



REPUBLIC OF KENYA



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Kiti & 4 others v Kanyi t/a Kenya Projects Budget & Executives Homes Ltd & 2 others (Civil Suit E056 of 2024) [2025] KEHC 12313 (KLR) (7 August 2025) (Ruling)

Neutral citation: [2025] KEHC 12313 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E056 OF 2024
F WANGARI, J
AUGUST 7, 2025**

BETWEEN

**EVA MMBONE KITI 1ST PLAINTIFF
DAMACLINE KWAMBOKA MOMANYI 2ND PLAINTIFF
NANA MOHAMED SOMOEBWANA 3RD PLAINTIFF
FAUD MBARAK ALI AHMED 4TH PLAINTIFF
NANA KHADIJA OMAR 5TH PLAINTIFF**

AND

**DAVID MUREITHI KANYI T/A KENYA PROJECTS BUDGET & EXECUTIVES
HOMES LTD 1ST DEFENDANT
KEE PLANTS (KP) PROPERTIES LTD 2ND DEFENDANT
STANBIC BANK K LIMITED 3RD DEFENDANT**

RULING

1. The Plaintiffs filed a Notice of Motion application dated 28/01/2025 under Certificate of Urgency pursuant to Order 40 Rule 1 & 2, Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, and 3A of the *Civil Procedure Act*, and all other enabling provisions of the law.
2. The Applicants seek for orders;
 - a. That pending hearing and determination of the suit herein, there be an order of temporary injunction to restrain the 3rd Defendants either by themselves, officers, agents, employees, assigns, principles or any person acting on their behalf from disposing of, leasing, renting, or in any manner whatsoever dealing with or interfering with the Plaintiffs' use, ownership and quiet occupation of all the property known as Property number 1528/IV/MN and more



specifically from selling, auctioning or in any other manner disposing off the suit Properties erected thereon.

- b. That there be an order of status quo on all that property known as subdivision number 1528/IV/MN.
 - c. That costs of this application be borne by the Defendants jointly and severally.
3. The application is premised on grounds on its face and the Supporting Affidavit sworn on 28/01/2025 by Eva Mmbone Kiti. It was stated that the Plaintiffs purchased maisonette units, hereinafter 'the suit properties' being Maisonette Units on Royal palm villas and erected on the property known as Sub-Division No. 1528 Section IV Mainland North for valuable consideration from the 1st Defendant.
 4. That it was a term of the respective Sale Agreements that upon the Plaintiffs' completion of payment of the purchase price and all requisite costs (which included registration costs, valuation, disbursements and stamp duty to facilitate transfer by way of a 99 year sub-lease to them) the 1st Defendant would hand over the suit properties to the Plaintiffs and issue the Plaintiffs with duly registered Certificates of Lease respectively which he has adamantly refused and declined to issue, despite the Plaintiffs being currently in occupation of the suit premises.
 5. The Plaintiffs stated that the 1st Defendant handed over legal possession of the suit properties which the Plaintiffs later realized are actually erected plot 1528/IV/MN which belongs to the 1st Defendant and also forms part of Royal Palm Villas.
 6. That in total breach of the sale agreements entered into, the 1st Defendant registered a Charge in favour of the 3rd Defendant on 25/09/2017 against the title of plot 1528/IV/MN as security for a loan of Kshs. 21,000,000.00 and a further charge on 01/08/2018 as security for a loan of Kshs. 25,000,000.00 without consent, knowledge and/or approval of the Plaintiffs, in breach of the constructive trust and proprietary estoppel created and threatening the Plaintiffs' pre-existing interest thereon.
 7. The Plaintiffs further stated that the 3rd Defendant has maintained a legal charge over the property 1528/IV/MN therefore encumbering the performance of the sale agreements of the Plaintiffs. That it is plainly impossible that the suit herein would be brought to a successful conclusion if the 3rd Defendant's alienation of the suit property pendente lite was permitted to prevail.
 8. That if the temporary injunction orders sought are not granted, the Plaintiffs' interest in the suit properties will be defeated as the 3rd Defendant intends to realize the security and doing so would render the case filed herewith nugatory as once plot 1528/IV/MN is sold, the plaintiffs' constructive trust against the Defendant and proprietary estoppel thereon will be defeated. That the Plaintiffs and their tenants presently reside on the suit property and if the same is disposed off, the Plaintiffs would be rendered homeless and destitute.
 9. In response to the application, the 3rd Respondent filed a Replying Affidavit sworn on 18/02/2025 by Amos Mugambi, the Head, Recoveries and Rehabilitations of the 3rd Defendant/Respondent. It was stated that from the outset, there was no privity of contract between itself and the Applicants. That the injunctive reliefs as sought in the application before court cannot be granted on the basis that the 1st Respondent obtained two separate financing from the 3rd Respondent.
 10. That the first loan facility was for the sum of Kshs. 42,000,000 vide the facility letter dated 28/08/2017. That part of the amount advanced by the aforesaid facility letter in the sum of Kshs. 21,000,000 was secured by a first ranking legal charge created by the 1st Defendant in favour of the bank over Subdivision Number 1528 of Section IV Mainland North.



