



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 36 OF 2011**

**GRACE SAMBA AND 27 OTHERS .....PLAINTIFFS**

**VERSUS**

**CHRISTINE NYAMALWA .....DEFENDANT**

**RULING**

**INTRODUCTION**

**The suit**

1. This suit was filed on the 4<sup>th</sup> March 2011 by Grace Samba on behalf of herself and 27 others alleged purchasers of plots on the suit property seeking specific reliefs as follows:

*“a) A permanent injunction restraining the defendant her servants and or agents or otherwise howsoever from illegally subdividing and or selling all that piece of property situate in Utange Bamburi known as Plot No. 362/II/MN (“the suit property”) and from disposing, of or alienating, transferring, registering,, and or to any person other than the plaintiffs herein. (sic)*

*b) An order that the defendant do comply with the terms of the agreements by facilitating the issuance of title deeds to the plaintiffs.*

*c) Costs of the suit.*

*d) Any other relief this Honourable Court may deem fit to grant.”*

**The Defence**

2. In her defence the defendant denied fraud but admitted that some of the plaintiffs bought portions of the land subject to more money being paid once subdivision was done; that the agreements for sale before the issuance of title on 26<sup>th</sup> March 2009 was null and void as the defendant had no legal capacity to sell before that date; that the defendant rescinded the agreements when the plaintiffs declined to add more money upon subdivision indicating that the plaintiffs were not interested to purchase the property and the defendant had a right to sell the property as she deemed necessary; that plaintiffs Nos. 12, 15, 16, 25 and 28 had sold their portions of land and they consequently have no interest in the property; that the

plaintiffs' loss was limited to monies paid which could be refunded at any time; that the subdivision of Plot No. 362/II/MN had already been concluded and subdivision certificate issued and registered against the title and all the subdivisions had been sold to purchasers for value without notice and there was no property known as 362/II/MN upon which an injunction could issue; and that the suit had been overtaken by events and in any event it was only Plaintiffs 5, 8, 10, 11, 18 and 23 who were in occupation of their respective plots. It was, therefore, contended that the suit did not disclose any interest in respect of the suit property to warrant issuance of the orders sought.

### **Reply to Defence**

3. In reply to the defence, the plaintiffs contended that the effective date of the agreement to contract was 25<sup>th</sup> July 2005 when the court declared that the defendant had become entitled to be the beneficial owner by virtue of adverse possession and entitled to be registered owner of Plot No. 362/II/MN and that the order was gazetted as Gazette No. 2207 on 24<sup>th</sup> March 2006 giving the defendant all powers and rights over sale of the plot and that pursuant to the gazette notice the plaintiffs bought portions of land making all agreements valid and enforceable; that rescission upon failure to add money on subdivision of the plot was invalid; that the interest acquired by the alleged bona fide purchasers for value was subject to the injunction sought; that the reselling of the plots after the agreement with the plaintiffs amounts to fraud as the plaintiffs and legal rights under the agreements; and the plaintiffs joined issue with the defendants on the question of occupation of the land and sale by some of the plaintiffs of their respective portions.

### **Withdrawal of cases**

4. Subsequently, by a consent dated 27<sup>th</sup> July 2011, the suits by Plaintiffs 5, 10, 11, 12, 14, 15, 17, 18, 19, 22, 23, and 27 were withdrawn with no order as to costs.

### **THE APPLICATION BEFORE THE COURT**

5. By a Notice of Motion dated 2<sup>nd</sup> February 2012, the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs sought specific Orders as follows:

1. *This Application be certified as urgent and be heard ex-parte in the first instance.*
2. *Pending the inter-parties hearing of this Application the Defendant/Respondent by herself, servants, agent, purchasers or otherwise however be restrained from illegally subdividing and/or selling all that piece of property situate in **UTANGE BAMBURI** known as **PLOTS NO. 12076/II/MN, 12077/II/MN, 12078/II/MN, 12079/II/MN, 12080/II/MN, 12081/II/MN, 12083/II/MN and all other plots emanating from the subdivision of Original 362/MN/II** (the suit property) and from disposing off, alienating, transferring, registering, constructing on, demolishing or otherwise dealing with the said property otherwise by doing it in favour of the Plaintiff/Applicant.*
3. *Pending the hearing and determination of this suit the Defendant/Respondent by herself, servants, agent, purchasers or otherwise howsoever be restrained from illegally subdividing and/or selling all that piece of property situate in **UTANGE BAMBURI** known as **PLOTS NO. 12076/II/MN, 12077/II/MN, 12078/II/MN, 12079/II/MN, 12080/II/MN, 12081/II/MN, 12083/II/MN and all other plots emanating from the subdivision of Original 362/MN/II** (the suit property) and from disposing off, alienating, transferring, registering, constructing on, demolishing or otherwise dealing with the property otherwise by doing in it in favour of the Plaintiff/Applicant.*
4. *That costs of this application be provided for.*

