



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND COURT CASE NO. 194 OF 2015**

KENNEDY NYAKUNDI MOGAKA ..... PLAINTIFF/APPLICANT

VERSUS

ESTHER KEMUMA MOGAKA ..... 1<sup>ST</sup> DEFENDANT

ZABLON NYAMARI MOGAKA ..... 2<sup>ND</sup> DEFENDANT

KISII UNIVERSITY ..... 3<sup>RD</sup> DEFENDANT

**RULING**

1. The plaintiff by a plaint dated 28<sup>th</sup> May 2015 contends that he and the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant in or about 1993 were joint partners albeit informally where the plaintiff was a 40% shareholder, the 1<sup>st</sup> defendant 20% shareholder and the 2<sup>nd</sup> defendant 40% shareholder. The plaintiff claims as partners and in the aforesated shareholding ratios they carried on business and on 9<sup>th</sup> August 1995 they incorporated the company **Ouru Discount Centre Limited** where they subscribed shares in the aforesated ratios. The plaintiff states that between 1993 and 2003 when they operated as partners they acquired various properties out of the business proceeds and some of the properties were registered in the names of the plaintiff, the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant and others in the name of the company Ouru Discount Centre Limited. It is the plaintiff's contention that all the properties so purchased/acquired were intended to be held by the person registered in trust for themselves and the other partners in the aforesated shares. The plaintiff thus claims declarations of trust in regard to the various properties registered either in the name of the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant to the extent of 40% share in his favour.
2. Simultaneously with the plaint the plaintiff filed a Notice of Motion application expressed to be brought under sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act and Order 40 Rule 1 (a) and Order 50 Rule 1 of the Civil Procedure Rules and seeks the following substantive orders:-
  - i. **That the honourable court be pleased to issue an order of temporary injunction to restrain the defendant jointly and severally, from selling, disposing, transferring and/or in any manner dealing with parcel of land, LR Number Kisii Municipality/Block III/334 pending the hearing and determination of the suit.**
  - ii. **That the honourable court be pleased to issue an order of temporary injunction to restrain the defendants jointly and severally, from, selling, disposing, transferring and/or in any manner dealing with the parcels of land, LR Numbers, Kisii Municipality/Block II/3, Kisii Municipality/Block II/4, Kisii Municipality/Block II/5, Kisii Municipality/Block II/6, Kisii**

**Municipality/Block I/820, Kisii Municipality/Block II/124, Kisii Municipality /Block II/124, Kisii Municipality/Block II/358 and Kisii Municipality/Block III/359 pending the hearing and determination of the suit.**

