



Ndung'u & 10 others v Original Wapenda Afya Bidii Co-operative Society Limited (OWAB) (Environment & Land Case 1562 of 2014) [2024] KEELC 972 (KLR) (8 February 2024) (Judgment)

Neutral citation: [2024] KEELC 972 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1562 OF 2014**

**JA MOGENI, J
FEBRUARY 8, 2024**

BETWEEN

JOSEPH NG'ANG'A NDUNG'U & 10 OTHERS PLAINTIFF

AND

**ORIGINAL WAPENDA AFYA BIDII CO-OPERATIVE SOCIETY LIMITED
(OWAB) DEFENDANT**

JUDGMENT

1. The Plaintiffs instituted a suit by a Plaint dated 15/12/2014 and Amended Plaint dated 10/10/2016 sued the Defendant seeking the following orders:
 - a. A permanent injunction restraining the defendants by themselves, their agents, servants and or any other persons whomsoever from encroaching upon, trespassing onto, remaining on or in any way however interfering with all that plot known 11, 12, 13, 17, 22, 26, 27, 28, 29, 61, 62 and 75 situate at Juja in Kiambu County in Nairobi respectively.
 - b. Specific performance
 - c. A declaration that there is a valid and enforceable undertaking against the defendant herein
 - d. An order compelling the defendant to honor their undertaking
 - e. Cost of this suit
 - f. Any other relief that this Honourable Court may deem just to grant.
2. The suit is opposed. The Defendant entered appearance on 18/01/2015 and filed a defence and counterclaim dated 11/02/2015, The Defendant pray for judgment against the Plaintiffs as follows: -
 - a. The Plaintiff's claim be dismissed with costs to the Defendant.



- b. The 7th and 8th Plaintiffs be ordered to vacate from the Defendant's land and in default the said Plaintiffs be evicted and vacant possession be given to the Defendant.
 - c. General damages for trespass.
 - d. Costs of this suit.
 - e. Interest on (c) and (d) above.
3. Upon pleadings being closed, the suit proceeded by way of viva voce evidence. The Plaintiffs called eight (8) witnesses, the Defendant called one witness. The parties testified on 17/02/2022, 7/06/2022, 22/03/2023 and 17/07/2023.

Plaintiffs' Case: -

4. In the plaint, the Plaintiffs plead that at all material times the defendant was and still is the registered owner of two (2) parcels of land namely L.R No. 4148/307(I.R No. 89991) and Land Parcel No. 4148/308 (I.R No. 89990) which are situated within Juja area of Kiambu County. the Defendant has caused the aforementioned parcels of land to be subdivided into numerous plots measuring 40x80 feet and offered the same for sale to Plaintiffs as follows:
- a. By an Agreement dated 12/10/2009, the Defendant sold to 1st and 4th Plaintiffs Plot Number 26 in the aforementioned subdivisions for the sum of the Kshs. 250,000/= and upon payment of the sold consideration price, the defendant issued 1st and 4th plaintiffs with a certificate of ownership thereto.
 - b. By an agreement dated 8/05/2009, the Defendant sold to 2nd Plaintiff Plot Number 27 in the aforementioned subdivisions for the sum of Kshs. 200,000/= and upon payment of the sold consideration price, the Defendant issued the 2nd Plaintiff with a certificate of ownership thereto.
 - c. By an agreement dated 10/06/2009, the Defendant sold to the 3rd Plaintiff plot Number 29 in the aforementioned subdivisions for the sum of Kshs. 200,000/= and upon payment of the sold consideration price, the Defendant issued the 3rd Plaintiff with a certificate of ownership thereto.
 - d. By an agreement dated 9/03/2009, the Defendant sold to the 5th Plaintiff plot Number 28 in the aforementioned subdivisions for the sum of Kshs. 200,000/= and upon payment of the sold consideration price, the Defendant issued the 5th Plaintiff with a certificate of ownership thereto.
 - e. By an agreement dated 6/04/2012, one Isaiah Mungai Kamau (who had bought plot number 22 from the defendant) sold to the 6th Plaintiff plot number 22 and wrote a letter dated 15/06/2012 to the Defendant informing her of the sale. The 6th Plaintiff paid transfer fees to the Defendant's advocates upon which he was issued with a certificate of ownership in his name. This was confirmed by the Defendant through a suit they had filed in ELC No. 658 of 2014 where they produced a list of the members they recognize as genuine as an exhibit. Plot number 22 in the name of the 6th Plaintiff was in the list.
 - f. By an agreement dated 13/03/2009, the Defendant sold to the 7th Plaintiff plot Number 12 & 13 in the aforementioned subdivisions for the sum of Kshs. 200,000/-and upon payment of the sold consideration price, the Defendant issued the 7th Plaintiff with a certificate of ownership thereto.



- g. By way of Agreement, the Defendant sold to one Gilbert Thuo who in turn sold to the 8th plaintiff (jointly with on Simon Wamugunda Njenga), upon sanction by the defendant Plot Number 11 in the aforementioned subdivisions for the sum of the Kshs. 550,000/- and upon payment of the sold consideration price, the defendant issued the 8th plaintiff with a certificate of ownership. (attached herewith and marked JNN 10a and 10(b) are copies of Sale Agreement and copy of Certificate of ownership respectively).
- h. By an Agreement dated 15/08/2009, the Defendant sold to 9th Plaintiff Plot Number 17 in the aforementioned subdivisions for the sum of the Kshs. 250,000/= and upon payment of the consideration price, the defendant is yet to issue the 9th Plaintiff with a Certificate of ownership (attached herewith and marked JNN 9 is a copy of Sale Agreement to attest as much).
- i. By an Agreement dated 24/04/2010, the Defendant sold to one Simon Njeri Maina who in turn sold to the 10th plaintiff, upon sanction by the defendant Plot Number 75 in the aforementioned subdivisions for the sum of the Kshs. 400,000/= and upon payment of the sold consideration price, the Simon Jeri Maina surrendered the original certificate of ownership to the 10th Plaintiff. (Attached herewith and marked JNN 10a and 10(b) are copies of Sale Agreement and copy of Certificate of ownership respectively).
5. It is the plaintiffs case that they are thus the bona fide purchasers and owner of all those plots known as plot Number 11,12,13,17,22,26,27,28,29,61,62 and 75 being subdivisions of land parcel L.R.No.4148/307(IR No.89991) and Land Parcel No.4148/308(IR No. 89990) on the subdivision plan situate at Juja area off Kiambu County. (hereinafter referred to as the subject plots). The plaintiffs further aver that having bought and fully paid for the subject plots the assumed both active and constructive possession and made developments thereon. In particular, the plaintiffs have erected a fence, built houses and other pertinent developments on the subject plots.
6. They contend that it was a fundamental clause of the sale agreement that the vendor was obliged upon payment to pursue and obtain individual titles for the plaintiff's respective portions of land by causing the registration of the various approved deed plans/mutations arising out of the subdivision aforesaid. In utter breach of the sale of land agreements entered between the plaintiffs and the defendant, the defendant has adamantly refused to process titles for the plaintiffs herein which refusal and or negligent is a breach of the defendant's specific and unequivocal undertaking as per the terms of the sale agreement.
7. The plaintiffs aver that on diverse dates this year the defendant sanctioned and offered for sale their respective plots to third parties without any scintilla of right of excuse, while knowing fully well that they had already sold their interest in the subject plots of land and no longer have any capacity to purport to offer for sale portions of land belonging to the plaintiffs. The plaintiffs aver that the defendant actions of refusing to effect transfer and obtain independent titles to the plaintiffs in respect of their plots of land is a breach of their unequivocal undertaking to procure titles for the plaintiffs, composed of malice, reckless, in bad faith, wrongful and illegal.
8. The Plaintiffs listed the particulars of contract fraud, malice and illegality on the part of the defendant, their agents and/or employees as follows: offering for sale plot Number 11,12,13,17,22,26,27,28,29,61,62 and 75 to the plaintiffs and obtaining full payment for the respective plots only to refuse, renege and or neglect to procure independent titles thereto, adamantly refusing to honour their unequivocal undertaking to obtain and furnish the plaintiffs with registered titles upon completion of the transfer, procuring the approved plans for the subdivision only to offer the same plots of land to third parties when they lack the capacity to do so, purporting to question the



authenticity of the ownership documents issued by the very defendant, refusing to effect registration of the plaintiff's subject plots deliberately without any iota of reason in law and or fact, purporting to deny knowledge of the plaintiff's as purchasers even after the same defendant rendered vacant possession of the subject plots and permitting developments thereon and fraudulently offering for sale land that has already been sold when the interest therein has already passed to the plaintiffs.

