedness to the plaintiffs.

vii. That, the plaintiffs stand to suffer irreparable loss and damage as the only other remedy is by way of a suit on the personal covenant which could take years to resolve and from which the plaintiffs could come out with no more than a pyrrhic victory.

viii. That, the agreement between the parties specifically provides for no payment of interest and given the inflationary trends, any further delay in payment the value of the amount due continues to diminish and it is important that there be no further delays in payment.

ix. That, the plaintiffs are asking for a remedy which is consistent with the remedies that formal chargees can resort to without recourse to court and the defendants are not prejudiced if the orders sought are granted

x. That, the defendants can obviate the need for the orders sought by paying the total amount due to the plaintiffs

xi. That, the balance of convenience tilts heavily in favour of the plaintiff.

xii. That, the plaintiffs are willing to give an undertaking as to damages

4. The application dated 14th October 2025 is supported by an affidavit sworn by Erwin Yvo Ketel (1st Plaintiff). It is that application for interim relief that is before the Court.

5. In response to the application for interlocutory relief is a Notice of Preliminary Objection dated 31st October 2025. There is, as of the date of the filing of these submissions, no affidavit filed in response to the application for interim relief and the facts deposed to therein must be assumed to be correct. The Respondent's preliminarily object to the entire suit on the grounds that:

> That the suit/ Cause HCCOMM E015 of 2025 has been filed in a court that lacks jurisdiction to hear and determine the matter, subject matter of which is the parcel of land LR NO. NAURU MUNICIPALITY BLOCK 3/943 subject to the jurisdiction of the Environment and Land Court and offends articles 162 (2) and 165 (5) of *the Constitution* as well as section 150 of the *Land Act*, 2012 and Section 4 of the *Environment and Land Court Act*, 2011.

Applicants' Case

6. The Applicants submit that, the question of jurisdiction over charges, mortgages, and realization of security is governed by *the Constitution* of Kenya and key legislation:• Constitution of Kenya, Article 162(2)(b) and 165(5): Establishes the ELC to hear disputes related to the environment and the use and occupation of, and title to, land.Article 165(5) prohibits the High Court from exercising jurisdiction over matters falling within the ELC's purview.• *Environment and Land Court Act*, Section 13: Defines the ELC's jurisdiction, which includes matters relating to land use planning, title, tenure, boundaries, rates, rents, and contracts granting enforceable interests in land.• *Land Act*, 2012, Section 79 & 90(3): Provides for the creation of informal charges (lien by deposit of documents) and sets out the remedies of a chargee, including suing, appointing a receiver, leasing, entering into possession, and selling the charged land. It mandates that a chargee holding an informal charge cannot take possession or sell land without a court order.

7. That the Court of Appeal has definitively ruled that disputes concerning the realization of security under mortgages and charges do not fall within the exclusive jurisdiction of the ELC and properly belong in the civil jurisdiction of the High Court

8. Reference is made to the case of Bank of Africa Kenya Limited & another v TSS Investment Limited & 2 others (Civil Appeal E055 of 2022) [2024] KECA 410 (KLR) (26 April 2024) (Judgment In Bank of Africa Kenya Limited & another v TSS Investment Limited & 2 others (Civil Appeal E055 of 2022) [2024] KECA 410 (KLR) (26 April 2024) (Judgment) , the Court of Appeal explicitly held that the ELC's jurisdiction is limited to disputes connected to the "use" of land and contracts incidental to the "use" of land.

9. That the Court clarified that mortgages, charges, and the collection of dues and rents are matters that fall within the civil jurisdiction of the High Court. The Court further reasoned that a charge is a disposition and does not constitute "use of the land" as contemplated by *the Constitution* or the ELC Act. The relationship created by a charge is limited to the realization of the security.

10. That further more in the case of Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna and Five Others (Civil Appeal 83 of 2016) the Court of Appeal had dealt with a similar jurisdictional question. In opposing an application to restrain the exercise of a statutory power of sale, applications, the appellant filed two replying affidavits, both sworn by its credit officer, one Ann Olago in which she raised an objection regarding the court's lack of jurisdiction. The appellant argued that the High Court lacked jurisdiction to entertain the matter by virtue of Article 162 (2) (b) as read with Article 162 (3) of *the Constitution*, Section 150 of the *Land Act* No. 6 of 2012, Section 13 (2) of the *Environment and Land Court Act*, 2011 (ELC Act) and Section 2 of the Statute Law Miscellaneous Amendment Act No. 25 of 2015. According to the appellant, that jurisdiction over the matter lay with the Environment and Land Court (ELC). Counsel for the appellant submitted the central question before the court was determining which judicial forum possesses the authority to adjudicate a dispute involving a legal charge. In support of his position, counsel referenced Article 162(2)(b) of *the Constitution*, which mandates Parliament to establish a specialized court with exclusive jurisdiction over matters relating to the environment, as well as the use, occupation, and title to land. That jurisdiction, counsel argued, fell to the Environment and Land Court. Furthermore, counsel pointed to Section 13(d) of the ELC Act, which explicitly grants the Environment and Land Court jurisdiction to hear and determine disputes concerning instruments that confer enforceable interests in land. Counsel emphasized that the ELC is the court specifically empowered to handle cases involving legal rights and interests in land arising from such instruments. In rejecting the submissions of the appellant's counsel, the Court of Appeal held as follows:

> " 41. Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the ELC Act ought to be understood within the context of the court's jurisdiction to deal with disputes connected to 'use' of land as discussed herein above. Such contracts, in our view, ought to be incidental to the 'use' of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court"

11. That the issues in the present Originating Summons is the determination of the existence or otherwise an informal charge and the subsequent granting of leave to realize the security through the exercise of a chargee's remedies under Section 90(3) of the *Land Act*. As this is fundamentally a dispute over the enforcement and realization of a charge, applying the clear precedent set by the Court of Appeal, the

High Court has the requisite jurisdiction to hear and determine this matter. The Preliminary Objection is without merit and should be dismissed.

12. The Plaintiffs/Applicants seek the following interim Orders:

    a. Restriction Order: An order of restriction to be issued and registered against LR No. Nakuru Municipality Block 3/943 to restrict any dealings on the property.

    b. An order restraining the Defendants, their agents, etc., from wasting, damaging, alienating, or dealing with the land in a manner inconsistent with the Plaintiffs' interest as informal chargees. This specifically seeks to restrain the Defendants from:

        i. Entering any agreement to sell the land without providing for the Plaintiffs' interest.

        ii. Leasing the property to new tenants or terminating current leases.

        iii. Collecting rent from the tenants.

        iv. Carrying out any further developments.

    c. That possession of the land be granted to the Plaintiffs to enable them exercise rights as a landlord, such as collecting rent and creating/terminating tenancies, to immediately reduce the debt owed.

13. That, the legal basis for the creation of an informal charge under Kenyan law is primarily established in Section 79 of the *Land Act*, 2012. Section 79(6) of the *Land Act*, 2012, explicitly provides for two distinct ways in which an informal charge may be created.

14. The Plaintiffs/Applicants contend that an informal charge is created when a chargee (lender) accepts a written and witnessed undertaking from a chargor (borrower). The clear intention of this undertaking must be to charge the chargor's land or interest in land. The purpose is to secure the repayment of money or money's worth obtained from the chargee, plus any agreed interest. This arrangement is often referred to simply as an "informal charge”.

15. The Plaintiff/Applicants contend that an informal charge may also be created when the chargor deposits certain documents with the chargee. The documents that can be deposited are a certificate of title to the land or a document of lease of land or indeed any other document which it is agreed evidences ownership of land or a right to interest in land. A deposit of documents under this sub-section is specifically known and referred to as a "lien by deposit of documents". By depositing the title documents with the Plaintiffs, an informal charge would still be created. The Plaintiffs' claim under this limb is based on the argument that the Defendants' action by agreement date and by surrendering the original title deed to them as security manifested a clear intention to create a charge and the action of the Defendants gave rise to an informal charge over LR NO. Nakuru Municipality Block 3/943, within the meaning of Section 76(6)(a) of the *Land Act*.

16. That unregistered informal formal charge cannot be enforced by the chargee exercising any of the statutory remedies save with leave of court. A crucial aspect of the informal charge is its enforcement, as stipulated in Section 79(7) of the *Land Act*: A chargee holding an informal charge (or a lien by deposit of documents) may only take possession of or sell the land, which is the subject of the charge, on obtaining an order of the court to that effect. The Plaintiffs in the current case are seeking a court order specifically for this purpose (leave to realise the security).

17. Reliance is placed upon the case of Kingdom Bank Limited v Osotsi (Civil Suit E004 of 2021), the High Court addressed the prerequisites for establishing an informal charge under Kenyan law and the

right of the chargee to realize the security upon default. The Plaintiff, Kingdom Bank Limited, filed an Originating Summons seeking leave from the court to exercise its right to sell a property identified as Title No. Kakamega/Chagenda/459 (the suit property). The bank argued that the property had been pledged to it by way of an informal charge under Section 79(6)(b) of the *Land Act*, 2012, to secure a loan of Kshs 1,000,000. The Defendant admitted depositing the title deed as security but opposed the application. The High Court narrowed the issues for determination down to two core questions:

i. Whether there was an intention to create an informal charge.

ii. Whether circumstances had arisen to entitle the bank to realise the security and necessitate the granting of leave.

