



REPUBLIC OF KENYA



**Muthama & 8 others v Ngugi & 5 others (Environment and Land Case Civil Suit  
1042 of 2012) [2023] KEELC 20316 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20316 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 1042 OF 2012  
SO OKONG'O, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**PETER KIMANI MUTHAMA ..... 1<sup>ST</sup> PLAINTIFF  
DAVID MWANGI NJOROGE ..... 2<sup>ND</sup> PLAINTIFF  
DENNIS KIMATHI MBAE ..... 3<sup>RD</sup> PLAINTIFF  
ANNA MUTHONI WACHIRA ..... 4<sup>TH</sup> PLAINTIFF  
PETER KARANJA WANYOIKE ..... 5<sup>TH</sup> PLAINTIFF  
HUMPHREY N. KAMENYI ..... 6<sup>TH</sup> PLAINTIFF  
THOMAS MACHARIA WANYOIKE ..... 7<sup>TH</sup> PLAINTIFF  
ESTHER MACHARIA ..... 8<sup>TH</sup> PLAINTIFF  
ROBERT M. MAKARA ..... 9<sup>TH</sup> PLAINTIFF**

**AND**

**HENRY KARANJA NGUGI ..... 1<sup>ST</sup> DEFENDANT  
MARGARET WANJIRU NDEHI ..... 2<sup>ND</sup> DEFENDANT  
FLORENCE ELIZABETH WANJIRU NGANGA ..... 3<sup>RD</sup> DEFENDANT  
ANDREW MUTHEE GATIMU ..... 4<sup>TH</sup> DEFENDANT  
STEPHEN NJIHIA KAMAU ..... 5<sup>TH</sup> DEFENDANT  
MBUGUA WA MUNGAI ..... 6<sup>TH</sup> DEFENDANT**



## JUDGMENT

1. The Plaintiffs instituted this suit against the defendants by way of a plaint dated 15<sup>th</sup> October 2012. The Plaintiffs averred that at all material times, the 1<sup>st</sup> to 4<sup>th</sup> Defendants were the officials of and/or were trading as Super Micro Venture Self Help Group with the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants acting as the Chairman, Secretary, Treasurer, and Vice- Chairman of the group respectively. The Plaintiffs averred that the 1<sup>st</sup> to 4<sup>th</sup> defendants were sued in their capacities as officials and members of Super Micro Venture Self Help Group (hereinafter referred to only as “the Group”). The Plaintiffs averred that the 5<sup>th</sup> and 6<sup>th</sup> Defendants were members of the Group and were sued on their own behalf and in their capacities as the agents and/or servants of the Group and the 1<sup>st</sup> to 4<sup>th</sup> Defendants.
2. The Plaintiffs averred that on diverse dates between March 2010 and December 2010, at Ruiru, Kiambu County, the 5<sup>th</sup> and 6<sup>th</sup> Defendants while presenting themselves as members, agents, and/or representatives of the Group pointed out to the Plaintiffs parcels of land which they claimed had been put up for sale by the Group and expressly and impliedly induced the Plaintiffs to enter into agreements for the purchase thereof and to make payments of the purchase price of the said parcels of land the particulars of which are as follows;
  - a. On or about March 2010, the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants singularly and/or jointly represented to the 1<sup>st</sup> Plaintiff that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants were registered and/or beneficial owners with powers and authority to dispose of all or part of that parcel of land known as RUIRU KIU BLOCK 2 (GITHUNGURI) 3048, in particular Plot No. 4 on Phase 63A to be exercised from the aforesaid parcel of land.
  - b. On or about 16<sup>th</sup> March 2010, the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants singularly and/or jointly represented to the 2<sup>nd</sup> Plaintiff that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants were registered and/or beneficial owners with powers and authority to dispose of all or part of that parcel of land known as RUIRU KIU BLOCK 2 (GITHUNGURI) 6323 in particular Plot No. 10 on Phase 172 to be exercised from the aforesaid parcel of land.
  - c. On or about December 2020, the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants singularly and/or jointly represented to the 3<sup>rd</sup> Plaintiff that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants were registered and/or beneficial owners with powers and authority to dispose of all or part of that parcel of land known as RUIRU KIU BLOCK 2 (GITHUNGURI) 2956 in particular Plot No. 7 and Plot No. 8 on Phase 19 to be exercised from the aforesaid parcel of land.
  - d. On or about March 2011, the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants singularly and/or jointly represented to the 4<sup>th</sup> Plaintiff that the 1<sup>st</sup> to 4<sup>th</sup> Defendants were registered and/or beneficial owners with powers and authority to dispose of all or part of that parcel of land known as RUIRU KIU BLOCK 2 (GITHUNGURI) 6324 in particular Plot No. 7 on Phase 19 to be exercised from the aforesaid parcel of land.
  - e. On or about March 2010, the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants singularly and/or jointly represented to the 7<sup>th</sup> and 8<sup>th</sup> Plaintiffs that the 1<sup>st</sup> to 4<sup>th</sup> Defendants were registered and/or beneficial owners with powers and authority to dispose of all or part of that parcel of land known as RUIRU KIU BLOCK 2 (GITHUNGURI) 2217 in particular Plot No. 6 on Phase 74 to be exercised from the aforesaid parcel of land.



- f. On or about February 2010, the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants singularly and /or jointly represented to the 5<sup>th</sup> Plaintiff that the 1<sup>st</sup> to 4<sup>th</sup> Defendants were registered and/or beneficial owners with powers and authority to dispose of all or part of that parcel of land known as RUIRU KIU BLOCK 2 (GITHUNGURI) 2007 in particular Plot No. 3 on Phase 17 and RUIRU KIU BLOCK 2 (GITHUNGURI) 2217 in particular Plot No. 5 on Phase 74 to be exercised from the aforesaid parcel of land.
  - g. On or about March 2010, the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants singularly and /or jointly represented the 6<sup>th</sup> Plaintiff that the 1<sup>st</sup> to 4<sup>th</sup> Defendants were registered and/or beneficial owners with powers and authority to dispose of all or part of that parcel of land known as RUIRU KIU BLOCK 2 (GITHUNGURI) 6318, in particular Plot No. 3 on Phase 172 to be exercised from the aforesaid parcel of land.
  - h. On or about March 2010, the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants singularly and /or jointly represented to the 7<sup>th</sup> Plaintiff that the 1<sup>st</sup> to 4<sup>th</sup> Defendants were registered and/or beneficial owners with powers and authority to dispose of all or part of that parcel of land known as RUIRU KIU BLOCK 2 (GITHUNGURI) 2015 in particular Plot No. 5 and Plot No. 6 on Phase 69 to be exercised from the aforesaid parcel of land.
  - i. On or about March 2010, the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants singularly and/or jointly represented to the 9<sup>th</sup> Plaintiff that the 1<sup>st</sup> to 5<sup>th</sup> Defendants were registered and/or beneficial owners with powers and authority to dispose of all or part of that parcel of land known as RUIRU KIU BLOCK 2 (GITHUNGURI) 6317, in particular Plot No. 4 on Phase 174 to be exercised from the aforesaid parcel of land.
3. The Plaintiffs averred that as a result of the said representations by the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants to the Plaintiffs and upon meeting the 1<sup>st</sup> to 4<sup>th</sup> Defendants, the Plaintiffs were made to believe that the said parcels of land belonged to the Group. The Plaintiffs averred that they were made to enter into agreements for sale of the said parcels of land with the 1<sup>st</sup> to 4<sup>th</sup> Defendants as officials of the Group and paid to them the purchase price in cash and through bank deposits to the account of the Group. The Plaintiffs averred that receipt of the said payments was acknowledged by the 3<sup>rd</sup> Defendant on behalf of the Defendants and on her own behalf as the purported owners of the said parcels of land.
  4. The Plaintiffs averred that the 1<sup>st</sup> to 4<sup>th</sup> Defendants issued certificates of ownership to some of the Plaintiffs for their respective parcels of land as follows;