6. The application was based on grounds set out in the applications as follows:

**(a) THAT** the Plaintiffs/Applicants purchased the piece of land jointly from the Defendant/Respondent and were apportioned each of them a Plot or several plots, the 3<sup>rd</sup> Plaintiff/Applicant was allocated Plot No. 14, 15, 16 and 17 of 362/II/MN, now referred to as **PLOTS NO. 12076/II/MN and 12077/II/MN**, while the 2<sup>nd</sup> Plaintiff/Applicant was apportioned Plot No. 19 and 20 of 362/II/MN, now referred to as **Plots No. 12078/II/MN and 12079/II/MN**.

**(b) THAT** the Defendant/respondent in total breach of a court order dated 9<sup>th</sup> day of **March, 2010** has gone ahead and sold the said **parcel No. 362/II/MN** to other parties and the same has now been altered through sub-division and change of user.

**(c) THAT** the Defendant/Respondent prior to the Court Order had executed Sale Agreements for land without title and discharge by performance agreement in respect of portions on **ORIGINAL 362/MN/II** for all Plaintiffs/Applicants herein including the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiff/Applicant.

**(d) THAT** despite the existence of agreements of sale and payments in full by all Plaintiffs/Applicants including the 3<sup>rd</sup> Plaintiff/Applicant, the defendant/Respondent delayed issuance of title.

**(e) THAT** as a result of (a) above, the land parcel value appreciated drastically and the defendant/Respondent proceeded to re-sell the property to other individuals illegally, as she was no longer the owner of the land parcel.

**(f) THAT** as a result of the illegal sale a third party has come to construct on the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs/Applicant's Plots illegally warranting this application under certificate.

**(g) THAT** as a result of the Defendant's/Respondent's contemptuous actions, the right to ownership of property by the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiff/Applicant is now threatened and unless restrained by this Honourable Court, these contemptuous actions will continue at the peril of the Plaintiffs/Applicants and in total disregard of the court process as well as the integrity of this Honourable Court.

**(h) THAT** the current illegal purchasers are dealing in the said property claiming that the order covered a non-existent parcel of land, there is need to address this misconception and illegality.”

7. The application was supported by the affidavit of Margaret Ningala and William Kombe both sworn on 2<sup>nd</sup> February 2012. As highlighted in the grounds of the application, the case for the applicants is set out in the supporting affidavits of the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs/applicants of 2<sup>nd</sup> February 2012, that they purchased subplots of land, respectively 2 and 4 sub-plots, of the parcel of land No. 362/II/MN by sale agreements in the year 2004 and subsequent full payment in the year 2005. Subsequently, the defendant had concluded the subdivision and sold the plots with new registration numbers to third parties. The third parties had commenced construction on the plots and threatened to evict the plaintiffs from the parcels of land, alleging that they were bona fide purchasers of the plots. The applicants contended that the sale to third parties of the sub-plots was illegal and fraudulent as they had already purchase the plots from the defendant. Photographs of various developments on the parcels of land were exhibited to the affidavits. Both plaintiffs urged the court “*that in the light of the fact that the matter is before this Honourable Court and that there is a court order to preserve the status quo, I pray this Honourable Court to bar the construction taking place on my parcel of land until the issues are resolved by the Court.*”

8. The application was opposed. In response the defendant filed a Replying Affidavit on 7<sup>th</sup> March 2012 and a Supplementary Affidavit on 31<sup>st</sup> May 2012. It was the defendant's case that she only became the registered owner of the suit property on 26<sup>th</sup> March 2009 and therefore lacked legal capacity to offer for sale the said property in 2004. Any agreement prior to her obtaining a title was said to have been a nullity. In any event, an agreement for sale of the suit land at the time, being agricultural land prior to the change of user granted on 17<sup>th</sup> June 2010, would have been subject to the consent of the Land Control

Board, and in the absence of such consent, the plaintiffs' claim to the suit land ought to fail. Moreover, based on the agreements in question, time had lapsed for obtaining Land Control Board consent in 2005.