9. The plaintiffs aver that sometimes this year the defendant started advertising the plaintiff's plots of land for sale to third parties and the plaintiffs got to know that Defendant was offering for sale their plots to 3rd Parties and upon inquiry, the Defendant through its advocates responded to call for copies of the plaintiffs' relevant ownership documents which information was availed in good faith, though ordinarily the defendant has original counterparts and a register of all the members who have bought land with them.
10. To plaintiffs' utter astonishment, it emerged that the defendant's sole reason for asking to be supplied with copies of the various ownership was to enable them fraudulently alleged that the documents held by the plaintiffs' were not authentic, when it was in fact the defendant who offered for sale to the plaintiffs' respective plots of land received the consideration, either by themselves or their agents, executed a sale agreement and duly issued the plaintiffs with certificates of ownership.
11. The Defendant's initial advocates who drafted the agreement and conveyance, M/S Kimani, Kabucho, Karuga & Company Advocates have since and confirmed that indeed the documents held by the plaintiffs were issued by the defendant who had retained their services to conduct the sale and the entire conveyancing process. The plaintiffs maintain that their continued stay on the subject plots has been brought to a standstill courtesy of the defendant's wrongful acts and the undying threats of illegal eviction from their plots of land.
12. The plaintiffs aver that there is real and probable likelihood that the defendant shall continue trespassing onto the plaintiff's subject plots unabated and illegally, unfairly and wrongfully unless restrained by this Honourable court.
13. The Plaintiffs claim against the defendants is for an injunction restraining the defendants by themselves or otherwise, their agents, servants and or any other persons whomsoever from offering for sale, encroaching on, trespassing onto, remaining and or in any way interfering with all those plots known as Plot no.11,12,13,17,22,26,27,28,29,61,62, and 75 on the subdivision plan situate in Juja, Kiambu County. the plaintiffs further claim for specific performance and enforcement of the defendant's undertaking to procure registered titles in the plaintiffs' names.

Defendant's Case: -

14. The Defendant denies each and every allegation made in the Plaintiff.
15. The Defendant denies the allegations made and contained in paragraph 4 of the Plaintiff and in particular states that;
 - a. The Defendant has never entered into any sale agreement with the 1st or the 4th Plaintiffs as alleged or at all and the Defendant has not received any payment from the said plaintiffs.
 - b. The Defendant has not received a sum of Kshs. 200,000 by way of bankers cheque or at all from the 2nd Plaintiff and has not issued the 2nd Plaintiff with a receipt as alleged or at all.
 - c. The Defendant did not enter into any sale agreement with the 3rd Plaintiff for sale of Plot No. 29. In deed no agreement for sale is exhibited in the pleadings.



- d. The Defendant denies having sold Plot No. 28 to the 5th Plaintiff as alleged. The Defendant did not receive any payment from the 5th Plaintiff by way of bankers cheque as alleged or at all. The annexed receipt does not belong to the Defendant.
 - e. That it is not true that the Defendant sold Plot No. 22 to the 6th Plaintiff. There are no documents attached to the Pleadings in support of the said allegation.
 - f. that it is not true that the Defendant sold Plots No. 12 and 13 to the 7th Plaintiff. No money was ever received from the said Plaintiff. The exhibited receipts do not belong to the Defendant.
 - g. The Defendant did not sell Plot No. 11 to the 8th Plaintiff.
 - h. The Defendant did not sell Plot No. 17 to the 9th Plaintiff. The Defendant has never signed any agreement in favour of the 9th Plaintiff and has not received any payment from the said Plaintiff as alleged or at all.
 - i. The Defendant did not sell or sanction the selling of Plot No. 75 to the 10th Plaintiff or at all. It had never sold the said Plot to Simon Maina Njeri as alleged or at all.
16. The Defendant states that save for the 7th and 8th Plaintiffs the two Plaintiffs have not occupied and/or taken possession of the suit properties.
 17. In response to paragraph 6, the defendant states that the plaintiffs are trespassers on the land and those that are in occupation are doing so illegally and the defendant shall seek for an order of eviction.
 18. The defendant denies the alleged particulars of contract fraud malice and illegality a-g inclusive.
 19. The Defendant states that it is the registered owner of the properties known as L.R. No. 4148/307 and L.R. No. 4148/308.
 20. In response to paragraph 13, 14 and 15 the Defendant states that the Plaintiffs are trespassers and ought to be evicted and restore the property to the Defendant. The Defendant cannot be restrained from enjoying its property.
 21. The Defendant states that the Plaintiffs have come to Court with unclean hands and are not worth of any orders in equity or at all.
 22. In response to paragraph 10 of the Plaint the Defendant states that upon receipt of the demand notice the matter was forwarded to the police for further investigation and the Plaintiffs are aware.
 23. The Defendant states that the Plaintiff have no cause of action against the Defendant and shall pray that the Plaintiff's case against them be dismissed.

COUNTERCLAIM

24. The Defendant states that the 7th and 8th Plaintiffs are trespassers in its parcels of land known as L.R. No. 4148/307 and L.R. No. 4148/308 and prays that they be evicted therefrom.
25. The defendant reiterates the contents of the defense and counterclaims vacant possession of the suit property from the two plaintiffs who are in occupation illegally.



Plaintiffs' Reply To The Defence And Defence To Counterclaim: -

26. The Plaintiffs deny each and every allegation as set out in the Defence and reiterates the contents of the amended plaint in response to the defendant's defense. The Plaintiffs admit that the Defendant is the registered owner of the suit property.

Defence To The Counterclaim

27. The Plaintiffs aver that the 7th and 8th Plaintiffs are a stranger to the contents of the counterclaim and reiterate that having bought and fully paid for the subject plots the assumed both active and constructive possession and made developments thereon. In particular, the plaintiffs have erected a fence, built houses and other pertinent developments on the subject plots.
28. The 7th Plaintiff denies that she is a trespasser in the land and avers that she is a bona fide purchaser for value and thus entitled to be on the land.
29. The 8th Plaintiff avers that she is in the parcel of land rightfully having purchased the same from John Ngei Vuti (an agent of the Defendant), a fact that has always been admitted by the Defendant.
30. Further and without prejudice, the Plaintiffs aver that the Defence and Counterclaim filed herein is a sham and constitutes mere denials of the averments in the Plaint.
31. The Plaintiffs pray that the Defence and Counterclaim be struck out with costs and judgment be entered for the Plaintiffs as prayed in the Plaint.

Plaintiffs' Evidence: -

32. PW1 – Joseph Ng'ang'a Ndung'u testified that he is the 1st Plaintiff. He adopted his witness statement dated 10/10/2016, a further statement dated 22/11/2021 together with a list of documents dated 11/03/2019 and produced them as his evidence in chief. He produced exhibits 1-3 at page 21, 57 and 74 as his evidence.
33. In cross examination, it was his testimony that the document at page 57 is the certificate No. 110 and Ruth Wanyoike is the 4th Plaintiff. The property for the 1st and 4th Plaintiff is the same. For the record, the 4th plaintiff is his wife. The certificate was issued through Kimani Kabucho Advocate. He collected his sale agreement from the advocate. He identified the parcel in 2009. He was taken to the land by the chairlady, Lydia Kinyua accompanied by mama Muiruri in 2009. He paid the deposit through instalments. The first installment was paid on 11/05/2009 through the aforementioned advocate. From the list of documents produced there is no receipt. In total, he stated that he paid Kshs. 250,000.00 in four installments. He paid to Kimani Kabucho Advocates. He has not indicated this neither on the statement nor plaint. It is true that there is no statement of payment. The sale agreement on page 22 is a sale agreement dated 12/10/2009. He signed the document at a different time with the vendors. He got the sale agreement then after his advocates confirmed it was okay, he sent it to the vendor's advocate. He collected it from Kimani Kabucho advocate. In the documents in Court, there is no evidence that the vendor received Kshs. 160,000.00 as down payment. He was to pay Kshs. 90,000.00 upon completion but completion was never achieved. He never got the documents but he paid Kshs. 90,000.00. He was paying through Kimani Kabucho Advocates.
34. It was his testimony that he got interim orders. He is residing on the property. He took possession in 2009. The agreement indeed does not show that he took possession. It is not true that he rushed to construct when the orders were issued. He never got approvals. He never paid rates because he did not have the title. He has no occupation certificate. He did not have any documents to show he is the



owner. The sale agreement is a subject of a criminal case involving one Mr. John Ngei Vuti. He knows him as a surveyor. He never identified the beacons for him. Lydia Kinyua is the one who identified the beacons for him. He has not produced any survey map. He identified his plot from a neighbor's map. There was no deed plan. He saw the report showing that the vendor's signature is fake and also that Mr. John Ngei Vuti is facing criminal charges. The document on page 74 is not his document so he cannot testify to the entries. Mr. Kimani Kabucho gave him the document. The owner of plot no. 26 is registered as OWAB. His name does not appear. The document is not signed. He did not have the original of that document. What he was referring to is the document at page 78. He was not give the document at page 73. It has a stamp and it goes to page 30. He retracted that document. The chairlady Lydia is not present in court and he did not intend to call her. The document at page 57 was issued after he bought the property. He never searched the shareholders and directors of the defendant.