11. The 3rd Respondent stated that the second loan facility was for the sum of Kshs. 63,400,000 vide the Facility Letter and Letter of Amendment dated 05/06/2018 and 27/07/2018 respectively. That part of the amount advanced by the aforesaid facility letter in the sum of Kshs. 25,000,000 was secured by a further charge created by the 1st Defendant in favour of the Bank over the suit property.
12. That before the facility was advanced to the 1st Defendant, the 2nd Defendant had undertaken robust due diligence to confirm ownership of the suit property and the existence of any encumbrances attached to it. That the property was registered in the names of the 1st Respondent and there were no encumbrances noted on the title document.
13. That the bank in further due diligence exercise engaged Axis Real Estate Limited to undertake valuation of the suit property which exercise culminated in the preparation of a valuation report dated 25/02/2021. That the valuation report indicates that David Mureithi Kanyi as the registered owner of the suit property.
14. The 3rd Defendant deponed that they are a stranger to the Plaintiffs/Applicants herein and the alleged dealings. That in any case, the 3rd Respondent was never a party to any of the alleged transactions. That from the agreements of sale annexed to the Supporting Affidavit, it is clear that what was being sold to the Applicants were maisonettes numbers 12 and 16 erected on Subdivision Number 910 Section IV Mainland North and maisonettes numbers 5 and 9 that were erected on Subdivision Number 1528 Section III Mainland North and not the suit property. That it is impossible for the title number of the properties being sold to be erroneously described in 4 different agreements for sale that were prepared and executed at different times.
15. According to the 3rd Respondent, the Applicants should therefore separately and solely pursue the party that sold them maisonettes numbers 12 and 16 erected on Subdivision Number 910 Section IV Mainland North and maisonettes numbers 5 and 9 that were erected on Subdivision Number 1528 Section III Mainland North and let the transaction between the 1st and 3rd Respondents continue in operation undisturbed.
16. That the agreements for sale attached to the Supporting Affidavit describe the properties allegedly sold to the Applicants as being either land reference number MN/IV/910 or MN/III/9613. That the suit property on the contrary is a Certificate of Title Number CR. 66342 being subdivision Number 1528 (Orig. 256/2) of Section IV Mainland North as delineated on Land Survey Plan Number 394726 measuring 0.3045 Hectares.
17. The 3rd Respondent further stated that in the absence of the Deeds of Variation Agreements of sale duly executed by the parties are a clear indication that the properties on which the maisonettes numbers 12, 16, 5 and 9 are erected are subdivision number 910 Section IV Mainland North and Subdivision Number 1528 Section III Mainland North. That there being no contractual nexus between the Applicants and the 3rd Respondent, the Applicants have no legal grievance against the 3rd Respondent, and that the suit does not disclose a cause of action.
18. That the purported sale agreements have also not been stamped contrary to the provision of the Stamp Duty Act and as such cannot be admitted as evidence in these proceedings. The 3rd Respondent stated that an agreement for sale is not a transfer and does not confer legal rights on the purported purchaser, and cannot supersede legal rights of a Chargee whose charge has been duly registered.