18. The court relied heavily on Section 79 of the *Land Act*, 2012. Specifically, Section 79(6)(b) defines an informal charge created where the chargor deposits a certificate of title with the chargee, known as a "lien by deposit of documents". The court found that the central requirement for an informal charge is writing to disclose a clear intent to offer the title or an interest in land to secure a debt. Despite the physical document of title not being exhibited, the court relied on the Letter of Offer which showed the intention to charge the property informally to secure the temporary overdraft facility. Crucially, the Defendant unequivocally confirmed on oath in his Replying Affidavit that he deposited his title deed with the bank to secure the repayment of the loan. The court was satisfied that an informal charge (a lien by deposit of documents) was created between the parties.

19. That Once the informal charge was proven, the court held that default to pay the loan founded the bank's right to seek leave to sell or possess the security. Since the security was an informal charge, the bank was statutorily required under Section 79(7) and 79(9) of the *Land Act* to obtain a court order before taking possession or selling the land. The court clarified that once the informal charge was established, the bank was obliged to comply strictly with the statutory duties of a chargee, including issuing the statutory notices of default and notice of intention to sell required under the Act (Sections 90 and 96). The court found that an informal charge was created by the deposit of the title deed and that the Defendant's default entitled the bank to realize the security. The Originating Summons was allowed and the court granted leave to the to the Plaintiff (Kingdom Bank Limited) to take possession and, if necessary, sell the security subject to strict compliance with all legal requirements for realization of securities (i.e., serving the requisite statutory notices.

20. That, it is the plaintiff's case that, that these orders are necessary to preserve the subject matter of the suit and to prevent irreparable loss and damage, as the Defendants are dealing with the property inconsistently with the informal charge by collecting rent and not reducing the debt. The plaintiffs as chargees holding an informal charge, cannot take possession or sell land without a court order.

21. That the application is brought under the provisions of Order 40 Rules 1 and 2 of the Civil Procedure Rules. It is also necessary to add that the jurisdiction to grant of an order inhibiting or restricting dealings in land is donated by Section 68 of the *Land Registration Act*. The section is couched as follows:

> " 68. Power of the court to inhibit registered dealings (1)The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge".

22. That, Section 68, read together with the provisions of Order 40 Rule 1 and 2 accordingly clothe this court to grant the orders sought with a view to preserving the subject matter of the suit. The applicant also seeks orders of possession to enable it collect rent pending the hearing and determination of the

suit to enable the plaintiffs exercise rights as a landlord, such as collecting rent and creating/terminating tenancies, to immediately reduce the debt owed.

23. That, the undisputed facts of the case as deposed to in the supporting affidavit of Erwin Yvo Ketel (1st Plaintiff) are as follows. The Plaintiffs advanced a loan facility totaling KES 17,782,028.00 (EUR 103,800 plus a KES 1,500,000 facilitation fee) to the Defendants. The Defendants, specifically the 1st Defendant, offered the parcel of land LR No. Nakuru Municipality Block 3/943 as security and surrendered the original title deed to the Plaintiffs. This arrangement created an informal charge over the land. The loan was repayable in two installments. The first installment (KES 5,289,000) was paid directly to the Plaintiffs from a drawdown by AAAS Energy Ltd. However, the Defendants failed to pay the second installment of KES 12,493,088, which was due on or before October 1, 2024, or the earlier of the first season of farming. The Defendants' failure to pay, despite receiving funds from the financed contract, is alleged to be an act of fraudulent intent. The unpaid amount remains outstanding, and the land is the only security for the colossal sum owed. The Plaintiffs have demanded payment and given notice of intention to realize the security. In the main suit, the Plaintiffs seek judicial leave to enforce the informal charge, as required by law. This application is limited to preserving the security and taking necessary action to reduce the undisputed indebtedness of the Defendants/Respondents.

24. That the Plaintiffs seek orders of restriction, an inhibitory injunction, and immediate possession for rent collection to protect their security pending the main hearing of the Originating Summons.

25. That these orders are necessary and proper based on established legal principles:

26. The Plaintiffs possess the original title deed and documents that evidence the creation of a valid informal charge or "lien by deposit of documents" under Section 79(6)(b) of the *Land Act*. The Plaintiffs are facing imminent, irreparable harm because the Defendants are actively dealing with the property inconsistently with the informal charge by collecting rent and failing to use it to reduce the debt. The sought orders (restriction/injunction and possession for rent collection) are intended to preserve the value of the security and stop the fraudulent conduct alleged against the Defendants. The inability to realize the security immediately, coupled with inflationary trends and the lack of interest on the loan, means any further delay diminishes the value of the amount due.