3. The plaintiff's application is premised on the grounds set out on the face of the application and in the supporting affidavit sworn by **Kennedy Nyakundi Mogaka** the plaintiff herein on 28<sup>th</sup> May 2015 and the further affidavit sworn on 7<sup>th</sup> July 2015 in response to the 1<sup>st</sup> and 2<sup>nd</sup> defendants replying affidavits. The 1<sup>st</sup> and 2<sup>nd</sup> defendants in opposition to the plaintiff's application filed a statement of grounds of opposition dated 3<sup>rd</sup> June 2015 and a replying affidavit sworn by **Esther Kemuma Mogaka** the 1<sup>st</sup> defendant on 16<sup>th</sup> June 2015. The 3<sup>rd</sup> defendant filed grounds of opposition dated 16<sup>th</sup> June 2015.
4. The facts in support of the plaintiff's case are set out in the plaint and in support of the instant application for a temporary injunction are set out in the supporting affidavit and the further affidavit aforementioned. It is the plaintiff's case that, he and his brother, **Zablon Mogaka**, the 2<sup>nd</sup> defendant and his said brother's wife, Esther Kemuma Mogaka the 1<sup>st</sup> defendant were as from 1993 operating an informal partnership where the plaintiff and his brother each held 40% share of the partnership business while the 1<sup>st</sup> defendant held 20% share of the business. The plaintiff avers that on 9<sup>th</sup> August 1995 the parties to the informal partnership incorporated a company **Ouru Discount Centre Limited** and he subscribed for shares in the company in the same proportion with the plaintiff and the 2<sup>nd</sup> defendant taking 40% share each while the 1<sup>st</sup> defendant took 20% share. The plaintiff further avers that between 1993 and 2003 the 1<sup>st</sup> and 2<sup>nd</sup> defendants and himself had agreed to invest part of their dividends and profits out of the business in the purchase, acquisition and development of real property. The plaintiff states that the properties itemized under paragraph 9 of the supporting affidavit and which comprise some of the properties in respect of which the plaintiff seeks a temporary injunction in terms of the prayers set out in the Notice of Motion and set out earlier in this ruling are the properties which were purchased, acquired and developed as explained in paragraphs 7 and 8 of the supporting affidavit. In consequence the plaintiff claims that although the properties were individually registered in the parties respective names it was mutually understood and agreed between the parties that notwithstanding such registration every individual was to hold the property in trust for the other parties in the aforesaid shares.
5. The plaintiff states that they ceased carrying out business jointly in 2003 and Ouru Discount Centre Limited ceased being a joint venture business vehicle. The parties from 2003 established their separate business with the 1<sup>st</sup> and 2<sup>nd</sup> defendant incorporating Ouru Power Limited as their business vehicle and the plaintiff with other shareholders incorporating Ouru Superstores Limited. The plaintiff avers the company Ouru Discount Centre Limited was not wound up but was left to only deal with the management of some of the properties under the agency of the 2<sup>nd</sup> defendant.
6. The plaintiff asserts that in spite of ceasing to carry on business jointly the parties acknowledged and regarded the property they had acquired before the separation as joint property held by the parties in the agreed shares such that the parties continued to share the rental accruals in the aforesaid shares and in the event of any sale the proceeds of sale were shared proportionately as per the share holding. The plaintiff by way of illustration states that when land parcels **Nyaribari Chache/B/B/Boburia/5298** and **Kisii Municipality/Block II/78** were sold the proceeds of sale were distributed in accordance with the shareholding. The plaintiff states that land parcels **Kisii Municipality/Block II/3, 4, 5 and 6** were developed jointly and are possessed jointly with the 1<sup>st</sup> and 2<sup>nd</sup> defendant having joint possession of the ground and mezzanine floors while the plaintiff possesses the basement. The uppermost floor is leased to Maasai Mara University though the 1<sup>st</sup> and 2<sup>nd</sup> defendant have failed and/or neglected to account for the accruing rent. The plaintiff maintains land parcels **Nyaribari Chache/B/B/ Boburia/4025 and 4026** inclusive of land parcel **Kisii Municipality /Block III/334** were developed jointly and the incomes therefrom have always been accounted and distributed to all the partners, including the plaintiff.
7. The plaintiff states there has been a desire to sever the ownership of the properties over a long period which however have been inconclusive meaning the properties have continued to be jointly held in shareholding ratios aforementioned. The plaintiff avers that the value of affected

properties presently is likely to be about one billion Kenya shillings (**Kshs. 1,000,000,000/=**). The plaintiff states that in early 2014 he and his brother, the 2<sup>nd</sup> defendant communicated and renewed their resolve to sell the parcels of land and in particular land parcel **Kisii Municipality/Block III/334** and in this regard the 1<sup>st</sup> and 2<sup>nd</sup> defendants responded to a tender advertisement by the 3<sup>rd</sup> defendant of 12<sup>th</sup> June 2014 whereby the 3<sup>rd</sup> defendant sought submission of sale by tender of developed land in Kisii town central business district. The 1<sup>st</sup> and 2<sup>nd</sup> defendant offered to sell land parcel **Kisii Municipality/Block III/334** for kshs. 340,000,000/=. The plaintiff states that he has learnt that the 3<sup>rd</sup> defendant awarded to the 1<sup>st</sup> and 2<sup>nd</sup> defendants the tender to purchase the property but the 1<sup>st</sup> and 2<sup>nd</sup> defendants have kept the fact of the intended sale to the 3<sup>rd</sup> defendant a guarded secret.