35. In re-examination, he testified that he got the list from Kimani Kabucho Advocates. He was buying Plot No. 26 which was then owned by OWAB. He knew OWAB was a cooperative society. After payment, he followed up on transfer and he was told the society had not acquired titles. He was given a certificate of ownership. Lydia was the society chairlady. She signed the sale agreement. The agreement stated that he had paid Kshs. 160,000.00.
36. PW2 – Simeon Kamau Gikunya testified that he is the 2nd plaintiff. He adopted his witness statement dated 28/09/2016 together with a list of documents dated 11/03/2019 and produced them as his evidence in chief. He produced exhibits 4-6 at page 26, 58 and 65 as his evidence.
37. In cross examination, it was his testimony that he stays at Kenyatta Road. The property is at Kenyatta Road. He moved there in 2012. When he was constructing, people came to say that the plot is not theirs. He has a two bedroomed house. He has approvals for construction. The approval is not in Court. It was in 2012. When he came to court, he did not file any documents to show that he had constructed. He bought through Kimani Kabucho Advocates in 2009. He entered into the property in 2012. He paid through the bank. His plot was no. 27. He did not have a deposit slip from the bank. The receipt he has is signed by a different person not those in the sale agreement. He paid by banker's cheque but he has no copies before court. Mr. Vuti signed the receipt but he was not the directors of OWAB. He was given the document on page 58 by OWAB through the chairlady Ms. Nyambura and they also went with her to see the suit premises. She identified the beacons. He never dealt with the surveyor. He dealt with John Vuti only once, when he got his certificate. He was given the certificate after 3 months. He was given by the chairlady. The date of certificate is 7/07/2009. He went to pick it from Nyambura. She was in the office. He never went to the offices of OWAB. They met at the offices of the Advocate, Kimani Kabucho. He never searched the owners of the company. He cannot agree that those who sold the land were fake and the documents were signed by wrong people. They signed the documents and he knows them.
38. In re-examination, he testified that he signed the agreement at the advocates office. Those who signed the certificate.
39. PW3 – Maria Mbereka Mutua adopted her witness statement dated 22/11/2021 together with a list of documents dated 11/03/2019 and produced them as her evidence. She produced documents from page 77 and 85 as her evidence.
40. In cross examination, it was her testimony that she acted for the Defendant and the Plaintiffs according to Plots No. 1-8 as listed in her statement. She had instructions from the Defendant but not in writing. She has no document showing she was appointed. It was agreed that she would prepare the sale agreements and the purchasers would pay Kshs. 5,000.00 each. She has not received any payment from the defendant. She was to advice both the defendant and the plaintiff. She drafted sale agreements



for all the 8 pieces of land. The agreement on page 43 is for Plot No. 17, completion date was 60 days which were to end by October. On special condition, it talks of completion date. It incorporates 1989 LSK conditions. If agreement is not completed one is to give 21 days but no notice was issued. Banker's cheque of Kshs. 240,000.00 paid in the name of the vendor's agent, Mr. John Ngei Vuti. The money was paid in her office and a receipt was issued. The balance was to be paid on 31/08/2009. The acknowledgement is the sale agreement. She did not remember the specific dates. She has no response to whether monies were not paid on the due date. If the cheque was in the name of the agent the transaction was completed. Paragraph 3 of page 3 bundle at page 45 was not completed. She did not prepare transfer; her instructions had been withdrawn in 2013 on 31/01/20213.

41. It is her testimony that the agreements were signed in 2009, her instructions were withdrawn before she could prepare the transfer documents. So between 2009 to 2013, she had not prepared the transfer documents because the deed plans were not ready and so the transfer could not be done. The agent that John Ngei Vuti introduced her to the vendors, they are not related. They come from the same village. The purchasers were not aged. The vendors gave her a copy of the proposed sub-division, the two letters dated 24/10/2007 and 25/10/2007 which they had signed between themselves but they are not part of the bundle before the court. The seal of the vendor was brought to her office. This was between 2007 and 2009. There was no written acknowledgement but she had the seal of the vendor until 2013. She was sealing all the documents she sealed all the share certificates in 2009. There was no incident where the seal was misused. She is not a certified public secretary. She did not keep the register of members but a copy was availed to her. She never kept any register. She testified that she prepared the agreements at page 21 to page 56 except the last one which was prepared by MMC. The last one she did is at page 52 between Simeon Maina and Maria Goretti. In all the documents there is no receipt by vendors of purchase price. The one at page 53-56, page 4 of the agreement at clause H, a 21-day notice was to be issued. The completion period was 45 days. The conditions in special condition A and terms set out were never complied with and they never issued a 21-day notice. Completion date was never complied with and no notice was issued. There is no separate acknowledgment for vendor for receiving the money except the sale agreement. Her client told her they paid the money and she never saw the payments being made. Page 85 is a letter to Sheikh Advocates. It is on the instant suit and they enclosed a letter dated 30/07/2014. There was a certified copy of members and she attached minutes withdrawing instructions. The list at page 74-77 is not signed by the vendors. She did not prepare the list. She has minutes but they are not part of the record. She did not know who prepared the list. She did not prepare it. she prepared the list from page 78-81. It is the genuine list of the purchasers and the officials. At page 66, there is a receipt no. 71 being payment for legal fees for onward transmission to OWAB. She paid the monies received for OWAB to OWAB. She is aware that there is a criminal case pending in court involving the suit property plot no. 17, 38, 26, 27, 12, 13 and 18. There were other agreements between the agent and vendors though in her statement she has restricted herself to 8 plots. The list from page 79 is not signed. In her statement, she has stated that the defendants are becoming greedy. The secretary to OWAB was Zipporah Nduta. She never received any list of members from her but she received documents from her. She filed a statement dated 8/11/2019 but it was not the one.
42. PW3 further testified that the certificates from page 56 were prepared by the vendors. She did not know what role John Vuti played and it would be incorrect to state that PW3 prepared them. Her clients gave her the seal. She has not received any payment from vendors. The purchasers paid her fees. She charged the purchasers not the vendors. She is not conflicted by testifying against her clients. Her clients OWAB have denied ever selling the suit property. It is incorrect to say she compromised herself.
43. In re-examination, she testified that in some of the agreements, there were advocates for the purchasers e.g. MMC. Upon signing the agreements, the purchasers paid various fees. By the time the payments were being done, the property was undergoing sub-division. The list she has produced contained bon



- fide purchasers and bona fide members and the purchases would become members by virtue of share certificates. She was asked to record a statement in one matter but she was never called to record a statement in the plots that counsel for the defendant produced earlier.
44. PW4 – Jerusah Nyanjugu Mwaura adopted her witness statement dated 28/09/2016 together with a list of documents dated 11/03/2019 and produced them as her evidence. She produced the documents at page 35, 67, 61 and 66 as her evidence in chief.
 45. In cross examination, it was her testimony that she bought plots 12 and 13 and the sale agreement is at page 35. She paid Kshs. 200,000.00 per plot. So she paid Kshs. 400,000.00 for both. She took the money to the lawyer's office. She paid in two installments. Her receipt is no. 555 and no. 507. It is signed by OWAB in 2008 and 2009. She was working with Maria and she was given the receipt in the presence of Maria. She did not know who issued it. She assumed that the receipt is from OWAB. She received the receipt from Lydia through Maria's office. The first payment was made on 23/12/2008 and she got a receipt through Maria's office. She did not know Vuti John Ngei. In OWAB, she knows Lydia and she was the one who showed her the plot. She explained that she paid the second installment on 20/02/2009. In her certificate, her address is 577-00516, Dandora. The postal address is 77123-006 Nairobi. The receipt addresses are different. After signing the sale agreement, she was never issued with a beacon certificate. No surveyor showed her the beacons. She never got her titles. She demanded her titles from Maria and she was told OWAB had withdrawn instructions from Maria. She was not aware because she has never been summoned or issued with any notice. She is staying on the land. She moved in 2011.
 46. In re-examination, she testified that she signed the agreement at Maria's office. OWAB officials were present. She reiterated that she paid in two installments and she gave the money to the lawyer.
 47. PW5 – Joseph Kamau Kinyanjui adopted his witness statement dated 28/09/2016 together with a list of documents dated 11/03/2019. He produced them as his evidence in chief. He produced the document at page 43 as his evidence in chief.
 48. In cross examination, it was his testimony that he purchased plot no 17. He signed the agreement in the office of the advocate Maria. Maria was their lawyer and he paid Kshs. 250,000.00 through the lawyer. He paid through a banker's cheque. He added that he could not remember in whose name it was drawn as he did not keep a copy. He knows that they received the monies from the lawyer or from whomever. The banker's cheque number was 059410. He paid the balance on 31/08/2009 in the same office and he was given a receipt as well. He paid to OWAB because he followed instructions. The receipt has OWAB's letterhead and the postal address is 77123-007 Nairobi. He never collected his share certificate so his property has no share certificate. Titles were just done the other day. He only paid Kshs. 5,000.00 and got a receipt from Maria's law firm. At page 74, the last column shows the postal address was Box No. 577-00516. The one on his receipt is Box no. 77123-00611 Nairobi. His plot is no. 17. He is not aware that it is the subject of a criminal case. He testified that he saw the people he bought the land from and one of them was even seated in court. When he was collecting the agreement and when he gave the cheque, two of them were present. From the information he gave, he was never called to record any statement.
 49. In re-examination, he testified that he signed the agreement from the lawyer's (Maria) office. It was witnessed. He gave a banker's cheque and it was received by them and then handed over to Maria.
 50. PW6 – John Kibe Kang'ethe adopted his witness statement dated 10/10/2016 together with a list of documents dated 11/03/2019 and produced them as his evidence in chief. He produced documents at page 53, 64 and 72 as his evidence in chief.