27. That the orders sought (entering possession and leasing to collect rent) are statutory remedies available to a formal chargee without recourse to court under Section 90(3)(c) and (d) of the *Land Act*. The sole reason the Plaintiffs (as informal chargees) are in court is the requirement under Section 79(7) of the *Land Act* to obtain a court order before exercising any power of possession or sale. Granting these interim orders is, therefore, consistent with the spirit and text of the *Land Act*, putting the informal chargee in a position akin to a formal chargee, pending final determination.

28. That, it is indisputable that, the is the only security available for the very substantial amount lent to the defendant. Unless it is preserved the plaintiffs may be left without a viable remedy as there is no telling if the Respondents can ever pay the amount due on the loan.

29. That the debt is substantial (over KES 17.7 million), and the land is the only security. The Plaintiffs face a "pyrrhic victory" if they are forced to pursue a lengthy suit on the personal covenant without securing the property. The balance of convenience tilts heavily in favour of the Plaintiffs, as their security is actively being dissipated by the Defendants' rent collection. Furthermore, the Plaintiffs have offered to give an undertaking as to damages, mitigating any potential loss to the Defendants if the orders are wrongly granted. The Defendant is not prejudiced if the orders are granted, as they can "obviate the need for the orders sought by paying the total amount due to the plaintiffs". The balance of convenience is in favour of granting the orders sought. The rent collected will be applied to reduce the debt owing.

Should the plaintiffs succeed in the suit, the Respondents will still have the equity of redemption and can at any stage simply obviate the orders sought by repaying the amount demanded.

30. That the plaintiffs have committed to give an undertaking as to damages.

31. That from the foregoing it is clear that the plaintiffs have made a prima facie case with a probability of success. There is a real likelihood that if the orders sought are not granted, irreparable loss or damage may occur. In any event, the balance of convenience tilts heavily in favour of granting the orders sought. Granting the conservatory orders is a critical, necessary, and proportionate measure to preserve the debt and the security, pending the determination of the Originating Summons.

Respondents Case

32. The Defendants/Respondents hereby respectfully submit these written submissions in support of their Notice of Preliminary Objection dated 31st October 2025 challenging the jurisdiction of this Court, and in opposition to the Plaintiffs/Applicants' Notice of Motion application dated 14th October 2025.

33. Defendants/Respondents have refined the following two (2) Issues for Determination;

    i. Whether the court has jurisdiction to hear and determine this matter?

    ii. Whether the applicants have met the threshold for granting interlocutory injunction Whether the Applicants are Entitled to Mandatory Injunctive Orders at an Interlocutory Stage?

34. On the 1st issue as to whether the court has jurisdiction to hear and determine this matter? It is the Respondents argument that, the Constitutional and Statutory Framework on Jurisdiction over Land Matters. Article 162(2)(b) of *the Constitution* of Kenya, 2010 expressly provides that:

> " Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
>
> (b) the environment and the use and occupation of, and title to, land."

Article 165(5)(b) of *the Constitution* states that:

> " The High Court shall not have jurisdiction in respect of matters—
>
> (b) falling within the jurisdiction of the courts contemplated in Article 162(2)."

That the *Environment and Land Court Act*, No. 19 of 2011. Section 13 delineates the jurisdiction of the ELC as follows:

> " (2) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes—
>
> ....
>
> (d) relating to public, private, and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
>
> (e) any other dispute relating to environment and land."

35. That Section 150 of the *Land Act*, 2012 reinforces this position by providing:

> "The Environment and Land Court established in the *Environment and Land Court Act* and the subordinate courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act."

36. That the *Land Registration Act*, 2012, Section 101 similarly provides:

> "The Environment and Land Court established by the *Environment and Land Court Act*, 2011 has jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act."

37. That the subject matter of this suit is exclusively and fundamentally land which claim, by the Applicants own pleadings, revolves entirely around LR No. Nakuru Municipality Block 3/943. The substantive orders sought include:

    i. A declaration that the agreement dated 8th April 2024 created an informal charge over the suit property;

    ii. Leave to realize the alleged security by way of possession, leasing, and sale of the suit property.

38. That the Applicants/Plaintiffs are inviting this Court to determine whether they have acquired an enforceable interest in land, and thereafter to grant orders for possession and sale of that land. And that a Charge over Land is a Dispute Concerning an "Instrument Granting an Enforceable Interest in Land"

39. The Applicants/Plaintiffs contend that, the agreement dated 8th April 2024 created an "informal charge" over the suit property and in their originating summons have invited the court to determine the same. Section 2 of the *Land Act*, 2012 explicitly recognizes a charge as an interest in land. The dispute as to whether such an interest has been created, and the enforcement of remedies arising therefrom, falls squarely within the jurisdiction of the ELC.

