REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 18 OF 2011

BENEDETTE WAMBUI NJOROGE………...............………………………..……PLAINTIFF

VERSUS

METHI & SWANI FARMERS
CO-OPERATIVE SOCIETY..….1ST DEFENDANT/RESPONDENT
HIRAM KIARIE NJOROGE…………................……....2ND DEFENDANT/RESPONDENT
PETER NGUGI MUNGAI………..…................…....…..3RD DEFENDANT/ RESPONDENT
STANLEY KAMAU NGOTHO……...................……..…4TH DEFENDANT/ RESPONDENT

RULING

Pursuant to the provisions of *Order 40 rules 1, 2, 3, 4* and *5* of the Civil Procedure Rules and *Section 3A* of the Civil Procedure Act, Benedette Wambui Njoroge, the Plaintiff/applicant herein, took out the motion dated 23rd February 2011 in which she sought for the following orders *interalia*:

1. That this matter be certified urgent, service thereof be dispensed with and it be heard exparte in the first instance.

2. That pending the hearing and determination of this Application, the Respondents/Defendants, their agents and or servants be restrained by a temporary order of injunction from continuing with the sub division, transfer, registration or issuance of the resultant titles or dealing in any manner with land formerly land reference number 10726/1.

3. That pending the hearing and determination of this suit herein the Respondents/Defendants their Agents and or servants be restrained by way of a temporary order of injunction from sub-dividing, registering, transferring and issuing title of the parcel of formerly land reference number 10726/1.

4. That alternative to prayer (2) and (3) above the Defendants be restrained by order of this Honourable court from interfering in any manner with the plaintiffs ownership, use and occupation of portion known as Land reference number 2576 that Plaintiff bought from the Defendants until the hearing and determination of this suit.

5. That the Honourable court be pleased to give any orders as it may deem fit.

6. That costs of this Application be provided for.

The Motion is supported by the two affidavits of the applicant. When served with the Motion, **Methi & Swani Farmers Co-operative Society, Harrison Kiarie Njoroge, Peter Ngugi Mungai** and **Stanley Kamau Ngotho**, being the 1st, 2nd 3rd and 4th Defendants/Respondents herein, opposed the same by filing two replying affidavits sworn by the 2nd Defendant/Respondent. When the Motion came up for interpartes hearing, learned counsels from both sides recorded a consent order to have the same disposed of by written submissions.

I have considered the grounds set out on the face of the Motion and the facts deponed in the affidavits filed for and against the Motion. I have further considered the written submissions filed by both sides. The thrust of the Applicant's case is that on 20th July 2010, she entered into a sale agreement with the Respondents in which the Applicant was to purchase from the Respondents a portion of land measuring 9 acres to be excised from L.R. No. 10726/1 I.R. 19073 situated at Kabati along Nyeri-Nairobi road for Ksh.5,625,000/=. The Applicant further claimed that the 1st Respondent also contracted her to prepare titles for its members numbering 2578 who each had been allocated land. The Applicant also alleged that she paid to the Respondent a deposit of Ksh.2,830,000/= at the time of executing the agreement and that the balance was to be paid upon ascertaining from the lands office the costs of processing the individual titles of the 1st Respondent's members. She was of the view that the balance of the purchase price was to be spent on discharging the main title, processing individual titles and in applying for change of user. It is the Applicant's submission that the respondents had agreed to refund all her expenses incurred in processing the titles and to pay Ksh.2000/= for each title. She alleged that so far she has incurred a sum of Ksh.6,000,000/= in discharging the main title, in subdivisions giving rise to 720 titles which are awaiting collection. The Applicant further alleged that in January 2011 the respondents purported to renege on the agreement terming her as a stranger. It is said that the Respondents appointed M/S Kenjap Co. Ltd. to perform the duties she had been contracted to do. She also complained that the Respondents are now selling to third parties the land reserved for her i.e. parcel No. 2576, in breach of the sale agreement. She has now come before this court claiming that unless the orders sought are given to her she will suffer irreparable losses which she specified to include *interalia*:

(i) Loss of Ksh.6,000,000/= spent on purchase of parcel No. 2576.