51. In cross examination, it was his testimony that his sale agreement is at page 52-56 between one Isaiah Mungai Kamau and himself. OWAB never signed an agreement with him. It is Isaac that sold plot no. 22 to him. He got the document at page 64 from officials of OWAB. The certificate is dated 18/02/2013 and he received it from OWAB. He paid transfer fees of Kshs. 15,000.00 and he got a receipt dated 21/08/2012. The certificate was issued on 18/02/2013. He was not aware that the advocate had ceased acting. The Kshs. 15,000.00 was for transfer of certificate of ownership. There was an earlier certificate of the owner in the name of Isaiah. He was not aware that the advocate did not have a seal. He testified that he made payments to OWAB for the transfer through the lawyer and for purchase, he made payments to Isaiah.
52. In re-examination, he testified that the agreement was drawn by MMC Advocates. It was disclosed that the title was still held by OWAB, clause no. 8 of the sale agreement. Before executing this agreement, he asked for document and Isaiah referred him to OWAB. He sought for the original certificate and a letter authorizing the transfer. Upon receipt, he went to OWAB officials and he met with Lydia who confirmed that the seller, Isaiah owned the plot and they asked him to pay the transfer fees through Maria who received the money on their behalf. He added that he was issued with a receipt dated 26/08/2012. It took long to get the certificate. After numerous visits, the certificate was issued in 2013.
53. PW11 – Samuel Mwangi Muchiri testified that he was a banker before. He adopted his witness statement together with a list of documents dated 11/03/2019 and produced them as his evidence in chief. He produced exhibits 1-21. He stated that he purchased his property from John Vuti Ngei. He was issued with a certificate of ownership from the advocate but it is from the defendant. He added that he fenced the property once he got ownership.
54. In cross examination, it was his testimony that he has a total of 21 documents. The first in the list of 12/04/2018 with 6 documents and the list on 15/11/2019. There is no such document as listed at No. 6 at the bundle of 12/04/2018. The certificate of ownership is not there. He wants to rely on the statement of Maria as part of her documents but she is not calling her as his witness. It is not his statement. He dealt with the lawyer and with the defendant. He transacted and paid Kshs. 335,000.00 per plot to John Ngei Vuti. He has made a claim against him but he has not sued him. He never paid any money to the defendant (OWAB). He never dealt with Pauline Wanjiru Wambui. Document no. 3 at page 30 is the same agreement between Pauline who bought from OWAB and she sold to Vuti who sold to him. He did not have a document between Pauline and OWAB for sale of the suit property. In the sale agreement at page 30, it refers to plot 4 of LR No. 4148/307 and 4148/308. The plot being discussed s for plot no. 48 and not plot no. 61 and no. 62. The agreement at page 35 is the one dated 2/07/2010, it is not signed by OWAB. It is between him and John Ngei Vuti and it did not involve the defendant. For the bundle dated 12/04/2018, there are minutes as document no. 1. He was not present in the meeting. Out of the meeting, he documents released were all the deed plans pertaining to LR No. 448/307 and 448/308 and a refund of Kshs. 250,000.00. these minutes were not in place when he was purchasing in 2010. Mr. Vuti gave him the deed plans. At the point of purchase, the minutes are for 2013. He got the two lists from the members, the ones on page 9/10 and 9/14. He never dealt with the company secretary of OWAB but he dealt with Vuti. He received the documents he has put in the two bundles from Mr. Vuti. He cannot remember who did the survey. It is a long time. He does not recall receiving a development plan. He got to know the other day that there is someone on the land. He is not in possession of the two plots of land. He cannot remember if the court dismissed his application to protect the suit property. He does not have the beacon certificate. He cannot remember what he was relying on to fence the correct plot. He bought plot no. 61 and 62 and not 48. He was told that the plot was being handled by OWAB. He was told that the original owners of the plot were old ladies. He does not remember verifying with the owners of the land as it is a long time ago. He



- wrote the statement yesterday. In his statement, he is referring to clause 1 of the sale agreement dated 21/04/2010 and the plot is no. 48.
55. In re-examination, he testified that his agreement is dated 2/07/2010. The agreement between him and Mr. Vuti refers to Plot No. 61 and 62. He was shown where the property is and he fenced it. He only got to know in 2019 that someone fenced the plot. The agreement was witnessed by Maria Mutua. The documents PW11-EXh 5-4 were shown to him before he purchased the property.
56. PW12 – John Ngei Vuti testified that he is a pastor. He adopted his witness statement dated 22/01/2019 as his evidence in chief. He testified that he is aware of the properties of Plot No. 61 and 62. He bought the two properties from Pauline Wanjiru Wambui. She was a member of OWAB. He purchased the property for Kshs. 280,000.00 per plot. After he acquired the two plots, he sold them. The agreement was prepared by Maria Mbereka for purchasing from Pauline and also for selling to Samuel. In 2007, there was a contract between OWAB and Maria Mbereka. Once he sold his property, there was an agreement together with a certificate. He knew about the plan of scheme and he pointed out the suit property. He is aware of the location of each suit property.
57. In cross examination, it was his testimony that he met Lydia Nyambura Kinyua who is the chairlady of OWAB. Samuel Mwangi Muchiri is not a member of the church where he fellowships. He sold Plot No. 61 and 62. He never sold them on behalf of OWAB. So Muchiri had no contract with OWAB in regard to these sales. When PW12 bought the suit property, he dealt with Pauline and not OWAB. He never saw an agreement between OWAB and Pauline. The company's secretary was Nduta, chairperson was Lydia Nyambura Kinyua and these are the people who would say who the members are. He has no document to show Pauline was a member of OWAB. The agreement between Pauline and himself is dated 21/04/2010. At page 2, the plot subject to this agreement is plot no. 48 and it is different from plot no. 61 and 62. The agreement at page 30 does not connect to plot 61 and 62 and it does not connect Mr. Muchiri to OWAB. Mr. Muchiri has not filed a suit against PW12. He gave M. Muchiri the land and he was given a share certificate by OWAB. He has no record to show that OWAB was paid. For plot no. 48, he paid Kshs. 300,000.00. there is no deed plan for the two parcels of land. He has a copy of the plan. A surveyor did the survey of the land, a Mr. Odhiambo and the amalgamation was done by the planner. The instruction was to do sub-division and the titles were to be issued by the lawyers. The instructions to PW12 when he met OWAB is contained in an agreement. The letter at page 11 was written to Mr. Vuti to undertake subdivision but he never responded to OWAB. The agreement between him and OWAB is however missing. He was supposed to do subdivision and do the deed plans. He understands the amalgamation process though he agrees that he may not understand it fully. One can apply for amalgamation and subdivision at the same time. They did not combine the two processes of land. The original two titles were not surrendered. The deed plan number is not part of the documents. Counsel Mbereka was his advocate, Pauline's advocate and OWAB's. she also acted for Mr. Muchiri as the buyer and PW12 as the seller. Mbereka is not his cousin. He introduced OWAB to a lawyer. He is charged in a criminal case. He could not remember the case number. When he was given the titles, he never took the seal of OWAB. He is the one who was preparing the certificates and giving to the lawyer. The lawyer would seal the certificates. He dealt with the chairlady and the treasurer, though there were two treasurers. One was Kibe and Margaret Wachira because she also signed the certificates. The certificate would be done in the presence of the lawyer. He could not tell what was happening between the advocate and OWAB. These plots were being sold by the chairlady. He never acted as an agent for anyone other than Muchiri. The share certificates were not released.
58. In re-examination, he testified that he was not given a share certificate. The seal was kept by Maria Mbereka. They had to go to Maria's office with OWAB but he was not privy to the contract. He reiterated that the seal was in Maria's office. The share certificate was being prepared by himself then he



sent it back to Maria's office then the chairlady, treasurer and secretary would go to the lawyer's office and they would sign it. The secretary, Nduta and Kinyua the chairlady would sign and then once they are paid, the owner of the plot would come to pick from the office of Maria. When he purchased the property from Pauline. She never gave him a share certificate. He added that he was not a surveyor but he contracted Odhiambo, the surveyor. He did his instructions as was requested up to the level of the deed plan to Maria. The criminal case he was charged in is 2576 of 2014. He was charged and the court determined and found that he was not guilty. The case in 3013 of 2014 was dismissed. There is still another criminal case that is ongoing.