40. That in determining whether disputes concerning the creation of an interest in land fall within the ELC's jurisdiction the Court of Appeal in Cooperative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] KECA 79 (KLR) (Visram, Karanja & Koome, JJ. A) had occasion to consider the question of whether disputes arising from charges over land fall within the jurisdiction of the ELC. The Court held:

> "By definition, a charge is an interest in land securing the payment of money or money's worth or the fulfillment of any condition (see Section 2 of the *Land Act*). As such, it gives rise to a relationship where one person acquires rights over the land of another as security in exchange for money or money's worth."

41. Critically, the Court of Appeal proceeded to distinguish between disputes concerning the validity of the charge (which fall within ELC jurisdiction) and disputes concerning questions of accounts (which may fall within High Court jurisdiction). The Court stated:

> "However, it bears repeating that the cause of action herein was never the charge (instrument) but the amounts due and owing thereunder. Neither the charge instrument nor the creation of an enforceable interest thereunder, were disputed. The main questions to be determined were the tabulation of the sums owing and whether statutory notices had issued prior to the attempted statutory sale."

42. That, in the instant case, unlike in the above referenced case, the Plaintiffs are not merely seeking a tabulation of accounts. Their primary claim is for a declaration that an informal charge exists, and for enforcement of remedies including possession and sale. The very existence and validity of the alleged charge is the core dispute which befalls the matter within the ELC's exclusive jurisdiction.

43. The Applicants/Plaintiffs have invoked Section 76 of the *Land Act*, 2012 which does not confer jurisdiction on the High Court, as the jurisdictional basis for these proceedings. Section 76 provides:

> "(1) A chargee may, at any time, apply to the court for leave to realize the security where—
>
> (a) there is a charge securing payment of any money, with or without interest; and
>
> (b) default is made in payment of the money in accordance with the terms of the charge, whether express or implied."

44. That this is a case where a charge does not exist, rather the applicants have approached the court to determine whether an agreement creates an informal charge.

45. This position was affirmed in In re Estate of Prisca Ongayo Nande (Deceased) [2020] KEHC 6553 (KLR), where Musyoka J. held:

> "My understanding of these provisions, in the context of the matter before me, is that any disputes or questions or issues that require court intervention, which revolve around sale, registration and transfer of land, fall within the jurisdiction of the Environment and Land Court The *Land Registration Act* and the *Land Act*, therefore, confer jurisdiction in the Environment and Land Court with regard to all the processes that are subject to the two statutes, and, therefore, any reference in the two statutes to court is meant to refer to the Environment and Land Court.."

46. That the Applicants cannot confer jurisdiction on this Court by framing a Land Dispute as Commercial. It is a well-established principle that jurisdiction is conferred by *the Constitution* and statute, not by the pleadings of parties or the framing of claims. A party cannot, by clever drafting or artful pleading, clothe a court with jurisdiction it does not possess.

47. The substance of the Applicants' claim is the creation, existence, and enforcement of an interest in land. The fact that the applicants require the court to establish whether there is an informal charge and there being no registered charge for the court to enforce the matter falls within the jurisdiction of the ELC Court

48. As to whether the applicants have met the threshold for granting interlocutory injunction Without prejudice to the preliminary objection on jurisdiction, and in the alternative should this Honourable Court find that it has jurisdiction, the Defendants submit that the application dated 14th October 2025 fails to meet the threshold for grant of the injunctive and mandatory orders sought.

49. The Court of Appeal in Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] KECA 606 (KLR) elaborated on the principles for granting interlocutory orders:

> "In an interlocutory injunction application, the applicant has to satisfy the triple requirements to; (a) establish his case only at a prima facie level, (b) demonstrate 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…three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially."

50. The Court further held:

> "If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage."

51. As to whether the Applicants Have Failed to Establish a Prima Facie Case? That the Applicants' claim is predicated on the existence of an "informal charge" created by the agreement dated 8th April 2024. A careful examination of that agreement reveals fundamental deficiencies that fatally undermine any assertion of a prima facie case.

52. Firstly, the agreement dated 8th April 2024 does not, on its face, create a charge. It contains provisions for the deposit of title documents and the addition of a caution (clauses 4.5 and 4.6). However, the mere deposit of title documents does not, without more, create a charge. Section 76(6) of the *Land Act* defines an informal charge as:

> "…a charge created over land without a charge instrument being executed or registered under this Act."