9. This application was further opposed as being *sub judice* for the reason that there are two other pending applications dated 3<sup>rd</sup> March 2011 and 6<sup>th</sup> July 2011 in the file seeking the same orders sought herein, and the court was urged to strike out the application. It was argued also that the said suit plots had since been legally sold and transferred to third parties who are purchasers for value without notice. The defendant stated that in the circumstances, the only remedy due to the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs was for a refund of their deposit, which the defendant was willing to oblige, subject to limitation of time, as the claim of specific performance had been overtaken by events.

### **THE ISSUE FOR DETERMINATION**

10. The issue for determination is whether the Court will, pending hearing and determination of the suit, grant an interlocutory injunction to restrain dealings with parcels of land created by subdivision of a parcel of land in which the plaintiffs had purchased sub-plots before the resale of the same to third parties who had commenced development of the said plots. In determining this issue, the court will consider questions of the effect of lack of consent on transactions for sale of agricultural land; when the authority of an adverse possessor to dispose of the suit property crystallizes; and whether orders may be issued to bind third parties who have acquired interests in the suit property but who have not been joined as parties in the suit.

11. The issue whether the defendant was in breach of an order of the court of 4<sup>th</sup> March 2011 in respect of plot 362/II/MN and whether the said parcel of land existed at the time of the court order is a matter for the determination upon full hearing of the suit in consideration of the reliefs, if any, to be granted in the Judgment. A determination on it, however, does not affect the case that the plaintiffs presented to court as a basis for the reliefs sought in the Plaint, that is to say, the merit, or lack of it, of the plaintiffs' case as regards the questions whether the sale transactions had applicable consent of the Land Control Board; whether the defendant had at the time of the agreement of sale to the plaintiffs become entitled, by declaration as owner thereof by adverse possession, to dispose the suit property; and the impact of the failure to join the third parties who had acquired the parcels of land - sub-divisions of the suit property – which the applicants had previously purchased, with or without notice of the plaintiffs' interest therein.

12. The breach by the defendant of the interim order, or otherwise, even if proved, cannot strengthen or weaken the plaintiffs' case as set out in the Plaint, which is what the court must consider at this interlocutory stage in granting or withholding the injunctive relief sought.

### **SUBMISSIONS BY THE PARTIES**

13. Counsel for the parties – M/s Kadima & Co. Advocates for the 1, 2, 3, 4 and 6 Plaintiffs; M/s Mogaka Omwenga & Co advocates for the defendant; and M/s E. W. Njeru & Co advocates for the 7, 20, 24 and 28 plaintiffs relying on the submissions for the 1, 2, 3, 4 and 6 Plaintiffs - then filed written submissions without supplementary oral argument, and ruling was reserved. Unfortunately, owing to intervening transfer of this judge and heavy workload in the Constitutional and Judicial Review Division of the Court, it was not possible to deliver the ruling earlier and the delay is greatly regretted.

14. Counsel for the plaintiff relied on ***Giella v. Casman Brown*** (1973) EA 358 on the principles for the grant of interlocutory injunction and put the plaintiffs' case simply as follows:

*“Your honour, despite the existence of the above said order, the Defendant's/Respondent's advocate has advised the Defendant/Respondent and all those who derive a “right” from the said Defendant to disregard the said orders under the assumption that the said parcel has since been (illegally) subdivided and no longer exists thus the order is unenforceable.*

*Your honour, a brief summary of the issue before court is thus; the Defendant/respondent, having petitioned this Honourable Court for ownership of **PLOT NO. 362/IV/MN** through adverse*

possession, went to the Plaintiffs/Applicants and presented the said parcel of land for sale. The Plaintiffs/Applicants agreed with the Respondent and proceeded to pay in installments over a period of time. It was their understanding that they were paying for their specific pieces and at the same time, assisting the Defendant/Respondent to process Title, expecting that once the same was out, the Defendant would then proceed to subdivide and transfer each plot to its new owner.