59. After hearing the testimony of the eight witnesses, the Plaintiffs' case was closed.

Defendant's Evidence: -

60. DW1 – Zipporah Nduta Wairimu testified that she is the secretary of OWAB. She has worked there since 1993. She has been authorized to come and testify on behalf of the company. She adopted her witness statement dated 23/02/2015 together with a list of documents dated 11/02/2015 and a further list of documents dated 12/10/2021. She produced them as her evidence in chief, marked as DW1 Exh 1-7 and DW1 Exh 8-12 from pages 1-40 of her bundle. It was her testimony that they have never done any transactions with the plaintiffs. They only met them here in Court. That they have also never used the system that the Plaintiffs used to buy property. They have never met them before this court. The certificates were detained by their surveyor; they were 32 share certificates. The bundle by the plaintiff at page 65-69 shows receipts but it is her testimony that they never issue receipts. A buyer usually presents a bank slip once they deposit the money in the bank. The signature is not theirs. The receipt at page 69 is for the one who was a surveyor. The advocate Maria Mbereka was their advocate. They engaged her to follow up with the surveyor but not to write any agreements. They paid her for the survey work, Kshs. 90,000.000 and not for any agreement execution.
61. In cross examination, it was her testimony that she is the secretary at OWAB. She did not have the CR12 in court to show that she is the secretary. The company appointed her to represent them in court but she did not have any written authorization filed in court. They gave advocate Mbereka work to support the surveyor but not any task of executing agreements. The signature on the agreement is not hers. The document no. 3 in the plaintiff's further list of documents is a sale agreement and she confirmed that they sold to the purchaser and the purchaser appointed Maina to execute the agreement. She confirmed the same. For the 11 agreements, they never authorized Maria to execute agreements. There are many cases involving John Vuti including criminal cases. For example, CR Case no. 3013/2014 but we were told that the litigation settled the matter out of court. CR Case E103/2020 had OWAB as the complainant concerning the plots and documents. The plaintiffs in this case are witnesses before the same court. She added that she never summoned the police to come and testify. The plaintiffs in this case were not even summoned to the police. There are 4 officials of OWAB. She did not know if Lydia Nyambura facilitated the plaintiffs by taking them to the ground. She does not know what the plaintiffs said about her. The documents at page 10 of the defendant's bundle shows current membership of OWAB. The list does not reflect membership at the Registrar's office. When the plaintiffs came to court, they had put up a wall and started construction. Maria advised that they should not disturb them but they never accepted her advice. They gave a list to the surveyor including the seal of the company. He would call them to take certificates when he registered. They signed 110 certificates in his office but when he returned, he never gave them back a list of 32 certificates. Vuti was arrested and they await the hearing of the case.
62. She further testified that Maria was their advocate. She gave them deed plans, seal and other documents after they appointed another advocate. She gave them the list of members which however was not



theirs. Agreements were prepared by Maria. Their advocate was under the law firm of Kimani Kabucho & Karuga Advocates. OWAB was incorporated in 1993. It was registered in 1999. The officials were 5 females. Since 1999 to date, FW1 is the secretary. She has a list of members she submitted it at page 26-10 of the defendant's bundle. It shows 28 members. It was prepared in 2015. They subdivided the land to give to members and the others were to be for sale. Not all 28 members have a plot. For now, the title deeds are out and they have been allocated approximately at 70%. Vuti had a criminal case in Thika. She did not know why it did not proceed. They gave Vuti 7 plots to use for subdivision but he never gave them the documents. They got their deed plan through intervention of the police. They never gave him the title deeds of the 7 plots but they gave him Kshs. 250,000.00. He gave them a receipt of Kshs. 80,000.00. they have no case against Maria but against Vuti. Maria never gave them any money for plots.

63. In re-examination, she testified that the further list at page 17 contains 5 documents received from Maria. There is no list of members. Here is a genuine sale document for Charles Kagura which was filed by the Plaintiff in the plaintiff's further list of documents. They never gave instructions nor paid Maria for the development of sale agreements. The advocate would acknowledge receipt of documents on behalf of Costa Properties, a company belonging to Vuti. The deed plan of 4147/307 & 308 was given to them at the police station and this was gotten after the small plots were issued with numbers. The criminal case no. 103 is still in court. They await the hearing and outcome. Among the plaintiff's in court there is none that they received their money for sale of a plot.
64. With that evidence, the Defendant closed his case.
65. After hearing, parties closed their respective cases, and the Court gave directions of filing of written submissions on 17/07/2023.

SUBMISSIONS: -

66. The Court gave directions on filing of written submissions on 17/07/2023, which the Plaintiffs and the Defendant did, and I have considered them. The 1st, 2nd, 4th, 6th, 7th & 9th Plaintiffs' submissions are dated 16/08/2023, the 6th Plaintiff's submissions are dated 4/09/2023, the 11th Plaintiff's submissions are dated 12/09/2023 and the Defendant's submissions are dated 6/10/2023.

Issues For Determination: -

67. The Court has now carefully read and considered the pleadings, the Plaintiff's submissions and the evidence adduced by the Plaintiff and the Defendants and I find the issues for determination are as follows.
 - i. Whether the Defendant's witness had authority to represent the Defendant.
 - ii. Whether there are valid sale agreements between the Plaintiffs and the Defendant.
 - iii. Whether the Plaintiffs are the bona fide purchasers and owners of all those plots known as plot Number 11,12,13,17,22,26,27,28,29,61,62 and 75 being subdivisions of land parcel L.R.No.4148/307(IR No.89991) and Land Parcel No.4148/308(IR No. 89990)
 - iv. Whether the Plaintiffs entitled to the orders sought.
 - v. Whether the Defendant is entitled to the orders sought in the counterclaim.
 - vi. Who should bear the costs of this suit and the counterclaim?



Analysis And Determination

Whether the Defendant's witness had authority to represent the Defendant.

68. Before I embark on whether or not I find that there is a valid agreement of sale, I think I need to sort out a preliminary issue with regard to the Defendant's witness' authority to represent the Defendant in this matter. The gist of the Plaintiffs' contention is that the Secretary of the Defendant had no authority, in accordance with the Co-operative Society Act 1997 to represent the Defendant. I note that the Defendant's witness (DW1) testified and confirmed that she did not produce a CR12 in court to show that she is the secretary. It was also her testimony that the company appointed her to represent them in court but she did not have any written authorization filed in court.
69. It is the Plaintiffs' submission that the person appearing as a witness for the Defendant had no authority to do so from the Defendant and hence she appeared as a witness so as to advance and protect her own personal interests. They relied on Section 28 (3) of the *Co-operative Societies Act* and the case of *East African Safari Air Limited vs Anthony Ambaka Kegode & Another* [2011] in support of this submission. It is their further submission that the Defendant's witness authority to defend the suit had to be sanctioned by either the Management Committee or the Co-operative society in general or a special meeting. Such sanction is to be evidenced by a resolution and/or minutes to that effect which the Defendant has failed to produce as evidence in this particular suit. The 11th Plaintiff also submitted that by looking at DW1's witness statement dated 23/02/2015, the Defendant neither authorized her nor did the society sanction her appearance in this matter on their behalf. That the advocate representing the defendant in this matter also had no authority or sanction from the defendant as no resolution was tendered before this Court authorizing him so to act. Up to the end of these proceedings, neither the status of the Defendant's witness nor the sanctioning of their advocates on record had been ratified by the Defendant and hence the defence advanced in this suit lacks merit. He relied on the case of *Bugerere Coffee Growers Ltd v Seraduka & Anor* [1970] EA 147 in support of this submission.
70. Order 9 Rule 2 of the Civil Procedure Rules, 2010 provides as follows;
- “2 Recognized agents (Order 9, Rule 2.) The recognized agents of parties by whom such appearance applications and acts may be made or done are- (c) in respect of a corporation, an officer of the corporation duly authorized under the corporate seal.”
71. The Defendant herein is a Co-operative Society which is a body corporate pursuant to the provisions of Section 12 of the Cooperative *Societies Act*, cap 490 which provides as follows:“Upon registration every society shall become a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold movable and immovable property of every description, to enter into contracts, to sue and be sued and to do all things necessary for the purpose of, or in accordance with its by-laws”.
72. Section 27(1) of the same Act states as follows:“The supreme authority of a co-operative society shall be vested in the general meeting at which members shall have the right to attend, participate and vote on all matters.”