(ii) Ksh.3,025,000 being the amount incurred in discharging title, subdivisions and processing of titles.

(iii) Loss of Ksh.4,156,000/= in respect of 2578 titles to be processed.

The Respondents on their part have denied the Applicant's claim. They aver that they did not contract the Applicant to carry out survey work nor to process title deeds for the 1st Respondent's members. The Respondents further argued that in any case the alleged subdivisions took place in 1992 an exercise which the plaintiff did not participate at all. The Respondents admitted that they entered into a sale agreement with the Applicant in respect of a 9 acres to be excised from **L.R. NO. 10726/1** a parcel of land measuring 460 acres. The Respondents further stated that one of the resultant subdivisions of the aforesaid parcel was **L.R. NO. 2576**, a parcel of land measuring 33.9 acres out of which 9 acres was to go to the Applicant. It is said the aforesaid parcel no longer exists since it was not registered. The Respondent alleged that on 5th November 2010 they established the amount required to process titles from the Ministry of Lands and thereafter they demanded from the Applicant to settle the balance of the purchase price i.e. Ksh.2,795,000/= which in any case she was aware that she was supposed to settle the same within 60 days from the date of the agreement. The Respondents accused the Applicant of failing to meet her part of the bargain when she failed to pay the balance. The Respondents denied the allegations that the balance of the purchase price were to be used to process titles nor to carry out subdivisions. It was also argued that there was no need for charge of user since the title was in form of a surrender of the leasehold to the government, the subdivisions having been done and the 1st Respondent having discharged title. The Respondents further averred that the Applicant had no ability to raise and spend Ksh.6 Million since she was unable to even raise the outstanding balance of the purchase price. The Respondents averred that they held a series of meetings with the Commissioner of Lands until the Chief Land Registrar authorized and or instructed the District Land Registrar Murang'a to issue title deeds to the members of the 1st Respondents. The Respondents argued that if the order of injunction is given it

will obviously inconvenience more than 2578 people. It is also argued that since the Applicant has not performed her part of the bargain, she should not expect to benefit from equity. The Respondents further pointed out that the Applicant has not shown the irreparable loss she would suffer if the order for injunction is denied.

The orders sought by the Applicant are basically orders of injunction. The principles to be considered in such an application are well settled. First, an applicant must show that he/she has a *prima facie* case with a probability of success. Secondly that an applicant must show that he/she would suffer irreparable loss if the order is denied. Thirdly that if the Court is in doubt the application would be decided on a balance of convenience. Let me apply those principles to this case. On the first principle, the Applicant has stated that she had executed an agreement of sale with the Respondents to purchase 9 acres to be excised from **L.R. NO. 10726/1 –** i.e. the subdivision No. 2576. It is also alleged that the Respondents contracted the applicant to carry out the subdivision of the aforesaid parcel of land, process title deeds and obtain the necessary approvals for change of user. The Respondents denied all the Applicant's claim save for the fact they executed an agreement for the sale of the parcel of land for 9 acres. The Respondents also admit that they rescinded the agreement of sale because the Applicant breached the same. There is no doubt that the Applicant has shown that the Respondents have expressed their intention to rescind the agreement of sale. The Applicant avers that the balance of the purchase price was to be used to subdivide the land and to process titles to be issued to the 1st respondent's members. The Respondents deny that. Of course the issue can be sorted in a trial where the evidence can be tested by cross-examination. I am satisfied that the Applicant has shown a *prima facie* case with some prospects of success.