Name	Agreement date	Parcel No.	Plot No.	Amount Paid
Peter Kimani Muthama	31.3.2010	Ruiru Kiu Block 2 Githunguri 3048	4	330,000/=
David Mwangi Njoroge	16.3.2010	Ruiru Kiu Block 2 Githunguri 6323	10	330,000/=
Dennis Kimathi Mbae	24.12.2010	Ruiru Kiu Block 2 Githunguri 2956	7 & 8	500,000/=
Anna Muthoni	31.3.2010	Ruiru Kiu Block 2 Githunguri 6324	9	330,000/=
Peter Karanja Wanyoike	-	Ruiru Kiu Block 2 Githunguri 2007 Ruiru Kiu Block 2 Githunguri 2217	3 5	245,000/=
Humphrey N Kamenyi	31.3.2010	Ruiru Kiu Block 2 Githunguri 6318	3	330,000/=
Thomas Macharia Wanyoike	-	Ruiru Kiu Block 2 Githunguri 2015	5 & 6	300,000/=
Esther W. Macharia Thomas Wanyoike Macharia	-	Ruiru Kiu Block 2 Githunguri 2217	6	260,000/=
Robert M. Makara	31.3.2010	Ruiru Kiu Block 2 Githunguri 6317	4	330,000/=

5. The Plaintiffs averred that prior to entering into the aforesaid sale agreements, the 1<sup>st</sup> to 4<sup>th</sup> Defendants represented to be the owners of or to have authority to dispose of the sold portions of land parcel numbers Ruiru/Kiu Block 2 (githunguri) 3048, Ruiru/kiu Block 2 (githunguri) 6317, Ruiru/kiu



Block 2 (githunguri) 6323, Ruiru/kiu Block 2 (githunguri) 2956, Ruiru/kiu Block 2 (githunguri) 6324, Ruiru/kiu Block 2 (githunguri) 6318.

6. The Plaintiffs averred that it was a term of the said agreements of sale that upon payment of the purchase price in full, the 1<sup>st</sup> to 4<sup>th</sup> Defendants would grant to the Plaintiffs vacant possession of their respective parcels of land which possession the 1<sup>st</sup> to 4<sup>th</sup> Defendants were unable to grant since the 1<sup>st</sup> to 4<sup>th</sup> Defendants were not the registered owners of the said parcels of land.
7. The Plaintiffs averred that it was an express and/or implied term of the said agreements of sale that the 1<sup>st</sup> to 4<sup>th</sup> Defendants would expedite the process of acquiring the titles for each of the plots purchased by the Plaintiffs and would deliver the same to the Plaintiffs within a reasonable period.
8. The Plaintiffs averred that in breach of the said agreements of sale, the 1<sup>st</sup> to 4<sup>th</sup> Defendants had not completed the said agreements of sale 900 days from the date of the execution of the first agreement of sale and 60 days from the date of the execution of the last agreement of sale in that the 1<sup>st</sup> to 4<sup>th</sup> Defendants had failed to hand over to the Plaintiffs the title documents for the purchased parcels of land.
9. The Plaintiffs averred that the 1<sup>st</sup> to 4<sup>th</sup> Defendants entered into the said agreements of sale with the full knowledge that they did not intend and/or had no capacity to complete the same. The Plaintiffs averred that the 1<sup>st</sup> to 4<sup>th</sup> Defendants obtained the purchase price from the Plaintiffs in respect of the said parcels of land by false pretenses and fraud in collusion with the 5<sup>th</sup> and 6<sup>th</sup> Defendants. The Plaintiffs averred that the 1<sup>st</sup> to 4<sup>th</sup> Defendants, and the 5<sup>th</sup> and 6<sup>th</sup> Defendants were liable to the Plaintiffs jointly and severally as principals and agents.
10. The Plaintiffs averred that their claims against the Defendants jointly and severally were for the distinct and separate sums paid by each of the Plaintiffs as the purchase price for their respective parcels as set out in paragraph 5 of the plaint together with a penalty of 25% of the purchase price provided for in the agreements of sale, and punitive damages for fraud.
11. The Plaintiffs averred that after the Defendants neglected and refused to complete the said agreements of sale or to refund the purchase price and other payments made to them, the Plaintiffs served them with a notice of repudiation of the said agreements and elected to sue for a refund of the monies paid by them to the Defendants instead of seeking specific performance. The Plaintiffs sought judgment against the Defendants as follows:
  - i. Against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants jointly and severally as follows;  
For the 1<sup>st</sup> Plaintiff, Peter Kimani Muthama
    - a. Kshs.330,000/=
    - b. Damages of Kshs. 82,500/=
    - c. Interest on (a) and (b) above
    - d. CostsFor the 2<sup>nd</sup> Plaintiff, David Mwangi Njoroge
    - a. Kshs.330,000/=
    - b. Damages of Kshs. 82,500/=
    - c. Interest on (a) and (b) above



d. Costs  
For the 3<sup>rd</sup> Plaintiff, Dennis Kimathi Mbae

- a. Kshs.500,000/=
- b. Damages of Kshs. 132,750/=
- c. Interest on (a) and (b) above

d. Costs  
For the 4<sup>th</sup> Plaintiff, Anna Muthoni

- a. Kshs.330,000/=
- b. Damages of Kshs. 82,500/=
- c. Interest on (a) and (b) above

d. Costs  
For the 5<sup>th</sup> Plaintiff, Peter Karanja Wanyoike

- a. Kshs.245,000/=
- b. Damages of Kshs. 61,250/=
- c. Interest on (a) and (b) above

d. Costs  
For the 6<sup>th</sup> Plaintiff, Humphrey N. Kamenyi

- a. Kshs.330,000/=
- b. Damages of Kshs. 82,500/=
- c. Interest on (a) and (b) above

d. Costs  
For the 7<sup>th</sup> Plaintiff, Thomas Macharia Wanyoike

- a. Kshs.300,000/=
- b. Damages of Kshs. 82,500/=
- c. Interest on (a) and (b) above

d. Costs  
For the 8<sup>th</sup> Plaintiff, Esther Macharia

- a. Kshs. 260,000/=
- b. Damages of Kshs. 82,500/=
- c. Interest on (a) and (b) above