Your honour, much to the Plaintiffs/Applicants surprise, the Defendant/Respondent on getting sufficient capital to finance her project, she successfully obtained orders of adverse possession, processed title and sold the property to another group who now call themselves “**purchaser for value**”. In act, effort by the Defendant/Respondent have been made to the extent that she obtained change of use and transferred the said subdivisions to the new group of purchase who are not party to this suit, and are claiming ownership.

Now the Plaintiffs/Applicants have come before court to seek redress while on the other hand, a third party is being encouraged to continue utilizing, exploiting and constructing on property that had already been bought by the Plaintiffs/Applicants.

Your honour, what the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs/Applicants are seeking at this point in time is an injunction that will preserve the “status quo” and sanity on the ground as parties herein set the record straight on who is the legal owner of the suit property and who ought to be compensated if any. The court ought to note that this matter has the representation of many counsels, with each party trying to stress their individual positions. It would not therefore be fair to any one or another to exploit the disputed parcel to the detriment of the other parties when individual Rights have not been proved through proper channels.”

15. For the defendant, it was contended, principally, that the Plaintiffs’ claim had no merit on the grounds of lack of consent of the land control board which was necessary for the transactions sued upon by the plaintiffs. In her submissions dated 16<sup>th</sup> April 2012, the defendant pointed out that the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiff/ applicants' claim was in relation to very specific plots and not the entire Plot No. 362/II/MN, hence the orders sought to affect the entire plot and/or Plot No.1002/II/MN is misconceived and cannot issue. The defendant submitted further that as at 11<sup>th</sup> January 2011, Plot No. 362/II/MN had changed to subdivision no. MN/II/12037 Deed Plan No. 318157 and hence as at 4<sup>th</sup> / 9<sup>th</sup> March 2011 the Plot no. 362/II/MN was not in existence and any orders given over it could not have been enforced, had they been served on the defendant at all – and there was no proof of service anyhow. The defendant referred the court to **Kahia vs Ng'ang'a**, (2004) 1 EA 75, CA No. 16 of 2001 on the proposition that in the absence of the Land Control Board consent the agreement for sale becomes null and void for all purposes. The cases of **Paramount BANK. Limited vs Mohammed Ghias Quresh & Another** (2005) eKLR, C.A. No. 239 of 2001; **Benjamin Leonard MacFoy vs & United Africa Co. Limited** (1962) AC 152 House of Lords; **Official Receiver & Provisional Liquidator Nyayo Bus Service Corporation vs Firestone E. A. (1969) Limited**, C. A. Nai No. 172 of 1998; **Francis M. Maranya vs National Bank of Kenya Limited & Another**, C. A. No. 6 of 1997; **Leonard Njonjo. Kariuki vs Njoroge Kariuki alias Benson Njonjo**, C. A. Nai No. 26 of 1979 were cited on the principle that courts do not sanction illegality. The defendant concluded by urging that the applicants' cases had very slim chances of succeeding, and since they had not shown that they were likely to sustain any irreparable loss, this application dated 2<sup>nd</sup> February 2012 ought to be dismissed with costs.

## **DETERMINATION**

### *Principles for the grant of interlocutory injunction*

16. As I understand it the central inquiry before the court, whether to grant interlocutory injunction sought by the Plaintiffs depends on well known principles. Firstly, I have considered that the principles for the grant of interlocutory injunctions whether under the **Giella v. Casman Brown**, supra, cited by the Plaintiffs’ counsel or under the **American Cyanamid Co. v. Ethicon Ltd**, (1975) 1 ALL ER, 504; (1975) AC 396 HL), the question of damages as an adequate remedy for the injury is central to the consideration

whether to grant interlocutory injunctions. As held in **Giella** injunctions will not normally be granted if the injury is remediable by an award of damages. Secondly, the applicant must demonstrate at least an arguable case in accordance with the **American Cyanamid** formulation and a **prima facie** case under the **Giella** test. I have in the past expressed preference for the arguable case standard of American Cyanamid on the reasoning, as held by Platt, JA in the twin decisions of **Banana Hill Investment Ltd. v. Pan African Bank Ltd & 2 Others** (1987) KLR 351 and **Mbuthia v. Jimba Credit Corporation Ltd** (1988) KLR 1, that it is not the function of the court at the interlocutory stage to attempt finalized determination of disputed matters of fact and law. Thirdly, under both formulations, the inquiry as to the balance of convenience falls for consideration subject to an arguable case under the **American Cyanamid** test, and where the Court doubts whether there is a prima facie case under the **Giella** test.