53. That even an informal charge must evidence an intention to create a charge. The agreement dated 8th April 2024 is, in substance, a loan agreement with security provisions. Whether those provisions amount to a charge is a contested issue that cannot be determined at an interlocutory stage on the basis of affidavit evidence alone.

54. Secondly, that the Plaintiffs have not demonstrated that the condition precedent for the second instalment was ever satisfied. Clause 3.4(b) of the agreement provides that the second instalment of KES 12,493,028 is payable on:

> "…the earlier of (i) after the first season of farming or (ii) October 1, 2024."

55. That the Applicants/Plaintiffs' own evidence reveals that, the first season of farming did not materialize due to delays in delivery of the System. In paragraph 4 of the Replying Affidavit of Dennis Michuli Willy sworn on 10th February 2026, the 1st Defendant avers:

> "The Delivery of the System under the EPC contract was delayed substantially, and such delay was caused by, or contributed to by, the 2nd Plaintiff as the EPC contractor."

56. That it is a well-established principle of equity that a party cannot benefit from its own wrong. The Plaintiffs, having allegedly contributed to the delay that prevented the occurrence of the condition precedent, are estopped from asserting that the condition has been satisfied or that the debt is due and payable. This alone demonstrates that the Plaintiffs' case is not prima facie with a probability of success.

57. The Applicants/Plaintiffs' have failed to discharge this burden. Their case rests on contested assertions and incomplete documentation. This does not meet the threshold of a prima facie case.

58. As to whether the Applicants Have Failed to Demonstrate Irreparable Injury? The respondents posit that, the Applicants seek orders for possession, management, and eventual sale of a property valued at approximately KES 100,000,000/- (clause 4.1 of the agreement dated 8th April 2024) to secure an alleged debt of KES 17,782,028/-. The security is valued at nearly six times the amount of the alleged debt.

59. Moreover, the Applicants are in physical possession of the original Certificate of Lease.

60. This substantially protects their alleged interest. No dealing with the suit property can be registered without production of the original title.

61. The Applicants' claim, if proved, is eminently quantifiable. They claim a specific sum of money. An award of damages would be an adequate remedy.

62. By parity of reasoning, a claim for repayment of a loan cannot justify the draconian remedy of possession and sale of land where the land is vastly more valuable than the debt and damages would be an adequate remedy.

63. The Defendants submit that, the Applicants have not only failed to demonstrate irreparable injury, but have affirmatively demonstrated that damages would be an adequate remedy.

64. The alleged debt is a specific, quantifiable sum. The 2nd Defendant is an operating company with assets.

65. That the Balance of Convenience Tilts in Favour of Maintaining the Status Quo.

66. The Applicants are not in possession of the suit property and have never been. The suit property is registered in the name of the 1st Defendant and has developments thereto that generates rental income. To issue an order barring the 1st Defendant from terminating and creating tenancies will frustrate his business yet the court is yet to establish if indeed an informal charge does exist.

67. That the orders sought would effectively dispossess the Defendants of their property before the main suit is heard. This would cause substantial and irreversible prejudice.

68. That, the Applicants seek orders that would place them in possession of the property, authorize them to collect rent, create tenancies, and terminate tenancies. These are final orders sought at an interlocutory stage which orders have been sought in their originating summons.

69. That the balance of convenience therefore tilts decisively in favour of maintaining the status quo pending the hearing and determination of the main suit. The Defendants are the registered proprietors, are in possession, and are collecting rent. Any interference with this state of affairs would cause substantial prejudice that could not be adequately compensated by costs.

70. As to whether the Applicants are entitled to Mandatory Injunctive Orders at an Interlocutory Stage? it is submitted that, the Applicants seek orders that are, in substance and effect, mandatory injunctions. They seek to be placed in possession of the suit property and to be empowered to exercise all rights of a landlord.

71. That, the principles governing the grant of mandatory injunctions at an interlocutory stage are more stringent than those for prohibitory injunctions. In Kenya Breweries Ltd v Washington O. Okeyo [2002] 1 EA 109, the Court of Appeal held:

> " 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 it 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 attempted to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application."

72. That, the Applicants have not demonstrated any of these exceptional circumstances. The case is not clear; indeed, it is hotly contested on multiple fronts. The act sought to be undone—the Defendants' possession and management of their own property—is not a simple or summary act.

73. The Court of Appeal in Nguruman Limited v Jan Bonde Nielsen (supra) was particularly critical of attempts to obtain final relief at an interlocutory stage:

> " What the learned Judge did was to prematurely pierce the corporate veil at an interlocutory stage and without prima facie evidence."

74. The Applicants herein seek prematurely to obtain orders of possession and sale of land at an interlocutory stage, without having established a prima facie case or demonstrated irreparable injury.