d. Costs  
For the 9<sup>th</sup> Plaintiff, Robert Makara

- a. Kshs.330,000/=



- b. Damages of Kshs. 82,500/=
  - c. Interest on (a) and (b) above
  - d. Costs
- ii. Against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> Defendants jointly and severally in favour of each Plaintiff for;
- a. Exemplary damages.
  - b. Costs and Interest of the suit.
12. The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants did not defend the suit. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants filed a joint statement of defence on 4<sup>th</sup> June 2015. In their defence dated 26<sup>th</sup> May 2015, they denied that the 1<sup>st</sup> to 4<sup>th</sup> Defendants were officials and/or were trading as Super Micro Venture Self Help Group (the Group). The 3<sup>rd</sup> and 6<sup>th</sup> Defendants denied further that the 1<sup>st</sup> to 4<sup>th</sup> Defendants entered into agreements of sale with the Plaintiffs as alleged in the plaint and that the 5<sup>th</sup> and 6<sup>th</sup> Defendants were members of the Group or agents of the 1<sup>st</sup> to 4<sup>th</sup> Defendants. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants denied that between March 2010 and December 2010, the 5<sup>th</sup> and 6<sup>th</sup> Defendants represented to the Plaintiffs that they were members or agents of the Group and that they pointed to the Plaintiffs several parcels of land which they induced the Plaintiffs to purchase from the Group.
13. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants denied that they made the Plaintiffs to believe that the said parcels of land were owned by the Group or that the 1<sup>st</sup> to 4<sup>th</sup> Defendants breached the agreements of sale that they entered into with the Plaintiffs. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants denied that the 1<sup>st</sup> to 4<sup>th</sup> Defendants received payments of the purchase price from the Plaintiffs by false pretense and fraud to which the 5<sup>th</sup> and 6<sup>th</sup> defendants were parties.
14. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants averred that the 3<sup>rd</sup> Defendant was merely an official of the Group and that she entered into the agreements of sale the subject of the Plaintiffs' complaints in her capacity as the Group's treasurer and not in her personal capacity. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants averred that the 3<sup>rd</sup> Defendant was wrongly joined in the suit that disclosed no or any reasonable cause of action against her. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants averred that the Plaintiffs' suit against the 3<sup>rd</sup> Defendant was misconceived, frivolous and vexatious and disclosed no reasonable cause of action since the 3<sup>rd</sup> Defendant's team vacated office of the Group after new officials were elected before the institution of the suit.
15. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants averred that the 1<sup>st</sup> to 4<sup>th</sup> Defendants entered into the said sale agreements as officials of the Group and not in their personal capacities and that the completion of the said agreements was frustrated by the acrimony that attended the Group's management pitting two factions which led to the delays in the completion.
16. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants averred that elections were held in 2010 and new officials were elected to the office of the Group who took the responsibility of completing the said agreements of sale. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants averred that the Group suffered fraud at the hands of the sellers of the parcels of land portions of which were sold to the Plaintiffs. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants averred that some of the said parcels of land were later found to be non-existent. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants averred that any money that was received by the 3<sup>rd</sup> Defendant from the Plaintiffs was received in her capacity as the Group's treasurer and was duly accounted for by the Group. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants averred that the 3<sup>rd</sup> Defendant left the Group in 2011 after handing over her office to the new officials of the Group.



17. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants averred that the 6<sup>th</sup> Defendant was merely a member of the Group and was not an agent and/or servant of the 1<sup>st</sup> to 4<sup>th</sup> Defendants. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants averred that the 6<sup>th</sup> Defendant was not an official or agent of the Group and actually bought a parcel of land from the Group. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants averred that the 6<sup>th</sup> Defendant never represented to any of the Plaintiffs that the 1<sup>st</sup> to 4<sup>th</sup> Defendants were the beneficial owners of the various parcels of land mentioned in the plaint. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants averred that the 6<sup>th</sup> Defendant only informed the 5<sup>th</sup> Plaintiff whom he knew as a lawyer and who had represented him in various legal matters of the existence of the Group. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants averred that there was no contract between the 6<sup>th</sup> Defendant and the Plaintiffs and as such the allegations of misrepresentation made against him were outrageous and unfounded. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants averred that the 6<sup>th</sup> Defendant was no longer a member of the Group.
18. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants averred that although the Plaintiffs had alleged fraud and false pretense against the Defendants, none of the Plaintiffs had lodged a criminal complaint against any of the Defendants. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants averred that the Plaintiffs' suit was pretentious and an abuse of the court process. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants prayed that the case against them be dismissed with costs.
19. On 23<sup>rd</sup> July 2015, the Plaintiffs and the 2<sup>nd</sup> Defendant entered into a consent whereby; judgment was entered for the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> to 9<sup>th</sup> Plaintiffs against the 2<sup>nd</sup> Defendant in the sum of Kshs. 330,000/= each, the 3<sup>rd</sup> Plaintiff's claim against the 2<sup>nd</sup> Defendant was marked as settled, the 2<sup>nd</sup> Defendant was to pay the costs of the suit in the sum of Kshs. 141,925/=, and the judgment was final as against the 2<sup>nd</sup> Defendant.
20. At the trial, the 1<sup>st</sup> Plaintiff, Peter Kimani Muthama (PW1) was the first to give evidence. PW1 stated that he was an estate agent and that he knew the other Plaintiffs and had the authority to represent them. PW1 adopted his witness statement filed in court on 21<sup>st</sup> December 2012 as part of his evidence in chief. PW1 stated that he knew the Defendants and that the 3<sup>rd</sup> and 6<sup>th</sup> Defendants were members of Super Micro Venture Self Help Group (the Group). PW1 stated that he was introduced to the 6<sup>th</sup> Defendant by the 5<sup>th</sup> Plaintiff. He stated that the 6<sup>th</sup> Defendant who was a member of the Group was selling some land at Ruiru. He stated that the 6<sup>th</sup> Defendant showed him Plot No. 4 (Plot No. 4) which was a portion of a larger parcel of land known as Ruiru Kiu Block 2(Githunguri)/3048 for which he paid Kshs. 330,000/=. He stated that the purchase price for the Plot was Kshs. 300,000/= while Kshs. 30,000/= was the fee for processing the title. He stated that he was issued with a receipt for this payment.
21. PW1 stated that he entered into a sale agreement with the Group in respect of Plot No. 4 which was signed by the officials of the Group. He stated that the title processing fee was Kshs. 50,000/= but he paid Kshs. 30,000/=. He stated that the title was never processed but the Group gave him a certificate of ownership. He produced the agreement for sale, the certificate of ownership, and the receipts as P.EXH. 1, 2 and 3 respectively. PW1 stated that he introduced some of the other Plaintiffs who were his friends to the Group. He stated that he knew the 6<sup>th</sup> Defendant personally and that the 6<sup>th</sup> Defendant was the one who showed him Plot No. 4.
22. PW1 stated that the Defendants neither gave him a title deed for the Plot nor refunded the full purchase price that he paid. He stated that the Defendants refunded him a sum of Kshs. 165,000/= only for plot No. 4. He stated that the balance of the purchase price was never refunded by the Group. PW1 stated that the Group was not a limited liability company and as such the Defendants were properly sued. He stated that he was not privy to the Defendants' internal operations. He stated that even the Ministry of Labour, Social Security and Services did not know the officials of the Group.