### ***Prima facie case or arguable case***

17. *Lack of consent of Land Control Board.* Under section 6 (1) (a) of the Land Control Act, the transactions the subject of this suit are void for want of consent of the land Control Board. Section 6 (1) (a) of the act provides as follows:

#### **6. Transactions affecting agricultural land**

(1) *Each of the following transactions that is to say—*

(a) *the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;*

(b)---

(c)---

*is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.*

See also **Kahia vs Ng'ang'a**, (2004)1 EA 75. As no consent was shown to have been obtained for the transactions for the sale of the suit property to the applicants, the agreements for sale are void for all purposes in terms of section 6 of the Land Control Act. The Act was not shown to be inapplicable to the transactions the subject of this suit.

18. *Lack of authority to sell the suit property.* When does an adverse possessor become entitled to dispose the property? Without expressing a concluded view at this stage, I consider that the right of an adverse possessor to dispose of an interest in the suit property must relate back to the date of judgment granting a declaration that the adverse possessor is entitled to the land by adverse possession for a period of over 12 years in accordance with the Limitation of Actions Act not from the date when she is actually registered proprietor of the property. In this case, the defendant would have had right to dispose of the suit property from the **20<sup>th</sup> July 2005** when the order for adverse possession and registration of defendant's owner of the land was made in Mombasa HCCC No. 134 of 2004 (OS), **Christine Wamalwa v. Syad Wilayat Shah and Anor.** The agreements for sale dated **28<sup>th</sup> March 2004** and **2<sup>nd</sup> March 2004**, and the discharges by performance both dated **27<sup>th</sup> June 2005**, respectively, for the applicants herein predate the Declaration of ownership by adverse possession and for that reason are invalid.

19. *Can fraud be proved against third parties who purchased land when the interest of the plaintiffs had not been registered on the title?* The alleged purchasers of the parcels of land which the applicants herein claimed were not joined as parties to the suit. An order should not be made against parties whose existence is known and pleaded by the applicants but who have not been enjoined in the suit to enable them appear to protect their interests. The plaintiffs pleaded generally fraud in the sale by the defendant of the parcels of land which the plaintiffs contend they had already purchased. To prove fraud against the purchasers so as to disentitle them to the protection of bona fide purchaser for value, the third parties should have been joined as co-defendants in the suit so that they are given an opportunity to protect their

interest, if any, in the suit property.

20. *Section 22 of the Land Control Act.* The defendant may have committed an offence under section 22 of the Land Control Act, if she received money on a void transaction. That may found a basis for criminal prosecution or refund of the purchase price under section 7 of the Act. There is, however, no basis for an injunction attaching to the suit property, the subject of the void transaction.

### ***Application sub judice?***

21. The previous applications of 3<sup>rd</sup> March 2011 and 6<sup>th</sup> July 2011 were filed by various representation of the applicants in the suit. The application dated the 3<sup>rd</sup> March 2011 was filed by the original advocate for the original 28 Plaintiffs together with the Plaintiff on the 4<sup>th</sup> March 2011 seeking similar reliefs as this application but with respect to the original parcel of land Plot NO. 362/II/MN Utange, Bamburi. By an application dated the 6<sup>th</sup> July 2011 by the Counsel for the 1, 2, 3, 4 and 6 Plaintiff/applicants seeking restriction to dealings with the suit property before subdivision referred to as No. 1002/I/MN, (apparently reference to title No CR.1002/1 for the suit property which became extinguished on 26<sup>th</sup> March 2009 upon registration of the defendant as registered owner by adverse possession). The two applications were not urged in the applicants' submissions before the court although the defendant had submitted on both applications by her two sets of submissions, respectively, dated the 7<sup>th</sup> December 2011 and 10<sup>th</sup> April 2012 in response to the said applications.