8. The plaintiff avers that he is apprehensive that 1<sup>st</sup> and 2<sup>nd</sup> defendants are intent on selling the parcel of land and to keep the entire sale proceeds without accounting to him the share due to him. The plaintiff contends that the 1<sup>st</sup> and 2<sup>nd</sup> defendants in offering the parcel of land for sale are acting unilaterally without considering the plaintiff has an interest in the parcel of land and that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have not given any guarantee securing the plaintiff's interest in the property. The plaintiff thus seeks an order of temporary injunction to restrain the defendants from in any manner dealing with the identified parcels of land pending the hearing and determination of the suit.
9. The 1<sup>st</sup> and 2<sup>nd</sup> defendants in their filed statement of grounds of opposition inter alia state as follows:-
  - i. **The instant Notice of Motion application pre-mature, misconceived, incompetent and otherwise legally untenable.**
  - ii. **The properties which are the basis of the instant suit are lawfully and legitimately registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents and hence the said defendants are seized and/or possessed of absolute rights, to use, abuse and/or dispose of the same, without the intervention of the plaintiff.**
  - iii. **In any event, the 1<sup>st</sup> and 2<sup>nd</sup> defendants' rights over the properties registered in their names is sanctified and vindicated vide the provisions of sections 23,24 and 25 of the Land Registration Act No. 3 of 2012 and an order of temporary injunction shall defeat and/or negate such statutory rights.**
  - iv. **The plaintiff has not satisfied the requisite conditions to warrant granting the orders of temporary injunction.**
  - v. **The plaintiff is guilty of concealment, misrepresentation and suppression of material facts, including but not limited to alleged acquisition of properties prior to conception, formation and incorporation of Ouru Discount Centre Limited and thus the plaintiff cannot be entitled to the discretion of the court.**
10. The 1<sup>st</sup> defendant in her replying affidavit sworn on 16<sup>th</sup> June, 2015 depones that Ouru Discount Centre Limited was incorporated on 9<sup>th</sup> August 1995 and that she subscribed 1000 shares while the plaintiff and the 2<sup>nd</sup> defendant subscribed 3,000 shares each as per the copy of the Memorandum of Association of the company annexed and marked "**EKM2**". The 1<sup>st</sup> defendant avers that the profits/income generated by the company in its trading activities were shared out and/or distributed in accordance with the shareholding ratios. It is the 1<sup>st</sup> defendant's position that the directors/shareholders were each at liberty to invest their incomes in their own separate business ventures and/or to acquire their individual separate assets and/or properties.
11. The 1<sup>st</sup> defendant states that the assets that were acquired by the company such as **LR No. Kisii Municipality/Block II/78** were registered in its name and other assets acquired by the individual directors/shareholders directly belonged to the individual directors/shareholders and were not joint property. The 1<sup>st</sup> defendant averred that the plaintiff was removed as a director of Ouru Discount Centre Ltd on 20<sup>th</sup> August 2004 and the removal was effected at the Registrar of companies office on 23<sup>rd</sup> August 2004 as evidenced by the annexures marked "**EKM 3(a) and (b)**". The 1<sup>st</sup> defendant further depones that prior to the exit of the plaintiff as a director of **Ouru Discount**