23. On cross-examination by the advocate for the 3<sup>rd</sup> and 6<sup>th</sup> Defendants, PW1 stated that before the Plaintiffs filed the suit in 2012, they did not do a search on the officials of the Group. He stated that they sued the people that they had dealt with as officials of the Group. He stated further that he was not privy to the election of the officials of the Group that had taken place. PW1 reiterated that the Plaintiffs sued the officials of the Group who were in office when they purchased their respective plots and made payment of the purchase price. PW1 stated that the agreement of sale between him and the Group was signed by the representatives of the Group and that the 3<sup>rd</sup> Defendant signed the agreement as the treasurer of the Group. He stated further that the receipts that were issued to him for the payments that he had made were in the name of the Group.
24. PW1 stated that the Defendants who were the officials of the Group were operating at Astrol Petrol Station at the time he purchased Plot No. 4. He stated that the Defendants later on got office premises. He stated that he was not given any reason why he was not issued with a title for Plot No. 4.
25. PW1 stated that he met the 6<sup>th</sup> Defendant at Astrol Petrol Station and that he went to Plot No. 4 with the 4<sup>th</sup> and 6<sup>th</sup> Defendants. He stated that they were accompanied by an official of the Group. He stated that the 6<sup>th</sup> Defendant accompanied them to the property as a member of the Group. He stated that the 6<sup>th</sup> Defendant was not a party to the agreement for sale that he entered into with the Group. He stated that it was the 6<sup>th</sup> Defendant who introduced the officials of the Group to him and also gave him the bank account to which he was supposed to deposit the purchase price for the property.
26. PW1 stated further in cross-examination that when he purchased Plot No. 4, the 2<sup>nd</sup> Defendant was the secretary of the Group and that the 2<sup>nd</sup> Defendant later became the Chairlady of the Group. He stated that the 2<sup>nd</sup> Defendant admitted the debt owed to the Plaintiffs by the Group and a consent judgment was entered for the Plaintiffs against the 2<sup>nd</sup> Defendant for the principal sum of Kshs. 2,455,000/= . He stated that the Plaintiffs recovered a sum of Kshs. 1,369,425/= of the said amount and that the balance was not paid by the 2<sup>nd</sup> Defendant. He stated that the Plaintiffs' claim was not settled in full and that the 2<sup>nd</sup> Defendant had not communicated when she would pay the balance of the decretal amount.
27. On re-examination, PW1 stated that according to the letter dated 17<sup>th</sup> March 2015, the Ministry of Labour, Social Security and Services, the officials of the Group were unknown. He stated that that explained why the Plaintiffs sued the officials that they had dealt with while purchasing their respective parcels of land. He stated that the Plaintiffs' claim in the plaint was for a total sum of Kshs. 3,726,500/= and that they entered into a consent with the 2<sup>nd</sup> Defendant who admitted personal responsibility for the amount that was indicated in the consent. He stated that the Plaintiffs' claim was against all the Defendants who were liable to them jointly and severally. On examination by the court, he stated that he did not become a member of the Group as he only purchased a plot from them.
28. The next witness was the 5<sup>th</sup> Plaintiff, Peter Karanja Wanyoike(PW2). PW2 told the court that he was an advocate of the High Court of Kenya and had written authority to represent the other Plaintiffs in the suit. He stated that he knew the 3<sup>rd</sup> and 6<sup>th</sup> Defendants. He stated that the 3<sup>rd</sup> Defendant was the treasurer of the Group which sold the suit properties to the Plaintiffs. He stated that the 6<sup>th</sup> Defendant was personally known to him and that he presented himself both as a member of the Group and as its Marketing Executive. He stated that the 1<sup>st</sup> Defendant was the chairman of the Group while the 2<sup>nd</sup> Defendant was the secretary. PW2 stated that the 4<sup>th</sup> Defendant was the vice-chairman of the Group while the 5<sup>th</sup> defendant was a member of the Marketing Executive of the Group.
29. PW2 stated that the Plaintiffs bought various parcels of land from the Defendants through the Group. He stated that each Plaintiff entered into a written agreement of sale with the Defendants. He stated that the Defendants did not complete the said agreements of sale in that the Defendants failed to



- issue the Plaintiffs with the titles for the parcels of land that they purchased prompting the filing of this suit. He stated that the payments that were made by each of the Plaintiffs were set out in the demand letter that was served upon the Defendants. He stated that the agreements of sale between the Defendants and the Plaintiffs provided for damages which the Plaintiffs claimed in addition to the principal amounts.
30. He stated that after the filing of the suit, the 2<sup>nd</sup> Defendant paid to the Plaintiffs a total sum of Kshs. 1,369,425/= leaving a balance of Kshs. 2,357,075/= due and payable by the Defendants to the Plaintiffs. PW2 stated that the 3<sup>rd</sup> and 6<sup>th</sup> Defendants admitted in paragraphs 18 and 20 of their defence that they were privy to the agreements of sale that the Plaintiffs entered into with the Defendants in respect of the various parcels of land that were sold to them. He stated that the 3<sup>rd</sup> and 6<sup>th</sup> Defendants admitted having been officials of the Group. He stated that since the Group was not a limited liability company, the 3<sup>rd</sup> and 6<sup>th</sup> Defendants were liable to the Plaintiffs in the capacities in which they were sued.
  31. On cross-examination, PW2 stated that he knew the 6<sup>th</sup> Defendant through his (PW2) late brother, Nganga Wanyoike as they were staying in the same estate. He stated that the 6<sup>th</sup> Defendant also went to college with the 7<sup>th</sup> Plaintiff who was also his (PW2) brother. He stated that the 6<sup>th</sup> Defendant was his client from about 2007 to 2014. He stated that the 6<sup>th</sup> Defendant continued giving him instructions even after he had sued him in the present suit. He stated that the agreement between him and the Group dated 25<sup>th</sup> February 2010 was signed in the Group's office in the presence of an advocate. He stated that initially, the Group used to meet at a café in Astrol Petrol Station along Thika Road. He stated that the Group later acquired an office off the Eastern Bypass.
  32. PW2 stated that although the 6<sup>th</sup> Defendant did not sign the agreements for sale that the Plaintiffs entered into with the Group, he was a member of the Group and the one who introduced him to the Group to which they made the payments they were claiming from the Defendants. PW2 stated that he was not aware that the 6<sup>th</sup> Defendant ceased to be a member of the Group in 2011. He stated further that the Plaintiffs sued the 3<sup>rd</sup> Defendant in her capacity as an official of the Group. He stated that the officials of the Group signed the various agreements of sale between the Group and the Plaintiffs. PW2 stated that he was not aware that the Group conducted elections and new officials were elected. On examination by the court, PW2 stated that all payments were made through direct deposit to the bank account of the Group.
  33. The 3<sup>rd</sup> Defendant, Florence Elizabeth Wanjiru Nganga (DW1) was the first witness for the Defendants who defended the suit. DW1 adopted her witness statement dated 4<sup>th</sup> September 2015 as part of her evidence in chief and produced the 3<sup>rd</sup> and 6<sup>th</sup> Defendants' bundle of documents as exhibits. She admitted that she was the treasurer of the Group. She stated that the Group was started in 2009 when 12 teachers came together and started a business of buying and selling land. She stated that each member contributed Kshs. 70,000/= to start them off.
  34. DW1 stated that she was elected as the treasurer of the Group, Henry Karanja Ngugi, the 1<sup>st</sup> Defendant, the chairman, the 2<sup>nd</sup> Defendant, Margaret Wanjiru Ndehi, the Secretary, and the 4<sup>th</sup> Defendant, Andrew Gatimu, the Vice chairman. She stated that they sold the parcels of land that they acquired initially to members of the public. She stated that a customer would come to them and once the customer made up his mind to buy land, she would give him the Group's bank account where he would deposit the payment and bring back the deposit slip after which he would be issued with a receipt. She stated that the Group did not accept cash from its customers and that all payments were made at Family Bank, Kiambu Branch. She stated that she did not issue or sign all the receipts that were