Submissions

19. The application was canvassed by way of written submissions. The Applicants in their submissions dated 04/04/2025 argued that the specialized jurisdiction of the Environment and Land Court is provided for under Article 162(2) (b) of *the Constitution*. That the Court of Appeal in *Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna & 5 others* (2017) eKLR acknowledged that charging land does not connote land use and employed ‘the dominant test principle which the Applicants relied on.
20. The Applicants argued that this being an application for interlocutory injunction, the court should be guided by the principles in *Giella v Cassman Brown & Company Ltd* (1973) EA 358, which principles were reiterated by the Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 others* (2014) eKLR.
21. On whether the Applicants have established a prima facie case, the Applicants concurred with the position in *Arvind Shah & 7 Ors v Mombasa Bricks & Tiles Limited*, Petition No 18 (020) of 2022 and submitted that the 1st Respondent had every intention of selling off-plan maisonettes to the public. That the Applicants accepted the offer, entered into an agreement for sale and paid the entire purchase price. That the 1st Respondent handed over vacant possession of the units on purchase to the Applicants who currently reside thereon.
22. The Applicants further contended that they have established proprietary estoppel in relation to the suit property and that the 1st Respondent holds constructive trust over the property in favor of the Applicants. That considering trust is an equitable remedy, it serves as an intervention against unconscionable conduct on the part of the 1st Respondent and is an overriding interest in the property.
23. The Applicants further submitted that failure to register a caveat, caution, or restriction does not negate the rights and interests that the Applicants have acquired in the suit properties erected on plot 1528/IV/MN. Specifically, that it does not repudiate, invalidate, or void the contracts, as the subject matter was clearly identified and consideration duly given, that it does not extinguish the constructive trust that has existed since 2017, when the 1st Respondent handed over possession in part performance of the sale, and that it does not automatically render the 3rd Respondent’s registered interest the first in time.
24. On whether the Applicants will suffer irreparable injury, the Applicants submitted that they reside on the suit property with their families and they will be rendered homeless and destitute if the title of the property is not protected from further alienation. The Applicants relied on the holding *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR and *Nguruman Limited v Jan Bonde Nielsen & 2 others* (2014) eKLR.
25. On the balance of convenience, the Applicants cited decisions in *Peter Kasimba & 219 others v Kwetu Savings & Credit Co-Operative Society Limited (Formerly Masaku Teachers Savings Co-Operative Society Ltd) & 11 others* (2020) eKLR, *Mugah v Kunga* (1988) eKLR and *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR, and invited the court to consider the application on a balance of convenience.
26. The 3rd Respondent filed submissions dated 08/04/2025 and argued on whether this court has jurisdiction to hear and determine this suit, that the Applicants seek to assert ownership claim over Subdivision Number 1528 of Section IV Mainland North which jurisdiction is a preserve of the Environment and Land Court. Reliance was placed on the Court of Appeal case of *Co-operative Bank Limited v Patrick Kangethe Njuguna & 5 others* (2017) eKLR.



27. On whether the 1st Respondent and the bank are bound by terms of the facility letters, charge and further charge, the 3rd Respondent submitted that the facility letters dated 28/08/2017 and 05/06/2018, the letter of amendment dated 27/07/2018 and charge dated 25/09/2017 which are duly executed by the 1st Respondent and the bank form the basis of the contractual relationship.
28. That the 1st Respondent and the bank clearly expressed their legal intention to be bound by such terms. That before the facilities were advanced to the 1st Respondent, the bank had undertaken robust due diligence to confirm ownership of the suit property and the existence of any encumbrances attached to it. That the property was registered in the name of the 1st Respondent and there were no encumbrances noted on the title.
29. The 3rd Respondent added that it is trite law that parties are bound by their contracts and as a general rule, courts will refrain from rewriting a contract for parties. That what it would do would be to enforce the clear incontrovertible terms of the contract.
30. The said positions were reiterated in the cases of Kundan Singh Construction Company International Limited v Bank of Africa Kenya Limited (Interested Party) HCCC No. 71 of 2015 and the Court of Appeal case in National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another, Civil Appeal No. 95 of 1999.
31. On whether the Applicants are entitled to the temporary injunction, the 3rd Respondent submitted that the case of *Giella v Cassman Brown & Co. Ltd* (1973) 1 EA 358 (CAK) set out the three conditions that must be satisfied before an interlocutory injunction can be granted. That there is a prima facie case with a probability of success, that the Applicants will suffer irreparable injury not atonable by way of damages, and that the Applicants must prove their claim on a balance of probabilities.
32. On whether the Applicants have established a prima facie case, the 3rd Respondent submitted that having established that the suit property is different from the property on which the Applicants' maisonettes were erected on, it is evident that the Applicants' rights were never infringed upon. That the Applicants have therefore failed to demonstrate the existence of a prima facie case. That if the Applicants had a contractual right to obtain an interest in the suit property as alleged, they had an obligation of protecting the said interest by either lodging a caution, inhibition or restriction against the title to the suit property.
33. On whether the Applicants stand to suffer irreparable harm not atonable in damages if the injunction is denied, the 3rd Respondent cited the cases of *Nguruman Limited v Jan Bonde Nielsen & 2 others*, Civil Appeal No. 77 of 2012 and *Elijah Kipng'eno Arap Bii v Kenya Commercial Bank* (2001) eKLR, and submitted that having resolved the 1st condition of the *Giella* case in the negative, of the Applicants having failed to establish that they have a prima facie case with a probability of success, venturing into the second condition will be inconsequential and an academic exercise.
34. On the balance of convenience, the 3rd Respondent stated that the Applicants having failed to safeguard their alleged interest in the suit property now seek to have the court restrain the bank which has registered interests in the suit property from dealing with the suit property by way of injunction. That finding in favour of the bank would be the option that guarantees the lower risk of injustice. That the balance of convenience therefore tilts in favour of the bank.