73. Section 28 of the Act provides for membership and powers of the committee. Particularly, I have considered the provisions of Section 28(3) of the Cooperative [Societies Act](#) which provides as follows:
- “The Committee shall be the governing body of the society and shall, subject to any direction from a general meeting or the by-laws of the co-operative society, direct the affairs of the co-operative society with powers to—
- (a). enter into contracts;
 - (b). institute and defend suits and other legal proceedings brought in the name of or against the co-operative society; and
 - (c). do all other things necessary to achieve the objects of the co-operative society in accordance with its by-laws.” [emphasis added]
74. The [Co-operative Societies Act](#) is in this regard a national legislation, and has the force of law throughout Kenya. Section 28 (3) of Cooperative [Societies Act](#), is clear on the duties of the Management Committee in the governing authority of the society hence they are mandated to direct the affairs of the society with powers, subject to any direction from a general meeting or the by-laws of the co-operative society 3(b) to institute and defend suits and other legal proceedings brought in the name of or against the society, and 3(c) do all other things necessary to achieve the society’s objectives.
75. What arises from the foregoing is that the authority to institute pleadings is vested with the committee of the society, which in turn gets directions in that regard from the general meeting or the by-laws of the society.
76. The court has considered the pleadings. The suit was filed by the Plaintiffs against the Defendant in its name. The Defendant filed a defence and in its witness statement, one Zipporah Nduta Warimu described herself as “Secretary to the Defendant.” The Defendant also filed a Counterclaim and the Verifying Affidavit thereto was sworn by one Zipporah Nduta Warimu who once again described herself as “Secretary to the Defendant and duly authorized and competent to swear the affidavit.”
77. No authority has been attached to the Verifying Affidavit or the Defence by the deponent in terms of Section 28 above. The averments in support of the defence and the counterclaim have been sworn by Zipporah Nduta Warimu who indicates that she is the Secretary of the Society. There is no indication of any authority from the general meeting or by laws.
78. With regard to the Defendant’s counterclaim, apart from Section 28 of the Cooperative [Societies Act](#) aforesaid, Order 4 Rule 1(4) of the Civil Procedure Rules states as follows: -
- “Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.”
79. And Order 4 Rule 1(6) states:
- “The court may of its own motion or on the application by the plaintiff or the defendant order to be struck out any plaint or counterclaim which does not comply with sub-rule (2) (3), (4) and (5) of this rule.”
80. It is apparent that the provision of Order 4 of the Civil Procedure Rules had not been complied with. The question of the impact of failure to file authority in terms of Order 4 Rule 1(4) of the Civil



Procedure Rules was discussed by the Court of Appeal in *Spire Bank Limited vs Land Registrar & 2 others* [2019] eKLR, which interpreted the law thus:

“It is essential to appreciate that the intention behind order 4 Rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company’s seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized.”

81. Ideally, the Court would be guided by the same. The mere fact that the deponent did not file authority from the Defendant authorizing the swearing of the Verifying Affidavit to file the suit on its behalf or in the Defence, cannot be a ground for invalidating the suit. However, in this particular case, indeed the suit proceeded to full hearing and the issue was not rectified before trial, during or even after trial. That being the position, the court concurs with the Plaintiffs that the Defendant’s witness had no authority to defend the suit.

82. In the case of *East African Portland Cement Ltd v Capital Markets Authority & 4 others* [2014] eKLR, Court held that “it is not a “procedural technicality” to require that a company authorizes any proceedings brought in its name.”

83. The learned Judge went ahead and explained why it was necessary for a company to authorize proceedings: -

“The requirements of the Companies’ Act and the petitioner’s Memorandum and Articles of Association with regard to the execution of documents and filing of depositions authorizing institution of suits are, I believe intended to protect the petitioner’s assets, to ensure among other things, that the petitioner is not embroiled in lawsuits instigated by individuals within the company without the sanctions of the body authorized to involve the company in litigation.”

84. This Court is further guided by the decision in *Bugerere Coffee Growers Ltd v Sebaduka & others* [1970] EA 147 as cited in the said *East African Portland Cement Ltd* (supra) for the principle that “when companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors’ meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in the case.”

85. In the circumstances, having found that the Management Committee as per the provisions of Section 28 of *Co-operative Societies Act* are the governing body of the Society with powers to institute and defend suits and other legal proceedings brought in the name of or against the Co-operative Society and that those powers are subject to any direction from a general meeting or the by-laws of the co-operative society, it therefore goes without saying that the Secretary, Ms. Zipporah Nduta Wairimu, was required to adduce evidence of the authority to act for the Defendant in order to establish that she had mandate to compromise the suit as she did. Since she did not, the Defendant’s Defence and Counterclaim are defective and are hereby dismissed on the basis of failure to comply with Section 28 (3) of the *Co-operative Societies Act*.



86. The managing committee of a co-operative society cannot take the society to the battlefield of litigation without the authority of the Committee. It is the members of the Committee who are answerable to the members of the society and it is only them who can decide what is good for the society. Litigation is not cheap and before a suit is lodged, the decision-making organ of the society must have its input in the decision. See the case of Kenya Union of Savings & Credit Co-operatives Limited (Kuscco) v Sacco Societies Regulatory Authority (Sasra) [2019] eKLR. The Defendant did not exhibit the authority of the Committee authorizing the commencement of the counterclaim. The counterclaim should have been instituted through a resolution of the Defendant's Management Committee and failure to do so makes the Defendant's suit a proper candidate for striking out.
87. In the end, I find and hold that the Defendant's counterclaim and defence are defective and are therefore dismissed.

Whether the agreements of sale between the Plaintiffs and the Defendant are valid

88. In deciding whether or not a contract for the sale of land is valid, the Court must look at whether or not the said contract meets the requirements of Section 3(3) of the *Law of Contract Act*. It is trite law that if one wishes to enforce an agreement over land, then such transaction must be in writing. Without such documented agreement, then one cannot enforce a sale agreement over land. This is brought out by Section 3 (3) of the *Law of Contract Act*, which provides as follows: -
- (3) No suit shall be brought upon a contract for the disposition of an interest in land unless (a) the contract upon which the suit is founded- (i) is in writing; (ii) is signed by all the parties thereto; and (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party: Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act*, nor shall anything in it affect the creation of a resulting, implied or constructive trust.
89. The requirement that a contract effecting any disposition of an interest in land must be in writing and executed by the parties to the contract is further fortified by Section 44 of the *Land Registration Act* 2012, which provides as follows: -

“ 44.

- (1) Except as otherwise provided in this Act, every instrument effecting any disposition under this Act shall be executed by each of the parties consenting to it, in accordance with the provisions of this section.
- (2) The execution of any instrument referred to in subsection (1), by a person shall consist of appending a person's signature on it or affixing the thumbprint or other mark as evidence of personal acceptance of that instrument.”

90. The above law is in black and white and I need not cite any authority. One cannot bring a suit to enforce an agreement for sale of land unless such agreement is in writing. We can only know that there is such agreement if the document itself is produced as evidence in the case.
91. In our instance, various sale agreements have been produced. The 1st and the 4th Plaintiffs adduced a sale agreement dated 12/10/2009 for plot no. 26, the 2nd Plaintiff produced a sale agreement dated 8/05/2009 for plot no. 27, the 5th Plaintiff produced a sale agreement dated 9/03/2009 for plot no.



28, the 6th Plaintiff produced a sale agreement between himself and one, Isaiah Mungai Kamau dated 12/04/2012 for plot no. 22, the 7th Plaintiff produced a sale agreement dated 13/03/2009 for plot no. 12 & 13, the 9th Plaintiff produced a sale agreement dated 15/08/2009 for plot no. 17, the 8th Plaintiff produced a sale agreement dated 14/09/2011 jointly between herself and one Simon Wamugunda Njenga and one Gilbert Thuo Macharia for plot no. 11 and lastly, the 10th Plaintiff produced a sale agreement dated 24/04/2010 between himself and one Simon Njeri Maina for plot no. 75. The 3rd Plaintiff did not produce any sale agreement before this Court. The only evidence tendered was on the Amended Complaint wherein it is alleged that there is a sale agreement dated 10/06/2009 for Plot No. 29.

92. The plain meaning of Section 3(3) of the *Law of Contract Act* is that for a party to found an action (suit) on a contract relating to a disposition of an interest in land such contract must satisfy all the requirements set out under section 3(3) of the Act. Such contract must be in writing, should be signed by all the parties to it and the signature of each party signing must be attested by a witness who is present when the contract was signed by such party. The contracts sought to be enforced by the plaintiffs against the Defendant must be such contract as is demonstrated to have complied with the mandatory provisions of Section 3(3) of the *Law of Contract Act*. This Court has looked at the sale agreements that have been produced, and noted that the Agreements for sale contain the names of the parties, the description of the property, the purchase price and the conditions thereto. A look at the said sale agreements confirms that the same are valid sale agreements which are enforceable by the parties. See the case of Nelson Kivuvani...Vs...Yuda Komora & Another, Nairobi HCCC No.956 of 1991.
93. Since all the above ingredients have been met in the various agreements of sale entered into between the Plaintiffs and the Defendant, the Court finds and holds that the Sale Agreements between the parties are valid and enforceable that are capable of being enforced by way of specific performance. I shall therefore grant prayer (c).

Whether the Plaintiffs are the bona fide purchasers and owners of all those plots known as plot Number 11,12,13,17,22,26,27,28,29,61,62 and 75 being subdivisions of land parcel L.R.No.4148/307(IR No.89991) and Land Parcel No.4148/308(IR No. 89990).