- produced in evidence by the Plaintiffs. She stated that she issued receipts in her capacity as the treasurer of the Group.
35. DW1 stated that she did not also sign all the agreements of sale produced in evidence by the Plaintiffs although the same bore her name. She pointed out two of the agreements that bore her name but were signed by the 4<sup>th</sup> Defendant, Andrew Muthee Gatimu, and Anthony Ikonya who was the Group's driver and not an official of the Group. She stated that of all the agreements produced by the Plaintiffs in evidence, she only signed the agreements at pages 19, 46 and 57 of the Plaintiffs' bundle. She stated that she did not also sign the certificates of ownership at pages 27, 25, 36 and 40 of the Plaintiffs' bundle of documents.
  36. DW1 stated that at the time of selling the said parcels of land, the Group had titles in its name in respect thereof. She stated that the Group sold land until around August/September 2010 when the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had some differences over elections of the officials of the Group. She stated that following these differences, the Group's bank accounts were frozen and a special general meeting of the Group was called for 11<sup>th</sup> September 2010 where new officials of the Group were elected. She stated that she was not invited to the meeting. She stated that several resolutions were passed at the said meeting and the then chairman was asked to handover to the new chairman. She stated that the new officials of the Group were supposed to complete the transactions that were pending.
  37. DW1 stated that after she was voted out at the said special general meeting, she did not conduct any other transaction on behalf of the Group. DW1 stated that her position was taken over by Boniface Muthama who became the new treasurer. She stated that she had no authority to carry out any transaction. She stated that the 2<sup>nd</sup> Defendant was elected as the chairperson of the Group at the said special general meeting. DW1 stated that the Plaintiffs' claim could only be directed at the new officials of the Group.
  38. On cross-examination, DW1 admitted that the Group was not a limited liability company. She stated that the current officials of the Group had the responsibility of meeting its liabilities. She stated that when this suit was filed in 2012, the Group had officials against whom the Plaintiffs' claims could be made. She stated that she ceased to be a member of the Group after she was voted out of office. She admitted that she signed several agreements of sale and also issued several receipts. She stated that she was wrongly sued as the transactions she was involved in were transacted by her on behalf of the Group. DW1 stated further that the money that belonged to the Group was taken over by the new officials of the Group and she did not know how they used the same. She stated that she was not aware of whether the purchasers of the Group's parcels of land were notified of the change in the management of the Group.
  39. On re-examination, DW1 stated that it was up to the Plaintiffs to ascertain the officials of the Group before filing the suit. She stated that under clause 3.1 of [the Constitution](#) of the Group, a member ceases to be a member of the Group if he/she fails to attend two consecutive meetings or fails to remit two consecutive monthly contributions. She stated that after the special general meeting held in 2010, she did not attend any of the meetings of the Group and did not remit her monthly contributions. On examination by the court, she stated that Super Macro Ventures Company Limited was not related to the Group and that she had no relationship with the said company. She stated that the receipt dated 24<sup>th</sup> December 2010 at page 37 of the Plaintiffs' bundle of documents was signed by Antony Ikonya. DW1 stated further that after the special general meeting, she served the Group until November 2010. She stated further that the last receipt she issued was the one dated 21<sup>st</sup> November 2010 at page 41 of the Plaintiffs' bundle of documents.



40. The Defendants' next witness was Mbugua Wa Mungai (DW2). He told the court that he was a senior lecturer at Kenyatta University. He adopted his statement dated 16<sup>th</sup> July 2015 as his evidence in chief and produced the 6<sup>th</sup> Defendant's documents in the 3<sup>rd</sup> and 6<sup>th</sup> Defendants' bundle of documents as exhibits. He stated that his first interaction with some of the Plaintiffs was in 2009. He stated that he first met the 5<sup>th</sup> Plaintiff at a café along Thika Road. He stated that he had known the 5<sup>th</sup> Plaintiff earlier during his college days at the University of Nairobi.
41. He stated that he informed the 5<sup>th</sup> Plaintiff that he had gone to see some land that belonged to the Group. He stated that the 5<sup>th</sup> Plaintiff became interested in the Group's land after he informed him of the existence of the Group at the said meeting. He stated that after the said meeting, the 5<sup>th</sup> Plaintiff came with the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs to Astrol Cafe along Thika Road where the officials of the Group used to meet and operate from. He stated that he used to work at Kenyatta University and the said café was on his way. He stated that he used to visit the café from time to time to find out what was happening concerning the subdivision of the Group's land. DW2 stated that he knew both the 7<sup>th</sup> and 8<sup>th</sup> Plaintiffs. He stated that the 7<sup>th</sup> Plaintiff who was a brother to the 5<sup>th</sup> Plaintiff and was his year mate at the University while the 8<sup>th</sup> Plaintiff was his student. He stated that the other Plaintiffs were not known to him.
42. DW2 denied that he met the Plaintiffs at the Group's office and provided them with information regarding the Group's parcels of land. He denied that he was an official of the Group. He stated that he had no capacity to give any information regarding the Group's land. He stated that the only information he could give the Plaintiffs was what was in his knowledge by virtue of being one of the purchasers of the Group's land. DW2 stated that the agreement of sale between him and the Group was dated 17<sup>th</sup> December 2009 (See page 7 of the Defendants' bundle of documents). He stated that he made payments and was issued with receipts (See pages 9 to 11 of the Defendants' bundle of documents). He stated that he paid a membership fee to the group of Kshs. 300,000/= on 11<sup>th</sup> April 2010 and topped it up to enable him to purchase the parcel of land that he bought from the Group. He stated that he became a member of the Group after he purchased land from the Group. He stated that he did not show the Plaintiffs any land that was being sold by the Group.
43. He stated that the Group had a vehicle that was used to take people around to show them plots that were on sale and anyone could get into the vehicle. He stated that he had no capacity to show the Plaintiffs the Group's land. He denied that he was an agent of the Group. He admitted that the 5<sup>th</sup> Plaintiff acted as his advocate in various property transactions and he was still acting for him even at the time of filing this suit. DW2 stated that the business card produced by the 5<sup>th</sup> Plaintiff in evidence was not his business card and that the telephone number on the card did not belong to him. He stated that he did not sell any land to the Plaintiffs nor did he receive any money from them as a member of the Group.
44. On cross-examination, DW2 admitted that he knew the 1<sup>st</sup> Plaintiff and that he (DW2) was a member of the Group. He stated that he paid a membership fee of Kshs. 300,000/= and was issued with a receipt by the 3<sup>rd</sup> Defendant. He stated that the Plaintiffs were not members of the Group as they did not pay membership fees. He stated that he was not aware that members of the Group were liable for the debts of the Group. DW2 reiterated that the business card that was produced in evidence by the Plaintiffs did not belong to him. He stated that the Group later had an office at Astrol Petrol Station and that the same was established in 2010.
45. The Defendants' last witness was, Mary Waceke Kabaiku (DW3). DW3 adopted her witness statement filed in court on 10<sup>th</sup> September 2015 as her evidence in chief. On cross-examination, she stated that she



knew the 6<sup>th</sup> Defendant and that the Group did not have an office. She stated that the Group's affairs used to be conducted at Astrol Petrol Station along Thika road. She stated the Group got an office later. She stated that she left the service of the Group in 2010 by which time the Group had an office.

## Submissions

12. After the close of evidence, the parties made closing submissions in writing. The Plaintiffs filed submissions dated 19<sup>th</sup> October 2022. The Plaintiffs framed the following two issues for determination by the court;
  - a. Whether the 3<sup>rd</sup> and 6<sup>th</sup> Defendants were liable in their personal capacities as members of Super Micro Venture Self Help Group (the Group).
  - b. Whether the Plaintiffs were entitled to the reliefs sought in the plaint.

The Plaintiffs submitted that all the Defendants who were members of the Group at the time the cause of action arose were liable for breach of contracts with the Plaintiffs in their personal capacities. The Plaintiffs submitted that the Group was not a limited liability company and as such it was not a separate entity distinct from its members.

47. The Plaintiffs submitted that since the Group was unincorporated, it could not be a legal entity separate from its members. The Plaintiffs submitted that in the circumstances, members must personally take up the liability of the Group. In support of this submission, the Plaintiffs cited *Wilson Kipkoech Chepkwony & 16 Others v. Samuel Kibowen Towett & 2 Others* [2021] eKLR. The Plaintiffs submitted that all the Defendants including the 3<sup>rd</sup> and 6<sup>th</sup> Defendants were properly sued. The Plaintiffs submitted that the 1<sup>st</sup> to 4<sup>th</sup> Defendants were the officials of the Group and were sued as such. The Plaintiffs submitted that the 6<sup>th</sup> Defendant was sued in his capacity as a member and an agent or servant of the Group. The Plaintiffs submitted that all the members of the Group were liable for the acts and omissions of the Group. The Plaintiffs submitted that unincorporated entities cannot be sued in their own names. The Plaintiffs submitted that the 3<sup>rd</sup> and 6<sup>th</sup> Defendants were liable to the Plaintiffs in their personal capacities as members of the Group.
48. The Plaintiffs submitted that having established that all the Defendants were liable to the Plaintiffs in their personal capacities as members of the Group, the Plaintiffs were entitled to the reliefs sought in the plaint. The Plaintiffs submitted that it was not contested that each of the Plaintiffs entered into separate agreements of sale of land with the Group and paid for their respective parcels of land. The Plaintiffs submitted that in the said agreements of sale, the Group acknowledged receipt of the payments made by each of the Plaintiffs. The Plaintiffs submitted further that the agreements of sale had clauses providing for penalties for breaches thereof. The Plaintiffs submitted that while they were ready, able and willing to complete their part of the said agreements of sale, the Defendants failed to honour their part of the said agreements of sale. The Plaintiffs submitted that even the consent that was entered into between the Plaintiffs and the 2<sup>nd</sup> Defendant on behalf of the Defendants subsequent to the filing of the suit was not honoured.