The Defendants/ Respondents submit:

75. The Applicants' application dated 14th October 2025 fails to meet the threshold for grant of interlocutory injunctive relief.

76. The Defendants/ Respondents respectfully pray that this Court be pleased to:

    a. Uphold the Notice of Preliminary Objection dated 31st October 2025;

    b. strike-out or transfer to the Environment and Land Court at Nakuru the Originating Summons dated 14th October 2025 and the entire suit;

    c. In the alternative, Dismiss the Plaintiffs/Applicants' Notice of Motion application dated 14th October 2025 with costs;

    d. Award the costs of the Preliminary Objection and the application to the Defendants/ Respondents.

Analysis & Determination

77. This Court conforms to the legal reasoning that, the Environment and Land Court and Subordinate Courts were established in the *Environment and Land Court Act* and bestowed with jurisdiction under Section 150 of the *Land Act* to hear and determine disputes, actions and proceedings concerning land jurisdiction.

78. Over the years contra-arguments have been advanced in both the High Court and the Environment and Land Court as to which forum has jurisdiction however courts are called upon to render substantive justice over technicalities. In this instance the 1st and 2nd Respondents jointly and severally entered into a contract within which they surrendered the title.

79. Under the *Land Act*, Part VII (Section 78 to 106) of the Act makes provision for charges. Under Sections 104 to 106 of the *Land Act*, the Environment, and Land Court has power, in respect to a dispute concerning a charge, to grant remedies and reliefs in regard to reliefs sought under Part VII of the *Land Act*. Sections 104 to 106 of the *Land Act* provides as follows:

> " Section 104 Power of the Court in respect of remedies and reliefs."

80. In considering whether to grant relief as applied for, a Court;

    a. shall, have regard to whether the remedy which the chargee proposes to exercise is reasonably necessary to prevent any or any further reduction in the value of the charged land or to reverse any such reduction as has already occurred if the charged land consists of agricultural land or commercial premises, and the remedy proposed is to appoint a receiver, or to take possession of or lease the land or a part thereof;

    b. shall, where the charged land consists of or includes, a dwelling- house, and the remedy proposed is to appoint a receiver, or take possession or lease the dwelling house or a part of it, have regard to the effect that the appointment of a receiver or the taking of possession or leasing the whole or a part of the dwelling house would have on the occupation of the dwelling house by the chargor and dependants and if the effect would be to impose undue disturbance on those owners, whether it is satisfied that:—

    i. the chargee has made all reasonable efforts, including the use of other available remedies available, to induce the chargor to comply with the obligations under the charge; and

    ii. the chargor has persistently been in default of the obligations under the charge; and

    iii. if the sale is of land held for a customary land, the chargee has had regard to the age, means, and circumstance including the health and number of dependants of the chargor, and in particular whether;

    (aa) the chargor will be rendered landless or homeless;

    (bb) the chargor will have any alternative means of providing for the chargor and dependants;

    iv. it is necessary to sell the charged land in order to enable the chargee to recover the money owing under the charge;

    v. in all the circumstances, it is reasonable to approve, or as the case may be, to make the order to sell the charged land.

81. A Court may refuse to authorize an order or may grant any relief against the operation of a remedy that the circumstances of the case require and without limiting the generality of those powers, may;

    a. cancel, vary, suspend or postpone the order for any period which the Court thinks reasonable;

    b. extend the period of time for compliance by the chargor with a notice served under section 90;

    c. substitute a different remedy or the one applied for or proposed by the chargee or a different time for taking or desisting form taking any action specified by the lessor in a notice served under section 90;

    d. authorise or approve the remedy applied for or proposed by the chargee, notwithstanding that some procedural errors took place during the making of any notices served in connection with that remedy if the Court is satisfied that;

i. the chargor or other person applying for relief was made fully aware of the action required to be taken under or in connection with the remedy; and

ii. no injustice will be done by authorising or approving the remedy, and may authorise or approve that remedy on any conditions as to expenses, damages, compensation or any other relevant matter as the Court thinks fit.

82. If under the terms of a charge, the chargor is entitled or is to be permitted to pay the principal sum secured by the charge by instalments or otherwise to defer payment of it in whole or in part but provision is also made in the charge instrument or any collateral agreement for earlier payment of the whole sum in the event of any default by the chargor or of a demand by the chargee or otherwise, then for purposes of this section the Court may treat as due under the charge in respect of the principal sum secured and of interest on it only the amounts that the chargor would have expected to be required to pay if there had been no such provision for earlier payment.