94. The Court determined that there are valid and enforceable agreements of sale between the Plaintiffs and the Defendant capable of being enforced. The Court also found that the Defendant's counterclaim and defence are defective and are dismissed. This means that the suit against the Defendant remains unchallenged.
95. The core issue in the suit herein is whether the Plaintiffs have proved their case against the Defendant. The plaintiffs must discharge the burden of proof however much there is no rebuttal from the Defendant.
96. It is the contention of the Plaintiffs that they are entitled to the suit premises because they purchased the plots from the Defendant and they seek for specific performance of those agreements. I need to find out if I have sufficient pleadings and evidence to support this allegation.
97. The plaintiffs brought this suit against the Defendant claiming that between March 2009 and April 2010, the Defendant sold to them the suit properties for valuable consideration and that the Defendant has in breach of the various agreements for sale entered into with them failed to issue them with the titles for the said properties and has instead decided to sell the same to third parties.
98. The Plots in contention herein are plot known 11,12,13,17,22,26,27,28,29,61,62 and 75. The 1st and the 4th Plaintiffs allege to have entered into a sale agreement dated 12/10/2009 between themselves and the Defendant for plot no. 26. PW1 testified that he paid Kshs. 250,000.00 for the suit plot. The plot



- was being sold for Kshs. 250,000.00. The sale agreement only confirms that the 1st and 4th Plaintiff paid Kshs. 160,000.00 prior to signing of the agreement. The agreement also states that Kshs. 90,000.00 shall be payable upon successful registration of the transfer. I note that no receipt was produced in court to support this allegation but evidence adduced before me demonstrates that the two were issued with a certificate of ownership no. 110 dated 22/06/2011 as seen on page 57. The certificate indicates that the 1st and 4th Plaintiffs had fully paid for the purchase of Plot 26. To this end, I am satisfied that the 1st and 4th Plaintiffs are entitled to Plot no. 26.
99. The 2nd Plaintiff alleges to have entered into a sale agreement dated 8/05/2009 between himself and the Defendant for plot no. 27. The Plot was being sold for Kshs. 200,000.00. The sale agreement provided that the 2nd Plaintiff was to pay Kshs. 200,000.00 through a banker's cheque upon signing of the agreement. I note that a receipt no. 565 dated 8/05/2009 was produced in court to support this allegation at page 65 of the Plaintiffs' bundle. Further evidence adduced before me demonstrates that the 2nd Plaintiff was issued with a certificate of ownership no. 0013 dated 7/07/2009 as seen on page 58. The certificate indicates that the 2nd Plaintiff had fully paid for the purchase of Plot 27. To this end, I am satisfied that the 2nd Plaintiff is entitled to Plot no. 27.
100. The 3rd Plaintiff did not produce any sale agreement before this Court. The only evidence tendered was the averments made in the Amended Plaint wherein it is alleged that there is a sale agreement dated 10/06/2009 for Plot No. 29. This was not the case. The only document produced by the 3rd Plaintiff is a certificate of ownership no. 0019 dated 10/06/2010 for Plot 29. This is insufficient evidence. The 3rd Plaintiff has failed to prove his case as against the Defendant in terms of ownership of Plot No. 29.
101. The 5th Plaintiff alleges to have entered into a sale agreement dated 9/03/2009 between herself and the Defendant for plot no. 28. The Plot was being sold for Kshs. 200,000.00. The sale agreement provided that the 5th Plaintiff was to pay Kshs. 200,000.00 upon signing of the agreement. I note that receipt no. 554 dated 12/02/2009 for Kshs. 220,000.00 was produced in court to support this allegation at page 72 of the Plaintiffs' bundle. Further evidence adduced before me demonstrates that the 5th Plaintiff was issued with a certificate of ownership no. 003 dated 27/02/2009 as seen on page 60. The certificate indicates that the 5th Plaintiff had fully paid for the purchase of Plot 28. To this end, I am satisfied that the 2nd Plaintiffs is entitled to Plot no. 28.
102. From the court record, the 6th Plaintiff contended to have entered into a sale agreement between himself and one, Isaiah Mungai Kamau dated 12/04/2012 for plot no. 22. Isaiah Mungai Kamau is alleged to have purchased the plot from the Defendant. There is a receipt that was issued in favor of the 6th Plaintiff for transfer fees, receipt no. 632 at page 73. It has been alleged that Isaiah wrote a letter to the Defendant on 15/06/2012 to inform him of the sale. The said letter was not produced before the court. The 6th Plaintiff was also issued with a certificate of ownership no. 017 at page 64. It indicates that the 6th Plaintiff had fully paid for the purchase price. That being said, the 6th Plaintiff's claim is against Isaiah Mungai Kamau as he is the person that he entered into a contract with. The said Isaiah Mungai Kamau is not a party to this suit. The 6th Plaintiff has no claim against the Defendant. Therefore, it is my considered view that I cannot order for specific performance with regard to Plot. 22 as the agreement dated 12/04/2012 provides that the registered owner is Isaiah Mungai Kamau and not the Defendant.
103. The 7th Plaintiff alleges to have entered into a sale agreement dated 13/03/2009 between herself and the Defendant for plot no. 12 and 13. The Plot was being sold for Kshs. 200,000.00. The agreement provided that the sum was to be paid upon execution. The purchase price was paid in two installments on 28/12/2008 and on 20/02/2009. I note that receipt no. 555 dated 20/02/2009 and receipt no. 507 dated 28/12/2008 was produced in court to support this allegation at page 68 of the Plaintiffs' bundle. Further evidence adduced before me demonstrates that the 7th Plaintiff was issued with a certificate of



- ownership no. 002 dated 27/02/2009 at page 58. The certificate indicates that the 7th Plaintiff had fully paid for the purchase of Plot no. 12 and 13. To this end, I am satisfied that the 7th Plaintiff is entitled to Plot no. 12 and 13.
104. The 8th Plaintiff alleges to have entered into a sale agreement dated 14/09/2011 jointly between herself and one Simon Wamugunda Njenga on the one part and one Gilbert Thuo Macharia on the other for the purchase of plot no. 11. The vendor in this agreement is listed as Gilbert Thuo Macharia. She averred that she paid transfer fees of Kshs. 15,000.00 and received receipt no. 542 and 541 together with a certificate of ownership no. 117 dated 13/09/2011 at page 65. The 8th Plaintiff also attached a receipt no. 301 dated 13/09/2011 for payment for certificate, receipt no. 541 dated 14/09/2011 for onward transmission to OWAB and receipt no. 542 dated 14/09/2011 for legal fees. However, it is my considered view that the 8th Plaintiff's claim for specific performance lies with the party she entered into a contract with and not the Defendant. Gilbert Thuo Macharia is not a party to this suit and therefore no remedy is available for the 8th Plaintiff as against the Defendant.
105. The 9th Plaintiff contended to have entered into a sale agreement dated 15/08/2009 between himself and the Defendant for plot no. 17. A copy of this sale agreement has been produced before me. I have perused it and it indicated that the Plot was being sold for Kshs. 250,000.00. The agreement stated under special conditions (1) that Kshs. 240,000.00 to be paid via banker's cheque no. 059410 upon execution. A balance of Kshs. 10,000.00 was to be paid on or before 31/08/2009. It is not clear whether the agreement meant that the 9th Plaintiff had paid the said amount via banker's cheque no. 059410 upon execution. Although he did not produce a copy of this bank cheque no. 059410 before the Court, I am inclined to believe that the 9th Plaintiff had deposited the money through the said cheque. Receipt no. 571 was produced in court to support this allegation. From the record, the 9th Plaintiff was not issued with a certificate of ownership as the same has not been produced. To this end, the 9th Plaintiff is entitled to Plot no. 17 upon proving that he paid Kshs. 10,000.00 as per the said agreement.
106. The 10th Plaintiff produced a sale agreement dated 24/04/2010 between herself and one Simon Njeri Maina for plot no. 75. Once again, the vendor according to this agreement is Simon Njeri Maina who is not a party to this suit. The 10th Plaintiff's claim is not against the Defendant and so it cannot be ordered to perform contractual obligations in a contract it was not a party to. Therefore, this Court cannot make any orders as against the Defendant with regard to Plot No. 75.
107. Lastly, the 11th Plaintiff claims plot no. 61 and 62. He admits to have purchased the same from John Ngei Vuti. He produced a sale agreement dated 2/07/2010 which confirms the same. John has not been sued in this suit. the 11th Plaintiff has no claim against the Defendant. No order for specific performance can be issued in his favor as he has no contractual obligations with the Defendant.
108. The 3rd, 8th, 10th and 11th plaintiffs have failed to prove that they have any contractual obligations with the Defendant. They have not placed before this court any evidence before this Court that they entered into any written agreement for sale with the Defendant in respect to the suit plots that they claim. The 3rd plaintiff has not produced a copy of the agreement for sale which she claims to have entered into with the defendant.
109. Before I make my final findings under this issue, it is important that I mention that there have been allegations of forgery with regard to the agreements placed before this Court. The agreements for sale that have been made between the 1st, 2nd, 4th, 5th, 7th and 9th Plaintiffs and the Defendant in respect of 12,13,17,26,27 and 28 were drawn by Kimani Kabucho Karuga and Company Advocates who are indicated in the said agreement as vendor's advocates. The purchaser's advocates are indicated as Kahari and Kiai Advocates in some agreements while in others, the firm of Kimani Kabucho Karuga and



Company Advocates are indicated to act for both the vendor and the purchasers. The agreements are indicted as having been signed by the Chairlady, Secretary and Treasurer on behalf of the Defendant. Their signatures are indicated to have been witnessed by one, Maria M. Mutua Karuga advocate. All these agreements for sale were executed in a similar manner. The 1st, 2nd, 4th, 5th, 6th, 7th and 9th plaintiffs have also exhibited copies of receipts said to have been issued to them by the Defendant for the payments they made towards the purchase price for their respective plots.