The Plaintiffs submitted that they had proved their claims against the Defendants. The Plaintiffs submitted that the Defendants through the 2<sup>nd</sup> Defendant admitted being indebted to the Plaintiffs in the sum of Kshs. 3,095,000/- and settled the 3<sup>rd</sup> Plaintiff's claim in full. The Plaintiffs submitted that it was only fair that the claims by the other plaintiffs were also settled by the Defendants. The Plaintiffs submitted that the Defendants obtained money from the Plaintiffs through misrepresentation. The Plaintiffs submitted that the Defendants hoodwinked the Plaintiffs to pay for the parcels of land that were not owned by the Defendants and which they did not have the capacity to sell and transfer to the



Plaintiffs. The Plaintiffs submitted that the Defendants were liable for the fraud committed against the Plaintiffs. Reliance was placed on *James Moenga Nyakweba & 2 Others v. Jairo Atenya Asitiba* [2017] eKLR in support of this submission. The Plaintiffs submitted that they had proved that they were entitled to the liquidated damages pleaded in the plaint. The Plaintiffs urged the court to allow their claims as prayed in the plaint together with costs and interest.

### **The 3<sup>rd</sup> and 6<sup>th</sup> Defendants submissions**

47. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants filed submissions dated 29<sup>th</sup> November 2022. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants (hereinafter together referred to only as “the Defendants” for ease of reference) framed the following three (3) issues for determination by the court;
  - a. Whether the 3<sup>rd</sup> and 6<sup>th</sup> Defendants were guilty of breach of contract and fraud.
  - b. Whether the 3<sup>rd</sup> and 6<sup>th</sup> Defendants were liable to the Plaintiffs for the sums sought in the plaint.
  - c. Who should pay the costs of the suit?
47. On the first issue, the Defendants submitted that the case against the 3<sup>rd</sup> Defendant was anchored on the fact that she was purportedly an official and member of the Group that sold land to the Plaintiffs while the case against the 6<sup>th</sup> Defendant was based on an alleged agency relationship between him and the Group and his membership of the Group.
48. The Defendants submitted that at the time the agreements of sale between the Plaintiffs and the Group were entered into, the Group was represented by its Chairman, Henry Karanja Ngugi, Secretary, Margaret Wanjiru Ndehi and Treasurer, Florence Elizabeth Ng’ang’a. The Defendants submitted that the 3<sup>rd</sup> Defendant did not sign the agreements for sale in respect of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Plaintiffs. The Defendants submitted that a look at the agreements revealed that the signatures appearing next to the 3<sup>rd</sup> Defendant’s name had marked dissimilarity and were different from the acknowledged signatures of the 3<sup>rd</sup> Defendant which appear in other agreements at pages 19, 46 and 57 of the Plaintiffs’ bundle of documents.
49. The Defendants submitted that while the name of the 3<sup>rd</sup> was in these contested agreements, the same were signed by the 4<sup>th</sup> Defendant (See agreements at pages 25, 38, 42, 50 and 52 of the Plaintiffs’ bundle of documents) and Anthony Ikonya (the Group’s driver) (See agreements at pages 31 and 33 of the Plaintiffs’ bundle of documents). The Defendants submitted that the 3<sup>rd</sup> Defendant only signed the agreements at pages 19, 46 and 57 of the Plaintiffs’ bundle of documents. The Defendants submitted that the 3<sup>rd</sup> Defendant did not authorise anyone to sign the said agreements on her behalf and therefore, if she was being sued as an official of the Group, there was no cause of action against her in so far as these agreements were concerned.
50. The Defendants submitted that whereas the 3<sup>rd</sup> Defendant was an official of the Group at the time the transactions in question were entered into, the 3<sup>rd</sup> Defendant ceased being an official of the Group in 2010 after she was voted out of the Group in an election that was called by the Group. The Defendants submitted that the new officials of the Group who were elected during the said election, assumed the responsibility of managing the affairs of the Group including the finalisation of pending land sale transactions. The Defendants submitted that the 3<sup>rd</sup> Defendant handed over her docket to one, Boniface Muthama who became the new treasurer. The Defendants submitted that the receipts at pages 22, 30, 37, 42, 49, 59 of the Plaintiffs’ bundle of documents were not issued by the 3<sup>rd</sup> Defendant.
51. The Defendants submitted that the 3<sup>rd</sup> Defendant had nothing to do with the alleged breach of contract having ceased to be an official of the Group in 2010. The Defendants submitted that it was the



- officials of the Group who took over in 2010 who should have been sued. In support of this submission, the Defendants cited Geoffrey Ndirangu & 5 others v. Chairman of Mariakani Jua Kali Association & 2 Others [2005] eKLR and Grace Mwenda Munjuri v. Trustees of the Agricultural Society of Kenya [2014] eKLR.
52. The Defendants submitted that both PW1 and PW2 admitted that at the time they filed the suit in 2012, they did not conduct due diligence to find out who the officials of the Group were at that particular point in time and there was no evidence led by the Plaintiffs to the effect that the elected officials of the Group were not in office in 2012 when the suit was filed.
53. The Defendants submitted further that if the 3<sup>rd</sup> Defendant was to be sued in her capacity as a member of the Group, she ought to have been sued together with all other members of the Group. In support of this submission, the Defendants cited Free Pentecostal Fellowship in Kenya v. Kenya Commercial Bank [1992] eKLR and Football Kenya Federation v. Kenyan Premier League Limited & 4 Others [2015] eKLR. The Defendants submitted that they led uncontroverted evidence that the Group was formed by 12 teachers. The Defendants submitted that PW2 admitted in cross-examination that the Plaintiffs did not sue all the members of the Group. The Defendants submitted that in the circumstances, there was no basis as to why the Plaintiffs chose six members of the Group and left out the others. The Defendants submitted that failure to sue all members of the Group left the suit incompetent.
54. The Defendants submitted that the 2<sup>nd</sup> Defendant was the secretary of the Group prior to the elections and became the chairperson of the Group after the elections. The Defendants submitted that on the basis that there were changes in the Group's leadership, the Plaintiffs requested for judgment on admission against the 2<sup>nd</sup> Defendant through an application dated 20<sup>th</sup> May 2015 which was compromised by way of a consent between the Plaintiffs and the 2<sup>nd</sup> Defendant. The Defendants submitted that pursuant to that consent, the Plaintiffs were paid Kshs. 1,369,425/= by the 2<sup>nd</sup> Defendant.
55. The Defendants submitted that the 2<sup>nd</sup> Defendant admitted in her affidavit filed in court on 22<sup>nd</sup> December 2015, that she was the one who instructed her advocates to record a consent against the Group. The Defendants submitted that the said admission related only to the claim against the 2<sup>nd</sup> Defendant and that the Plaintiffs' submission that the 2<sup>nd</sup> Defendant admitted the debt on behalf of all the Defendants was frivolous.
56. With regard to the claim against the 6<sup>th</sup> Defendant, the Defendants submitted that the 6<sup>th</sup> Defendant admitted that he was a member of the Group. The Defendants submitted that if the 6<sup>th</sup> Defendant was to be sued as a member of the Group then he could only be sued together with all the other members of the Group since the Group's liability was consolidated in the entire membership. On the allegation that the 6<sup>th</sup> Defendant acted as an agent of the Group, the Defendants submitted that there was no proof that there was an agency relationship between the 6<sup>th</sup> Defendant and the Group.
57. On the allegation that the Defendants were involved in acts of fraud, the Defendants submitted that there was no evidence that the Group did not own the parcels of land in question or that the Plaintiffs were induced to purchase the same. The Defendants submitted that there was also no evidence that there was collusion between the officials of the Group or any member of the Group to hoodwink the Plaintiffs to make payment for non-existent properties. The Defendants submitted that agreements of sale between the Group and the Plaintiffs were entered into on "a willing seller- willing buyer basis" and as such the issue of fraud could not arise.
58. The Defendants submitted that there were breaches of the said agreements of sale by some of the Plaintiffs. The Defendants submitted that the 2<sup>nd</sup> Plaintiff paid the balance of the purchase price on 21<sup>st</sup>