83. A Court must refuse to authorise or approve a remedy if it appears to the Court that;

a. ....

b. the default in issue has been remedied;

c. the threat to the security has been removed;

d. the chargor has taken the steps that the chargor was required to take by the notice served under section 90; and(d)the chargee has taken or attempted to take some action against the chargor in contravention of Section 90(4).

84. Section 105 provides that the Court may reopen a charge of whatever amount secured on a matrimonial home, in the interests of doing justice between the parties.

85. Section 105 provides that the Court may exercise the powers conferred on it by this Act either;

a. on an application made to it for that purpose by either the chargor or the charge;

i. to enforce the charge; or

ii. to commence an action under section 90; or

b. on an application by the chargor for relief against the exercise by the chargee of any remedy in connection with a default by the charger under a charge; or

c. on an application by the Registrar in respect of;

i. charges provided by one or more specific chargees where there is prima facie evidence of a pattern of unfair dealing and practices by that chargee or those chargees; or

ii. a chargee, being a corporate body, that appears to exercise discrimination against chargors on account of their gender, or by refusing to grant charges to persons on account of their gender except that a chargee, being a corporate body that is implementing any programme, approved or assisted by the national or county governments, designed to assist women to improve their economic and social position by providing them with advances secured by a charge of land shall not be taken to be acting in discriminatory manner if the advances under that programme are made only to women.

86. In reopening the charge, the Court may—

a. direct that the charge shall have effect subject to modifications that the Court shall order;

b. require the chargee to repay the whole or part of any sum paid under the charge or any related or collateral agreement by the chargor or any guarantor or other person who assumed an obligation under the charge whether it was paid to the chargee or any other person;

c. require the chargee to pay any compensation to the chargor which the Court shall think fit; or

d. direct the chargee, being a corporate body to cease acting in a discriminatory manner with respect to the granting of charges.

87. In considering whether to exercise the powers conferred on it by this section, the Court shall have regard to;

> " a. the age, gender, experience, understanding of commercial transaction, and health of the chargor at the time when the charge was created, if the chargor is an individual;
>
> b. the financial standing and resources of the chargor relative to those of the chargee at the time of the creation of the charge;
>
> c. the degree to which, at the time of the creation of the charge, the chargor was under financial pressure and the nature of that pressure;
>
> d. the interest rates prevailing at the time of the creation of the charge and during the continuation of the charge and the relationship of those interest rates to the interest rate applying from time to time in the charge;
>
> e. the degree of risk accepted by the chargee, having regard to the value of the charged land and the financial standing and other resources of the chargor;
>
> f. the importance of not undermining the confidence of reputable chargees in the market for charges; and
>
> g. any other factors that the Court considers relevant."

88. Therefore, the question that must be answered is whether the dispute as framed by the Plaintiff herein is a dispute concerning land under the *Land Act* and therefore subject to the jurisdiction of this Court in view of the provisions of Sections 2, 104, 105, 106, and 150 of the *Land Act*?

89. In Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors (1969) EA696 stated as follows:

> " So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration..."

90. Similarly, In the case of John Musakali vs. Speaker County of Bungoma & 4 others (2015) eKLR, the Court held that:

> " The position in law is that a preliminary objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the preliminary objection should

have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable preliminary objection on a point of law."

91. Its thus manifest from the above authorities, it is clear that a preliminary objection ought to be based on a pure point of law, and consists of facts which are not disputed by either party. In this case, I am satisfied that the preliminary objection raises a pure point of law as it challenges the jurisdiction of this court to hear and determine this suit.

92. In this instance the objection raised is that, this Court lacks jurisdiction to entertain these proceedings, as the dispute concerns title to, possession of, and interests in land where it has not been established whether an informal charge does exist, and that the same falls within the exclusive jurisdiction of the Environment and Land Court

93. In the case of Ardhilink Limited v Equity Bank Limited & another (Environment and Land Case E023 of 2025) [2025] KEELC 7704 (KLR) (6 November 2025) (Ruling) Justice JA Mogeni rejected the preliminary objection, confirming the ELC's authority to handle land-based disputes, including challenging a chargee's power of sale. The ruling emphasized that issues related to land, such as improper statutory notices and valuation under The *Land Act* 2012, fall squarely under the ELC Act's jurisdiction, regardless of the underlying commercial context.

94. I thus find merit in the Notice of Preliminary Objection dated 31st October 2025 upholding the Same;

    a. The Originating Summons dated 14th October 2025 and the entire suit Shall forthwith be transferred to the Environment and Land Court at Nakuru for consideration on merit;

    b. Costs of the Preliminary Objection is Awarded to the Defendants/ Respondents.

It is so ordered.

DATED SIGNED AND DELIVERED AT NAKURU ON THIS 3RD DAY OF MARCH 2026

MOHOCHI S.M.

JUDGE