- Centre Limited** the company sold and transferred various assets as set out in annexure “**EKM4**” valued at kshs. 44,900,000/= and the mutual agreement was that the plaintiff was not to pay for the assets but rather the same was to be taken as representing a payout of his equity in the company. It is therefore the defendants’ position that as from 1<sup>st</sup> January 2004 the plaintiff ceased to have any interest whatsoever in Ouru Discount Centre Limited.
12. The 1<sup>st</sup> defendant further deposes that the only property that was acquired by the company being LR No. **Kisii Municipality/Block 1/78** was sold to Ouru superstores Ltd, a company exclusively associated to the plaintiff as per agreement dated 27<sup>th</sup> October 2007 annexed and marked “**EKM5**”. She further deposes that the plaintiff and 2<sup>nd</sup> defendant jointly owned land parcel LR No. **Nyaribari Chache/B/B/Boburia/5298** which they sold on the 17<sup>th</sup> October 2007 as per the agreement of sale annexed and marked “**EKM7**”. The 1<sup>st</sup> defendant further states that in addition to the property acquired by the company and/or jointly by the parties, she and the 2<sup>nd</sup> defendant acquired separate properties in their individual names.
13. The 1<sup>st</sup> defendant avers that she individually acquired land parcel LR No. **Kisii Municipality/Block III/334** from one **Isaac Atandi Machuka** on 22<sup>nd</sup> September 1993 and the land parcel was transferred to her on 4<sup>th</sup> October 1993 and a certificate of lease issued in her favour (see transfer of lease and certificate of lease marked **EKM 8(a) and (b) respectively**). The 1<sup>st</sup> defendant deposes that she acquired land parcel LR No. **Kisii Municipality/Block III/334** before Ouru Discount Centre Limited was incorporated and hence the company could not have participated and/or been involved in the purchase of property. The 1<sup>st</sup> defendant states that upon acquisition of land parcel **Kisii Municipality/Block III/334** she commenced the development of the plot and ultimately constructed a multi-storey building known as Uhuru Plaza. The 1<sup>st</sup> defendant avers she used her resources including savings she had accumulated when she was working in the United States of America (USA) and further obtained banking facilities from various financial and banking institutions to undertake the development and denies that either the plaintiff or Ouru Discount Centre Limited contributed to the purchase or the development of the property.
14. The 1<sup>st</sup> defendant further stated she acquired other properties namely LR Nos. **Kisii Municipality/Block III/358** and **359** in her name and denies that these properties were acquired in the manner alluded to by the plaintiff asserting that the two properties together with LR No. **Kisii Municipality/Block III/334** exclusively belong to her and are owned by her. The 1<sup>st</sup> defendant however states that on or about 3<sup>rd</sup> January, 2002 the directors of Ouru Discount Centre Limited entered into negotiations with her with a view to have land parcel LR No. **Kisii Municipality/Block III/334** transferred to the company and a transfer was in fact executed (“**EKM3**”) but a dispute regarding the consideration payable by the company for the plot to her arose leading to the collapse of the intended transfer. The 1<sup>st</sup> defendant further asserts that she has had to single handedly defend her ownership of the property LR **Kisii Municipality/Block III/334** when the Kenya Anti-Corruption Commission sought to repossess the property and to cancel the 1<sup>st</sup> defendant’s title and all that time the plaintiff did not stake any claim to the property. The 1<sup>st</sup> defendant states that the plaintiff’s interest in the land parcel LR No. **Kisii Municipality/ Block III/334** was awakened after her tender to sell the property to the 3<sup>rd</sup> defendant was accepted and the 3<sup>rd</sup> defendant agreed to purchase her property for kshs. 340,000,000 while the plaintiff’s tender to sell his own property to the 3<sup>rd</sup> defendant was not accepted. The 1<sup>st</sup> defendant asserts that the plaintiff has no discernable interest in the property **Kisii Municipality/Block III/334** and is merely intent on frustrating the 1<sup>st</sup> defendant’s intended transaction with the 3<sup>rd</sup> defendant.
15. The plaintiff in response to the 1<sup>st</sup> and 2<sup>nd</sup> defendants’ response in their replying affidavits filed a bulky further affidavit running to 67 paragraphs sworn on 7<sup>th</sup> July 2015. The plaintiff in the further affidavit sought to refute the averments by the defendants that he did not contribute towards the purchase and development notably of land parcel **Kisii Municipality/Block III/334**. The plaintiff reiterates that this particular property was developed with funds from Ouru Discount Centre Limited and was at all times regarded and treated as joint property of the plaintiff and the