November 2010 way after the 90 days' period stipulated in the agreement. The Defendants submitted that on his part, the 3<sup>rd</sup> Plaintiff paid Kshs. 25,000/= to an entity known as Super Macro Ventures Co. Ltd. which had no relation to the Group. The Defendants submitted that the 4<sup>th</sup> Plaintiff also paid the balance of the purchase price on 21<sup>st</sup> November 2010 long after the 90 days' period. The Defendants submitted that the 5<sup>th</sup> and 7<sup>th</sup> Plaintiffs on their part only paid Kshs. 200,000/= each instead of the full purchase price of Kshs. 490,000/= and Kshs. 460,000/= respectively. The Defendants submitted that the 7<sup>th</sup> and 8<sup>th</sup> Plaintiffs paid Kshs. 100,000/= only instead of the full purchase price of Kshs. 260,000/=.

59. The Defendants submitted that the Plaintiffs' claims against the 3<sup>rd</sup> and 6<sup>th</sup> Defendants were frivolous and should be dismissed. On the issue of costs, the Defendants submitted that the same should be awarded to the 3<sup>rd</sup> and 6<sup>th</sup> Defendants.

### Analysis and Determination

47. I have considered the pleadings, the evidence on record and the submissions filed by the parties. The 3<sup>rd</sup> Plaintiff's claim was settled in full by the 2<sup>nd</sup> Defendant. The 3<sup>rd</sup> Plaintiff has no further claim against the Defendants. The 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants did not defend the suit while the 2<sup>nd</sup> Defendant entered into a consent with the Plaintiffs in respect of the Plaintiffs' claim. The only defendants who filed a defence against the Plaintiffs' claim were the 3<sup>rd</sup> and 6<sup>th</sup> Defendants. The parties did not agree on the issues for determination by the court. In their submissions, each party framed its own set of issues on which it submitted on. From the two sets of issues framed by the parties, I would summarise the issues arising for determination in this suit as follows;

- a. Whether the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Plaintiffs have proved their claims against the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants.
- b. Whether the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Plaintiffs are entitled to the reliefs sought in the plaint against the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants.
- c. Who is liable for the costs of the suit?

### Whether the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Plaintiffs have proved their claims against the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants.

64. Several facts giving rise to this suit are not disputed. The Defendants were members of an entity known as Super Micro Ventures Self-Help Group (the Group). In *the Constitution* of the Group, it is described as "organization" whose mission was "To provide a forum to socialize in order to perpetuate friendship and develop each other socially, morally and economically". *The constitution* of the Group provided further that the members of the Group were those who subscribed to *the constitution* of the group and such other persons or organizations as the members of the Group may from time to time admit to membership. There is no evidence that the Group was registered under any law recognized in Kenya. No certificate of registration was produced in evidence. The register of members of the group was also not produced in evidence even for the initial members who subscribed to *the constitution* of the Group whom the court was told were twelve (12) in number.

65. From the foregoing, it is clear that the Group was neither a Society, a limited liability company nor a trust. The Group was merely a name that a group of people came together and gave themselves. Since the Group was not formed or registered under any law, it was not a legal entity. It therefore had no capacity to enter into any legal transactions as it was not an entity recognised in law. The parties cited several authorities on the status of groups such as the Group herein. I have also come across a number



on the same issue. In *Dennis Olooligero & 2 Others v. The Art of Ventures Limited & 2 Others*, Nairobi HCCC 1358 of 2005 [2006] eKLR which was a suit brought by persons who described themselves as members of a Community Based Organization (CBO), registered under the Ministry of Gender, Sports, Culture and Social Services, the court held that such organization had no legal capacity and proceeded to strike out the suit. The court stated that: "I am satisfied from the evidence I have considered so far, that the plaintiffs/applicants herein lack the legal capacity to commence or maintain the present proceedings, since they represent an unlawful society in law...".

66. In *Daniel K. Yego & 3 others v. Paulina Nekesa Kode* [2016] eKLR the court stated as follows;

"The above is the law as it currently exists. The *Societies Act*, it will be seen, does not contemplate Self Help Groups and does not mention them anywhere. Persons have however continued to mobilize themselves into Self Help Groups and a Ministry of the Government has been issuing registration certificates to them. Their purpose may be well intended, mostly to assist persons to come together for the purposes of community development. The intentions are no doubt noble, but it is apparent that there is a lacuna regarding their registration and legal status which has never been filled.

33. It follows that any group, and that includes the so-called Self Help Groups, which are often of more persons, and which are not registered under the *Societies Act*, or registered as other recognized units under any other statute, are unlawful groups. You cannot give legal personality to an unlawful group and one cannot be allowed to represent and agitate for rights on behalf of an unlawful group. It is in fact an offence under the *Societies Act* to do so, as I have pointed out above. It is time to call a spade a spade; I am afraid that these groups, which are often of more persons, are unlawful, and unless and until an appropriate law for their legal recognition, outside the framework of the *Societies Act* is provided, they will remain unlawful associations."

67. I do not wish to refer to the Group herein as an illegal society or unlawful association. I will treat it as just a name that the Defendants gave to their association. It was just a name and nothing more. The 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants did not deny being members of the Group. The 3<sup>rd</sup> defendant admitted that she was one of the pioneer members of the Group when it was formed in 2009. The 6<sup>th</sup> Defendant told the court that he became a member of the Group in April 2010. He paid a membership fees of Kshs. 300,000/- on 11<sup>th</sup> April 2010.

68. The Plaintiffs purchased parcels of land from the Group between 25<sup>th</sup> February 2010 and 24<sup>th</sup> December 2010. When the Plaintiffs entered into the agreements of sale with the Group in respect of the said parcels of land and made payments of the purchase price being claimed herein, all the Defendants were members of the Group. Since the Group was just a name as I have mentioned, the agreements of sale between the Plaintiffs and the Group were actually made between the Plaintiffs and the Defendants who were represented by their officials. I am in agreement with the Plaintiffs that the said agreements were enforceable against the Defendants jointly.

69. The 3<sup>rd</sup> Defendant had contended that she ceased to be a member of the Group in 2011. *The constitution* of the Group that was produced in evidence by the 3<sup>rd</sup> and 6<sup>th</sup> Defendants provided for ceasing of membership of the Group. According to clause 3.1 of the said constitution, a member could cease to be a member of the Group upon giving to the executive committee one (1) month notice in writing of his intention to cease being a member, if he is removed from the Group by a vote of not less than two-thirds (2/3) of the members of the Group at an extra-ordinary general meeting or



when a member fails to attend two consecutive meetings or fails to remit two consecutive monthly contributions without notice.