Having come to the conclusion that the Applicant has shown a prima facie case, let me now determine the question as to whether or not the Applicant will suffer irreparable loss if the order is denied. It is the submission of the Respondents that the damage the Applicant is likely to suffer if the order of injunction is denied can be ascertained in monetary terms. I have carefully perused paragraph 13 of the affidavit of the applicant and it is obvious that the Applicant has quantified in monetary terms the loss she anticipates to suffer if the order of injunction is denied. The Applicant has estimated her gross loss to be Ksh.13,181,000/=. I have also perused the default clause of the sale agreement executed by the parties and annexed to the supporting affidavit of the Applicant. In paragraph 8 of the aforesaid agreement it is stated that the defaulting party shall pay or refund the innocent party the amount received together with 25% interest per annum as liquidated damages. It is therefore obvious that the Applicant can be compensated in monetary terms. The Court of Appeal in **MUREITHI =VS= CITY COUNCIL OF NAIROBI [1981] K.L.R. 332** held *interalia*:

(i) The conditions for the grant of an interlocutory injunction are: existence of probability of success, likelihood of irreparable harm which would not be adequately compensated for by damages and balance of convenience.

(ii) An injunction cannot be granted where damages would be an adequate remedy.

At page 336 the Court of Appeal went further to state as follows:

"In this case there is also no question that the defendant would be in a financial position to pay any damages that may be awarded to the Plaintiff. If her action succeeds she could be adequately compensated in damages, including loss of profits if she is advised to amend her plaint accordingly."

In the case before me there is no allegation that the Respondents are not in a position to pay the amount the Applicant has alleged she would lose if the order of injunction is denied. On this principle, I will deny the Applicant the orders sought.

The third principle to be considered is the balance of convenience. The Respondents have pointed out that the 1st Respondents' members will be greatly inconvenienced as opposed to the Applicant if the

order of injunction is granted. It is the Respondents' argument that if the order is given the 1st Respondent's intention to process titles to its 2578 members will be frustrated yet those members are not parties to this suit. In response to this argument, the Applicant stated that since the Respondents blatantly breached the agreements, the court should not consider the principles of irreparable harm and balance of convenience. With respect, I agree with the Applicant that where there is plain and uncontested breach of a clear covenant not to do a particular thing, the issue of irreparable loss and balance of convenience do not arise. Let me examine whether or not the Respondents blatantly breached the agreements with the Applicant. The applicant avers that she was an agent of the Respondents for purposes of processing titles and that the terms of the agreement were oral express and implied. The Respondents deny ever engaging the services of the Applicant. It is obvious that this issue can only be ascertained during the trial. The Respondents state that the Applicant had no legal capacity to undertake subdivisions and processing of titles hence if the Applicant was contracted to perform the aforesaid tasks then the contract is illegal, void and unenforceable. The Applicant argues that she was shocked to later learn that the Respondents have appointed Kenjap Ltd. to perform her tasks. It is difficult at this stage to conclude that the Respondent acted blatantly. In rescinding the agreement dated 20th July 2010, can it be said that the Respondents acted blatantly? I have looked at the letter rescinding the agreement dated 2nd December 2010. The letter talks of a meeting held on 5th November 2010 in which the Respondents requested the Applicant to settle the outstanding balance of Kshs.2,795,000/= to enable the company meet its financial obligations. It would appear the Applicant did not pay as requested hence the Respondents were prompted to rescind the sale agreement. In my view the Respondents cannot be said to have acted blatantly in the circumstances. In a nutshell the court must consider the irreparable and the convenience principles in this application. After a careful consideration as to who between the Applicant and the Respondents would be more inconvenienced, I have come to the conclusion that the 1st Respondent's members will be the most inconvenienced. What it means is that the processing of 2757 titles will be stopped pending the hearing of this suit. The Court cannot guarantee when the hearing of the case will be concluded. Further more those who are likely to be affected by the injunctive order are not parties to this suit nor are they privy to the contracts between the Respondents and the Applicant.

In the end I am convinced that a fair order in the circumstances of this case is to dismiss the Motion which I hereby order. I direct that costs shall abide the outcome of the suit.

Dated and delivered at Nyeri this 25th day of March 2011.

J. K. SERGON
JUDGE

In open court in the presence of Justice (Retired) Mutito for the Respondent and Mr. Murgor for the Applicant.