22. By the submissions of the applicants herein dated the 15<sup>th</sup> May 2012, the said applications of 3<sup>rd</sup> March 2012 and 6<sup>th</sup> July 2011 appear to have been overtaken by events and the court will therefore deal with the subsequent application dated 2<sup>nd</sup> February 2012 by the same applicants. I am not able to hold that the application is ***sub judice*** when the applicants obviously seem to have abandoned the two applications in favour of the present application. I would deem the said applications as abandoned as to be no bar to the present application.

### ***Multiple plaintiffs separately represented.***

23. While there is no rule against different counsel appearing for different plaintiffs in a case where the plaintiffs may in accordance with the rules of court be properly joined as plaintiffs, litigation is more efficiently conducted with the plaintiffs being represented by the same counsel or group of counsel with one leader to avoid different positions being taken and litigated in the matter where the plaintiffs have the same case and interest in the matter and necessitating different applications. As it is in this case, the original suit and application was filed on behalf of 28 plaintiffs, 13 of whom have since withdrawn their suits and the present application was filed by only 2 of the remaining 15 plaintiffs three of whom are represented by the Counsel for the present applicants, four others by a different Counsel and the remainder who must remain represented by the original advocate who filed suit for the Plaintiffs.

### ***Whether damages are adequate***

24. The plaintiffs may have a very strong case for damages in view of the breach of agreement for sale of the plots under section 7 of the Land Control Act which provides as follows:

#### ***7. Recovery of consideration***

*If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.*

25. Section 22 of the Act prescribes criminal sanction for acts in furtherance of a void transaction as follows:

## **22. Acts in furtherance of void transaction**

*Where a controlled transaction, or an agreement to be a party to a controlled transaction, is avoided by section 6 of this Act, and any person— (a) pays or receives any money; or (b) enters into or remains in possession of any land, in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement or of the intentions of the parties to the avoided transaction or agreement, that person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment.*

26. Where a statute provides for the payment of damages for an injury as in the case of the Land Control Act, the Court cannot grant an injunction without breaching the provisions of the Statute. Accordingly an application for an injunction in such circumstances where the statute has prescribed a remedy of an award of damages is incompetent and cannot support an arguable case for purposes of *Giella* or *American Cyanamid* principles for the grant of interlocutory injunction.

### ***Balance of convenience test***

27. The plaintiffs' written submissions of 5<sup>th</sup> May 2012 were clearly an argument purely based on the balance of convenience. In "***seeking at this point in time is an injunction that will preserve the "status quo" and sanity on the ground as parties herein set the record straight on who is the legal owner of the suit property and who ought to be compensated, if any***" the plaintiffs offers a submission on convenience only. No serious attempt was made to lay out an arguable or a ***prima facie*** case and to discount the adequacy of damages in terms of the test in ***Giella*** case which was cited in the submissions.

28. Having held that the plaintiffs have not established an arguable case under ***American Cyanamid*** test for grant of interlocutory injunctions not to mention the ***prima facie*** case test under ***Giella***, and having found that recovery of consideration was the statutorily mandated remedy for the injury claimed by the plaintiffs, an inquiry as to the balance of convenience does not arise.

29. Had it become necessary for the court to consider the balance of convenience, however, I would have found that the scales tilting towards protecting the rights of third parties whom the plaintiffs conceded have bought parcels of land in the suit property and who have not been joined in the suit and, therefore, have no opportunity to protect their interests in the property. The availability of statutory remedy for recovery of consideration lessens the weight on the side of grant of injunction. The balance would therefore lie in declining the interlocutory injunction sought by the Plaintiffs.

### **ORDERS**

30. Accordingly, for the reasons set out above, the Plaintiffs' Notice of Motion dated the 2<sup>nd</sup> February 2012 is declined and any interim orders granted hereinbefore are discharged.

31. Costs in the Cause.

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 20<sup>TH</sup> DAY OF FEBRUARY 2015.**

**A. OMOLLO**

**JUDGE**

In the presence of: -

No appearance for the Plaintiff(s) Nos. \_\_\_\_\_

No appearance for the Plaintiff(s) Nos. \_\_\_\_\_

No appearance for the Plaintiff(s) Nos. \_\_\_\_\_

No appearance for the Defendant(s)

Mr. Kiarie - Court Assistant(s).