70. From the evidence on record, I have noted that the 3<sup>rd</sup> Defendant was still attending the meetings of the Group as at 25<sup>th</sup> June 2011. The 3<sup>rd</sup> Defendant did not place any evidence before the court in proof of her allegation that she ceased to be a member of the Group in 2011 after she was voted out of office. The 6<sup>th</sup> Defendant similarly claimed that he ceased to be a member of the Group in 2011. Like the 3<sup>rd</sup> Defendant, the 6<sup>th</sup> Defendant produced no evidence in support of the allegation apart from claiming that he stopped making contributions to the group. There was no evidence that he had been making contributions and of when he stopped making the payment.
71. I am of the view that even if the 3<sup>rd</sup> and 6<sup>th</sup> Defendants ceased to be members of the Group in 2011 before this suit was filed as they have claimed, the cause of action giving rise to the suit arose when they were members of the Group. They cannot therefore escape liability for the contracts that the Group entered into when they were members.
72. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants had also contended that if they were liable to the Plaintiffs as members of the Group then failure by the Plaintiffs to sue all the members of the Group was fatal to their claims. I find no merit in this contention. The Group as I have stated was not registered under any law. It was therefore not possible for the Plaintiffs to ascertain its members or officials at any particular time. As I have mentioned earlier in the judgment, the court was not furnished with a list or record of the members of the Group. The minutes that the 3<sup>rd</sup> and 6<sup>th</sup> Defendants produced in evidence to demonstrate that the Group had conducted elections and elected new officials were internal documents of the Group that were not accessible to the general public. In the circumstances, I am in agreement with the Plaintiffs that they were within their rights to sue the members and officials of the Group who they had dealt with and who were known to them. Order 1 Rule 9 of the Civil Procedure Rules provides as follows;
- “9. No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”
73. Under Order 1 Rule 9 of the Civil Procedure Rules, non-joinder and misjoinder of a party is not fatal to a suit. I am of the view that if the 3<sup>rd</sup> and 6<sup>th</sup> Defendants felt that necessary parties to the suit had not been joined to the suit, they were at liberty to seek their joinder to the suit. This court is enjoined to deal with the suit as concerns the rights and interests of the parties before it.
74. There is no dispute that the Plaintiffs entered into the agreements the particulars of which are set out in paragraph 4 of the plaint with the Group and that the Plaintiffs made payments the particulars of which are set out in paragraph 5 of the plaint to the Group. It is also not in dispute that the Group did not honour its part of the said agreements to the extent that the Plaintiffs were not issued with the titles for the properties that they purchased. It is also not disputed that the Group did not refund in full to the Plaintiffs the payments that they made on account of the purchase price and for processing of the titles for the said parcels of land. It follows that the Group kept both the money and the parcels of land sold to the Plaintiffs. It is not disputed that the Group was unable to transfer the parcels of land to the Plaintiffs for various reasons amongst them that, some parcels of land did not exist while others were not in the name of the Group.



75. In Black's Law Dictionary, 9<sup>th</sup> Edition, Page 213, breach of contract is defined as;

“a violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages.”

76. I am satisfied that the Plaintiffs have proved their case for a refund of the payments made to the Group on account of the purchase price and title processing fees for the properties that were not transferred to them. The agreements between the Plaintiffs and the Group provided for liquidated damages of 25% of the purchase price in the event of breach of the agreements. The Plaintiffs have proved that the Group is in breach of the said agreements and as such they are entitled to liquidated damages.

77. In their submissions, the 3<sup>rd</sup> and 6<sup>th</sup> Defendants contented that some of the Plaintiffs were also in breach of the said agreements of sale. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants did not file a counter-claim against the Plaintiffs. The alleged breach of the said agreements by some of the Plaintiffs was not pleaded. Submissions are not pleadings. Since issues for determination by the court arise from the pleadings, I decline the invitation by the 3<sup>rd</sup> and 6<sup>th</sup> Defendants to determine whether or not some of the Plaintiffs breached the agreements that they entered into with the Group.

**Whether the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Plaintiffs are entitled to the reliefs sought in the plaint against the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants.**

78. The Plaintiffs sought judgment for a refund of the purchase price paid by each Plaintiff inclusive of the title processing fees, liquidated damages together with interest. The Plaintiffs have also sought exemplary damages together with interest thereon and the costs of the suit. As I have already found above, the Plaintiffs have proved the claims that they have made against the Defendants. It is my finding that the Plaintiffs are entitled to the reliefs sought save for the claim for exemplary damages. In *Godfrey Julius Ndumba Mbogori & another v. Nairobi City County* [2018] eKLR, the court stated as follows:

“Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes v Barnard* [1964] AC 1129 where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are:

- i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government,
- ii) cases in which the defendants conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and
- iii) where exemplary damages are expressly authorized by statute”.

In *The Nairobi Star Publication Limited v. Elizabeth Atieno Oyoo* [2018] eKLR the Court of Appeal stated as follows:



“33. As regards exemplary damages, the same are only to be awarded in limited instances. The categories of cases in which exemplary damages should be awarded are set out, at paragraph 243 of Halsbury’s Laws of England, as follows: -

“Exemplary damages should be awarded only in cases within the following categories: -

- (1) Oppressive, arbitrary or unconstitutional action by servants of government;
- (2) Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff; or
- (3) Cases in which the payment of exemplary damages is authorized by statute.”

In *Wilfred Keli Ndolo v. Jescah Gatakaa Amboka & another* [2019] eKLR the court stated as follows:

“When it comes to assessment of exemplary damages this court is not bound to evidence such as that required in respect of general damages. All that is being asked of the court by a litigant is that it ought to take note that the conduct of the offending party is so egregious that he requires to be punished by way of an award of damages against him. Exemplary damages are at the discretion of the court.”

Guided by the above case law, I am not persuaded that the Plaintiffs have made a case for an award of exemplary damages against the Defendants. The Plaintiffs have not established the existence of the circumstances under which exemplary damages are awardable.

79. The court takes notice of the fact that following the consent judgment entered in favour of the Plaintiffs against the 2<sup>nd</sup> Defendant, the Plaintiffs have already received a sum of Kshs. 1,368,925/= on account of a refund of the purchase price paid to the Group. This is exclusive of the payments that were made to the 3<sup>rd</sup> Plaintiff who has no claim against the Defendants. The court will have to factor this payment in the final orders.

## Conclusion

80. It is the finding of the court that the Plaintiffs have proved their case against the Defendants on a balance of probabilities. The court finds further that the principal amount claimed by the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Plaintiffs together with liquidated damages amounts to Kshs. 3,068,750/=. I have found that the liquidated damages claimed by the 7<sup>th</sup> and 8<sup>th</sup> Plaintiffs were erroneous. The same should have been Kshs. 75,000/= and Kshs. 65,000/= respectively instead of the claimed amount of Kshs. 82,500/=. From the said sum of Kshs. 3,068,750/=: I will deduct a sum of Kshs. 1,368,925/= already paid to the Plaintiffs. This will leave a balance of Kshs. 1,699,825/=. Judgment is therefore entered for the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Plaintiffs against the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants jointly and severally for:

- a. Kshs. 1,699,825/= being the balance of the refund of the purchase price and liquidated damages.
- b. Interest on (a) above at court rate from the date hereof until payment in full.
- c. Costs of the suit.

**DELIVERED AND DATED AT KISUMU ON THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2023**



**S. OKONG'O**

**JUDGE**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Nzilani h/b for Mr. Nganga for the Plaintiffs

Mr. Musana h/b for Mr. Ngugi for the 3<sup>rd</sup> and 6<sup>th</sup> Defendants

