

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
HCCOMM NO. E004 OF 2025

CAROLYNE CHEPKORIR KOSKEY1ST PLAINTIFF
JACINTA WAITHERERO MUNGAI.....2ND PLAINTIFF
VERSUS
DAVID MUREITHI KANYI1ST DEFENDANT
GARAM AUCTIONEERS2ND DEFENDANT
STANBIC BAN LTD3RD DEFENDANT

RULING

1. By a plaint dated 3.4.25, the Plaintiffs seek a perpetual injunction restraining the Defendants, by themselves, their agents, servants and/or assignees from selling by public auction or in any way dealing with the Plaintiffs 4 maisonettes Nos. 1, 2, 3 and 4 on Plot No. 928/IV/MN (Original 713/40) (the property). The Plaintiffs also seek that the charge created by the 1st and 3rd Defendants over the title to the property be declared fraudulently null and void. The Plaintiffs further seek that the 1st Defendant be ordered to specifically perform his part of the agreement with the Plaintiffs and create subleases for the maisonettes and certificates of title be issued or in the alternative, that the Registrar of Lands, Mombasa do issue certificates of title for the maisonettes upon presentation of a survey plan. They also seek costs.
2. The Plaintiffs also filed an Application of even date seeking the following orders:
 1. *Spent.*
 2. ***THAT there be order of temporary injunction against the 2nd and 3rd Defendants either by themselves, agents, servants and or employees and or any person acting under their instructions from selling by Public auction or by any other manner whatsoever the four Maisonettes known as No. 1, 2, 3 & 4 (Phase 10) on Plot No. 928/IV/MN Original (MN/IV/713/40) pending hearing and determination of this suit.***
 3. ***THAT prayer 2 above be issued in the interim.***
 4. ***THAT costs of the Application be in the cause.***
3. The grounds upon which the Application is premised are that the 1st Plaintiff is the owner of Maisonettes 2, 3 and 4 while the 2nd Plaintiff is the owner of Maisonette 1 on the property, having purchased the same from the 1st Defendant for valuable consideration. The Plaintiffs

took possession 9 years ago in 2016. The Plaintiffs came to know that the maisonettes were advertised for sale on 7.4.25 by public auction, ostensibly for a loan obtained by the 1st Defendant from the 3rd Defendant (the Bank). The Plaintiffs further averred that although the agreements state that the maisonettes are on Plot 934, they are actually on Plot 928. The Plaintiffs state that they were not aware of the loan and only became aware of it *vide* the newspaper advertisement. They thus asserted that if the sale proceeds they shall suffer irreparably since they are innocent purchasers for value and that the maisonettes are their lifetime investments.

4. The Application is opposed by the Bank *vide* the replying affidavit of Angela Njeri, the Bank's Manager, Non-Performing Loans sworn on 14.5.25. It was averred that preliminarily, this Court lacks jurisdiction to entertain this matter for the reason that the Applicants seek to assert their ownership claim over the maisonettes, which jurisdiction is a preserve of the Environment and Land Court (ELC). Further, that without prejudice to the preliminary objection, there is no privity of contract between the Bank and the Plaintiffs, as such, the orders sought cannot be granted. It was averred that the Bank did its due diligence and found no encumbrances on the title to the property before advancing the loan of Kshs. 40,000,000/= to the 1st Defendant, a portion of which was secured by the title to the property. Further, that the agreements for sale exhibited by the Plaintiffs indicated that the maisonettes are erected on subdivision 934 and not on the property. That in any event, an agreement for sale does not confer legal rights on a purchaser and cannot supersede the legal rights of a charge whose charge has been duly registered. The Bank's case was that the Plaintiffs have not met the test for the grant of an injunction as set out in **Giella v Cassman Brown** and urged that the Application be dismissed with costs.
5. As I consider the Application, I must of necessity begin with the preliminary objection challenging the jurisdiction of this Court. The Bank's objection is that the Plaintiffs the Applicants seek to assert their ownership claim over the maisonettes, which jurisdiction is a preserve of the ELC.
6. Article 162(2)(b) of the Constitution and Section 13 of the Environment and Land Court Act confer jurisdiction over disputes relating to use, occupation of, and title to land, exclusively on the ELC.
7. The jurisdiction question between the ELC and the High Court over matters relating to charges and mortgages has been raging for a long time. The Court of Appeal stepped in to settle the dispute in the case of **Co-operative Bank of Kenya Limited v Patrick Kangethe**

Njuguna & 5 others [2017] eKLR. In that decision which is binding on this Court, the Court of Appeal stated:

40. To the appellant, the charge was an instrument granting an interest in the land, hence jurisdiction in the matter lay with the ELC. However, under Section 2 of the said Act, an instrument is a writing or enactment which creates or affects legal or equitable rights and liabilities. For the purposes of this suit, that instrument was the charge. 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.

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.

8. The Court of Appeal noted that the dominant issue in that case was not the use of land but the settlement of amounts owing from the respondents to the appellant on account of a contractual relationship of a banker and lender. As such, it was the High Court, not the ELC that had jurisdiction over the matter.

9. The Court went on to state:

42. While exclusive, the jurisdiction of the ELC is limited to the areas specified under Article 162 of the Constitution, Section 13 of the ELC Act and Section 150 of the Land Act; none of which concern the determination of accounting questions. Consequently, this dispute does not fall within any of the areas envisioned by the said provisions. On the other hand, the jurisdiction of the High Court over accounting matters is without doubt, for under Article 165(3) of the Constitution provides inter alia, that;

1. subject to clause (5), the High Court shall have-

a. unlimited original jurisdiction in criminal and civil matters.

10. In order to determine which between this Court and the ELC has jurisdiction over this matter, it is necessary to look at the Plaintiffs' case. They claim that they purchased the maisonettes from the 1st Defendant and have been in possession of the same since 2016 having paid the purchase price in full. They further claim that the 1st Defendant failed to create sub-leases in their favour which was a term of the agreement. They do not therefore have titles to their respective maisonettes. They further challenge the legality of the charge over Plot 928 on the ground that the property was charged when the Plaintiffs were already in possession of the maisonettes and their consent was not obtained. Additionally, that they were not served with the notice of the sale by public auction. Clearly, the Plaintiffs are apprehensive that the intended public auction, if completed, will naturally result in the Plaintiffs losing the use, occupation and title to the maisonettes. There is also the claim that the maisonettes were built on Plot 928 although the agreement states that they are on Plot 937.
11. The Plaintiffs' prayers in the plaint are also instructive. They seek a perpetual injunction restraining the Defendants from selling by public auction or in any way dealing with their maisonettes. The Plaintiffs also seek that the charge created by the 1st and 3rd Defendants over the title to the property be declared fraudulently null and void. The Plaintiffs further seek that the 1st Defendant be ordered to create subleases for the maisonettes and certificates of title be issued or in the alternative, that the Registrar of Lands, Mombasa do issue certificates of title for the maisonettes upon presentation of a survey plan.
12. Clearly, the foregoing leaves no doubt that the dominant issue in the present suit revolves around use, occupation and title to the maisonettes. The cause of action herein is the validity of the charge, and not a question of accounts. Applying the test in the **Kangethe** case, it is the ELC and not this Court that has the requisite jurisdiction to determine the suit by dint of Article 162(2) of the Constitution as well as the ELC Act.
13. In the end and in view of the foregoing, the Court upholds the preliminary objection herein, with the result that the Application dated 3.4.25 and the plaint of even date are struck out with costs to the 3rd Defendant.

DATED SIGNED and DELIVERED in MALINDI this 30th day of April 2026

M. THANDE
JUDGE