1<sup>st</sup> and 2<sup>nd</sup> defendants. The plaintiff maintains that the land parcels **Kisii Municipality/Block III/358** and **359** registered in the name of the 1<sup>st</sup> defendant were acquired by the 1<sup>st</sup> defendant for and on behalf of the three of them and that the 1<sup>st</sup> defendant was only registered as legal owner in trust for the three of them. The plaintiff averred that as proof of joint ownership of the properties registered in individual name is the fact that the rent accrued was being shared proportionately between the parties and/or applied to service the business banking facilities including overdraft at the Kenya Commercial Bank.

16. The plaintiff/applicant and the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents filed written submissions to canvass the plaintiff's application dated 28<sup>th</sup> May 2015. The plaintiff's submissions dated 28<sup>th</sup> August 2015 were filed on 31<sup>st</sup> August 2015 and the 1<sup>st</sup> and 2<sup>nd</sup> respondents submissions dated 2<sup>nd</sup> October 2015 were filed on 5<sup>th</sup> October 2015. The 3<sup>rd</sup> defendant/respondent filed its submissions dated 25<sup>th</sup> November 2015 on 27<sup>th</sup> November 2015. I have reviewed the pleadings, the plaintiff's Notice of Motion application together with the affidavits sworn in support and in opposition with the annexures and the parties submissions and the issue for determination at this point is whether the plaintiff has demonstrated a prima facie case with a probability of success to warrant the court to grant a temporary order of injunction as prayed. In other words the issue is whether the plaintiff has satisfied the threshold and/or conditions upon which an injunction may be granted as laid down in the leading case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A 358** where the court established the conditions to be satisfied as follows:-

- i. **An applicant must demonstrate a prima facie case with a probability of success.**
- ii. **An applicant must show that unless the injunction is granted he/she stands to suffer irreparable damage that cannot be compensated for by an award in damages; and**
- iii. **In case the court is in doubt in regard to any of the above conditions, it may determine the application by considering the balance of convenience taking into account all the circumstances.**

17. In the instant case it is not disputed that the plaintiff and the 2<sup>nd</sup> defendant are brothers and that in the early 1990s they were carrying on business jointly before incorporating the 1<sup>st</sup> defendant, who is the wife of the 2<sup>nd</sup> defendant in the business as a partner. There appears to be agreement that in the business, the plaintiff and the 2<sup>nd</sup> defendant each held 40% shares while the 1<sup>st</sup> defendant held 20% share. This was the position at the time they incorporated their flagship company Ouru Discount Centre Limited on 9<sup>th</sup> August, 1995. The parties are agreed that the joint business agreement continued upto 2003 when the plaintiff ceased to carry on the joint business with the 1<sup>st</sup> and 2<sup>nd</sup> defendants preferring to start his own business. It is the investments and the properties acquired by the joint proprietors of the business either in the name of the company that they incorporated and/or in their individual capacities that is the subject of contest in this case.

18. The plaintiff insists the acquisitions and development of the various assets either in the individual names of the parties or the company was done for the joint benefit of all the parties and the shareholding was to be as mutually agreed between the parties. The 1<sup>st</sup> and 2<sup>nd</sup> defendants are of a different view arguing that each individual was at liberty to invest independently and maintain that is what happened insisting the plaintiff has no interest whatsoever in the properties that are registered in the individual names of the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The 1<sup>st</sup> and 2<sup>nd</sup> defendants aptly set up the provisions of section 24, 25 and 26 of the **Land Registration Act, 2012** and submit they hold title to the parcels of land which are absolute and indefeasible under the provisions of the law. The plaintiff for his part asserts that the 1<sup>st</sup> and 2<sup>nd</sup> defendants hold the titles in trust for him to the extent of 40% beneficial ownership in his favour. In the plaint the plaintiff has sought declarations of trust in regard to land parcels **Kisii Municipality/Block III/334**, **Kisii Municipality Block III/358** and **359** all registered in the name of the 1<sup>st</sup> defendant and has further sought declarations of trust that the 2<sup>nd</sup> defendant holds land parcels **Kisii Municipality/Block II/3, 4, 5** and **6** and **Kisii Municipality/ Block II/124** all registered in the name of the 2<sup>nd</sup> defendant to the extent of 40% beneficial ownership in favour of the plaintiff.