Analysis

35. This court has considered the Notice of Motion application, supporting affidavit, the Replying Affidavit and the rival submissions by the Applicants and the 3rd Respondent, the issues for determination are: -
- a. Whether this court has jurisdiction to hear and determine the suit herein
 - b. If the answer to the above is to the affirmative, whether the Applicants have met the threshold for grant of temporary injunction
 - c. Who should bear costs
36. This suit was instituted vide a Plaint dated 27/07/2024 seeking in summary;
- A declaration that the Plaintiffs are the owners and entitled to exclusive and unimpeded right of use, possession and occupation of their respective maisonettes in Plot No. 1528/IV/MN.
- A declaration that the 1st Defendant was in breach of the respective contracts of sale with the Plaintiffs.
- An order for Specific Performance on the part of the 1st Defendant to issue the Plaintiffs with a 99 year sublease for the respective Maisonettes.
- An order against the 3rd Defendant to issue partial discharge of charge over the Plaintiffs respective properties.
- In the alternative to the above, the Registrar of Titles, Mombasa to issue the 99 year sublease in favour of the Plaintiffs.
37. I note that the Plaintiff filed a Notice of Motion Application dated 31/10/2024 seeking injunctive orders against the 3rd Defendant restraining it from interfering with the Plaintiffs' use, ownership and quiet possession of properties erected in property no. 1528/IV/MN, selling, auctioning or any other manner disposing off the suit properties.
38. I have perused through the physical court file and the e-filing platform. The said application was never prosecuted as there are no directions issued in respect to the said application. The Plaintiffs' counsel did not bring to the attention of this court that there was a pending application.
39. The Plaintiffs further filed a Notice of Motion application dated 28/01/2025 which is the subject of this Ruling. The Plaintiffs prayed to have status quo orders issued I respect to the suit properties, temporary injunction restraining the 3rd Defendants from interfering with their use, ownership and quiet possession of their properties. The 3rd Defendant was to be restrained from selling by auction or disposing the properties in any other manner pending the hearing and determination of the suit.
40. This is a matter which is both commercial in nature as it raises issues of breach of contract, legal charge of property on one part, and on the other part, it deals with the use and occupation of land. From the Pleadings filed, the predominant features and the substratum of the subject matter is that of the use and occupation of land. Before the determination as to whether or not the legal charge against the alleged Plaintiffs properties was proper, the issue of land and/ or property ownership must be determined first.



41. The issue of jurisdiction was raised at the submissions stage. The issue of jurisdiction being very fundamental can be raised any time including on appeal. In the case of Kenya Ports Authority vs Modern Holding [EA] Limited [2017] eKLR it was held as follows: -

“We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the court itself provided that where the court raises it suo moto parties are to be accorded the opportunity to be heard”

42. The issue is whether it is this court or the Environment or Land Court that has jurisdiction to deal with the matter.

43. The Constitution of Kenya under Article 162 (2) (b) establishes the Environment and Land Court. It provides as follows;

Systems of courts

162 (2) 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.

44. The jurisdiction of the court is mentioned under section 13 of the Environment and Land Court Act, No. 19 of 2011 which provides as follows;

Jurisdiction of the Court

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(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.

45. I disagree with the Plaintiffs submissions that this court has jurisdiction to deal with the issues raised in the suit as the matter related to a legal charge, where the Environment and Land Court has got no jurisdiction to deal with. I do agree with the submissions by the 3rd Defendant that the principal claim is in respect to the ownership, use and occupation of land of the subdivisions in the suit property.



46. As held by Nyarangi JA. in Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR: -

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

47. Therefore, this court lacks jurisdiction to deal with the issues raised as it downs its tools forthwith.

48. On costs, I exercise the discretion of this court and order that each party do bear its own costs.

Determination

49. The upshot of the foregoing is as follows:

- a. That this suit is hereby struck out for want of jurisdiction.
- b. Each party to bear its own costs.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 7TH DAY OF AUGUST, 2025.

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HON. F. WANGARI

JUDGE

In the presence of:-

Ms. Wanjiru Advocate h/b for Ms. Nabwana Advocate for the Plaintiffs

Mr. Wafula Advocate for the 3rd Defendant

Ms. Norah, Court Assistant