19. The dispute as to whether or not the 1<sup>st</sup> and 2<sup>nd</sup> defendants hold the various properties in trust for

themselves and the plaintiff is highly contested. The issues and facts are disputed and the court cannot at this interlocutory stage make any definite findings without hearing the evidence and the parties and their witnesses being subjected to cross examination to test the veracity of the evidence. Whether or not the 1<sup>st</sup> and 2<sup>nd</sup> defendants hold the said properties in trust for the plaintiff is a matter of evidence and that can only be determined after hearing the evidence at the trial.

20. Considering the totality of all the evidence and material placed before the court at this stage I cannot say the plaintiff's case is frivolous, vexatious and/or hopeless so as to be unsustainable. While I do not hold that the plaintiff has demonstrated a prima facie case with a probability of success in view of the highly contested nature of the dispute, I nonetheless, I am of the view that the plaintiff has shown he has an arguable case. Although the 1<sup>st</sup> and 2<sup>nd</sup> defendant places reliance on Sections 24, 25 and 26 of **Land Registration Act, 2012** and contend that their titles are absolute and indefeasible, the rights of a proprietor conferred by registration are curtailed and are subject to the limitation under Section 25 (2) and the overriding rights set out under Section 28 of the Act. Section 25 of the Act provides:-

**25(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –**

- a. **To the leases, charges and other encumbrances and to the conditions and restrictions, if any shown in the register; and**
  - b. **To such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.**
2. **Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.**

21. Section 28 (b) lists “**trusts including customary trusts**” to be an overriding interest affecting land and which does not require noting in the register. The plaintiff in the present suit pleads trust and it will be his burden to prove the same at the trial. Where in a case such as the present one where the issues are highly disputed and contested, the court has a duty to preserve and/or conserve the subject matter of the suit until the case is determined so that at the conclusion of the case no party is unduly prejudiced by the dissipation or the disappearance of the subject matter. In the instant case other than the revelation that land parcel **Kisii Municipality/Block III/334** was the subject of an intended sale to the 3<sup>rd</sup> defendant following the acceptance of a tender to sell the property by the 3<sup>rd</sup> defendant, there is no indication that the other properties mentioned in this suit are under any threat of sale or being transferred out. It is noteworthy that the status of the properties has remained the same since 2003 when the parties ceased to carry on joint business. As I have understood it, the plaintiff is not opposed to the sale of land parcel **Kisii Municipality/Block III/334** to the 3<sup>rd</sup> defendant. His complaint is that the 1<sup>st</sup> and 2<sup>nd</sup> defendant have not committed that they will account 40% of the sale proceeds to the plaintiff being what he claims to be his share of ownership of the property. The 1<sup>st</sup> and 2<sup>nd</sup> defendants do not admit the plaintiff is entitled to such share as they claim he has no ownership interest in the property at all. Hence the stalemate.

22. Since all the parties are agreed that land parcel **LR No. Kisii Municipality/Block III/334** may be sold I see no reason to restrain its sale to the 3<sup>rd</sup> defendant as per the accepted sale tender offer at kshs. 340,000,000/= and/or to any other party at the current market value. As the plaintiff claims a stake in its ownership limited to 40% share I would in sanctioning the sale of the property direct that 40% of the sale proceeds be not disbursed or released to the plaintiff and/or any of the other parties but that the same be invested in an interest earning account in a reputable bank to be agreed upon by the parties in the joint names of the plaintiff's and the 1<sup>st</sup> and 2<sup>nd</sup> defendants advocates pending the hearing and determination of the suit. In view of the fact that the plaintiff does not

contest ownership of 60% of the property by the 1<sup>st</sup> and 2<sup>nd</sup> defendants either jointly or severally my direction is that in the event of sale of the property, the 60% share of the sale proceeds shall be disbursed and released to the 1<sup>st</sup> and 2<sup>nd</sup> defendants as per their direction. In respect of the other properties made subject to this application, I direct that the status quo obtaining presently in regard to the properties be maintained until the suit is heard and determined.

23. The 3<sup>rd</sup> defendant objected to the plaintiff's application and filed grounds of objection dated 16<sup>th</sup> June 2015 and written submissions as aforesaid. The 3<sup>rd</sup> defendant states that no agreement for purchase of land parcel **LR No. Kisii Municipality/ Block III/334** has been executed by the 3<sup>rd</sup> defendant. The 3<sup>rd</sup> defendant contends that the suit discloses no reasonable cause of action against it and in its defence filed herein avers that the plaintiff's suit against it is misconceived, misplaced and an abuse of the due process of the court. The plaintiff in the plaint apart from averring the 1<sup>st</sup> and 2<sup>nd</sup> defendants intend to sell land parcel number **LR Kisii Municipality/Block III/334** to the 3<sup>rd</sup> defendant do not attribute any wrongdoing to the 3<sup>rd</sup> defendant and does not in fact seek any relief against the 3<sup>rd</sup> defendant and it is unclear for what reason the 3<sup>rd</sup> defendant was enjoined in the suit. Having reviewed the pleadings I am not satisfied that the 3<sup>rd</sup> defendant is a necessary party in these proceedings or that its presence is necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit. I find this a proper and fitting case for the court to in terms of **Order 1 Rule 10 (2)** to exercise its discretion **suo moto** to order the 3<sup>rd</sup> defendant's name struck out of the suit so that the suit proceeds only against the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The 3<sup>rd</sup> defendant is not a necessary party in the suit and its presence merely serves to confuse the issues that need to be determined.

24. Order 1 Rule 10 (2) provides:-

**10(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court is necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit be added.**

25. In my view the 3<sup>rd</sup> defendant was improperly joined as a defendant and its presence is unnecessary to enable the court to adjudicate the issues arising in the suit. I accordingly strike out the name of Kisii University named as the 3<sup>rd</sup> defendant in the suit and award the costs of the suit to the 3<sup>rd</sup> defendant to be agreed with the plaintiff failing agreement to be taxed by the taxing master of the court.

26. In the result and flowing from my ruling above I make the following orders:-

- 1. The 1<sup>st</sup> and 2<sup>nd</sup> defendants are hereby permitted to proceed with the intended sale of property LR No. Kisii Municipality/Block III/334 to Kisii University at the agreed price of kshs. 340,000,000/= and/or with any other party at the current market value and upon such sale being completed to have 40% of the net proceeds invested in a joint interest earning account in a reputable bank in the joint names of the plaintiff's and the 1<sup>st</sup> and 2<sup>nd</sup> defendants advocates pending the hearing and determination of the suit.**
- 2. Upon the completion of the sale of the property as in (1) above 60% of the net sale proceeds to be disbursed/released to the 1<sup>st</sup> and 2<sup>nd</sup> defendants as per their direction.**
- 3. The parties shall maintain and observe the status quo in regard to all the other properties which are the subject of this suit pending the hearing and determination of the suit.**
- 4. The 3<sup>rd</sup> defendant's name Kisii University be and is hereby struck out from these proceedings with costs of the suit to be agreed, and if not agreed, to be taxed by the taxing master of the court.**
- 5. The costs of the application shall be in the cause.**

**Ruling dated, signed and delivered at Kisii this 26<sup>th</sup> day of February, 2016.**

**J. M MUTUNGI**

**JUDGE**

**In the presence of:**

..... for the plaintiff

..... for the 1<sup>st</sup> defendant

..... for the 2<sup>nd</sup> defendant

**J. M. MUTUNGI**

**JUDGE**