110. This Court notes that there is no evidence before it of any complaint made against the firm of Kimani Kabucho Karuga & Co. Advocates who prepared the said agreements and indicated that it was acting for the Defendant. No complaint has also been lodged against Maria Mutua Karuga advocate who is said to have witnessed the execution of the said agreements for both the vendor and the purchasers. The said firm of advocates has confirmed in writing that the said agreements for sale were signed by the Defendant's officials.
111. Further to the above, there is no evidence adduced in this court to demonstrate that there was a forensic examination done on the agreements and receipts produced before me to demonstrate that the same were forgeries. There was no forensic examination report produced before me. The court record shows that there one case against John Ngei Vuti which is said to be pending and two others dismissed. As at the time of viva voce hearing, there is no finding that he was involved in the alleged fraud.
112. The upshot of the foregoing is that this Court is satisfied that the 1st, 2nd, 4th, 5th, 7th and 9th Plaintiffs are the bona fide purchasers and owners of all those plots known as plot Number 12,13,17,26,27 and 28 being subdivisions of land parcel L.R.No.4148/307(IR No.89991) and Land Parcel No.4148/308(IR No. 89990). More particularly, the 9th Plaintiff is entitled to Plot no. 17 upon proving that he paid KShs. 10,000.00 as per the said agreement.

Whether the Plaintiffs are entitled to the orders sought.

113. This Court has gone through the sale Agreements. Having found that the same was valid and enforceable it would therefore mean that the parties are bound by the terms of the Contract. See the case of Total Kenya Ltd..Vs..Joseph Ojiem, Nairobi HCCC No.1243 of 1999, where the Court held that:-“Parties to a contract that they have entered into voluntarily are bound by its terms and conditions.....”
114. Parties are bound by the terms of their contracts and the Court can not be seen to be rewriting the contract for the parties. See the case of National Bank of Kenya Ltd ...Vs...Pipeplastic Samkolit (K) Ltd & Another, Civil Appeal No.95 of 1999 (2001) KLR 112 (2002) EA 503, where the Court held that:-“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved”.
115. Once again, there is no evidence adduced in this court to demonstrate that there was a forensic examination done on the agreements and receipts produced before me to demonstrate that the same were forgeries. There was no forensic examination report produced before me. The court record shows that there one case against John Ngei Vuti which is said to be pending and two others dismissed. As at the time of viva voce hearing, there is no finding that he was involved in the alleged fraud.



116. It is trite law that allegations of fraud are serious and must be strictly proved. See the case of *Urmilla W/ O Mahendra Shah..Vs...Barclays Bank International Ltd & Another* (1979) KLR 76, the Court held that:

“Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, but something more than a mere balance of probabilities is required.”

117. Having already noted that the contract signed by the parties was valid and held that no evidence has been produced to establish any forgeries with regard to the agreements of sale before it, I shall now focus on the prayers sought in the Amended Plaintiff.

118. Prayer (a) seeks a permanent injunction restraining the defendant by themselves, their agents, servants and or any other persons whomsoever from encroaching upon, trespassing onto, remaining on or in any way however interfering with all that plot known 11,12,13,17,22,26,27,28,29,61,62 and 75 situate at Juja in Kiambu County in Nairobi respectively. Since I have already found and held that the 1st, 2nd, 4th, 5th, 7th and 9th Plaintiffs are the bona fide purchasers and owners of all those plots known as plot Number 12,13,17,26,27 and 28, it follows that no party save for the respective owners with their authority should have any right to enter therein. The Defendant has no legal mandate to use the suit property in any manner. As such, this prayer is meritorious, as pertains to Plot Nos. 12,13,17,26,27 and 28.

119. The Plaintiffs have sought for specific performance under Prayer (b). For an order of specific performance to be issued, the Court must first determine whether there an enforceable contract. As earlier noted, the court did find and hold that there were valid contracts and as such the same are enforceable.

120. This Court has perused the Sale Agreements that have been produced, and noted that the same are in writing and signed by all parties and further there was consideration. It thus met the requirements of Section 3(3) of Contract Act. Granting of specific Performance is discretionary and as such the Court should in deciding whether or not to grant the orders look at the merits of the case based on a case-to-case basis and whether there is an adequate alternative. See the Case of *Reliable Electrical Engineers Ltd.....Vs....Mantrac Kenya Limited* (2006) eKLR, wherein Justice Maraga (as he then was) stated that:-

“Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well laid principles”

“The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages are adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the defendant.”

121. Having found in this case that the sale agreement was valid and enforceable and that there was no fraud when parties entered into the sale agreement, the Plaintiffs submitted that an order for specific performance ought to issue. It has been shown that there is no adequate alternative remedy for



- the Plaintiffs who aver that they cannot obtain similar portions as the Suit Properties for the same consideration paid for 14 years ago.
122. The Plaintiffs further submitted that they have also shown that they are ready, able and willing to complete the sale agreements. It is the duty of the Defendant to procure the completion documents listed in the agreement and complete the registration of the subdivided portions from the parent title in their favour.
123. As already found and held by this Court, there were valid sale agreements by the parties that were duly signed. Further the said agreements have not been vitiated by any factors nor have the allegations or form of illegality that has been alluded to been proved. Various Plaintiffs had testified that they had already taken possession and put-up permanent buildings on their respective plots. I also note that most of the payments of the purchase price were made between the year 2009 – 2011. In this instant therefore, damages may not be an appropriate remedy and as such Specific Performance is the best way to ensure that justice has been served. The award is specific performance will not prejudice the Plaintiffs nor the Defendant at all. This Court therefore finds that the 1st, 2nd, 4th, 5th, 7th and 9th Plaintiffs are entitled to the orders sought.
124. I note from the Amended Plaint that one of the prayers sought by the Plaintiffs is a declaration at prayer (c) thereof that there is a valid and enforceable undertaking against the defendant. I have already effectively granted that prayer as pertains to the 1st, 2nd, 4th, 5th, 7th and 9th Plaintiffs and I see no reason to return to it.
125. Prayer (d) is seeking for an order compelling the Defendant to honor their undertaking. The Court found and held it is satisfied that the 1st, 2nd, 4th, 5th, 7th and 9th Plaintiffs are the bona fide purchasers and owners of all those plots known as plot Number 12,13,17,26,27 and 28. This court also found that the agreements for sale were valid and enforceable which would therefore mean that the parties are bound by the terms of the Contract. For this reason, I opine that this relief is fit and just to grant. I shall therefore grant the same under prayer (d).
126. Consequently, now carefully considered the available evidence and the exhibits thereto together with the written submissions, the Court finds that the 1st, 2nd, 4th, 5th, 7th and 9th Plaintiffs have discharged his duty of proof on a balance of probabilities against the Vendor and the Vendor herein is the Defendant. More particularly, the 9th Plaintiff is entitled to the order of specific performance with regard to Plot no. 17 upon meeting the conditions of his agreement with the Defendant.

Who should bear the Costs of this Suit and the Counterclaim?

127. It is trite law that Costs follow the event. The 1st, 2nd, 4th, 5th, 7th and 9th Plaintiffs have succeeded in their claim. I see no reason to deny them costs of the suit and the counterclaim.

Final orders and disposal

128. Accordingly, having been satisfied that the 1st, 2nd, 4th, 5th, 7th and 9th Plaintiffs have proved their claim to the required standards, I enter judgment for the he 1st, 2nd, 4th, 5th, 7th and 9th Plaintiffs against the Defendant herein in the following terms: -
- a. The Defendant's defence and counterclaim dated 11/02/2015 are defective and are therefore dismissed.
 - b. An order of permanent injunction be and is hereby issued restraining the Defendant by themselves, their agents, servants and or any other persons whomsoever from encroaching



upon, trespassing onto, remaining on or in any way however interfering with all that plot known 12,13,17,26,27 and 28 situate at Juja in Kiambu County in Nairobi respectively.

- c. An order of specific performance is hereby issued to the Defendant in favour of 1st, 2nd, 4th, 5th, 7th and 9th Plaintiffs in respect of plot known as 12,13,17,26,27 and 28 situate at Juja in Kiambu County in Nairobi respectively.
- d. It is hereby declared that there is a valid and enforceable undertaking against the Defendant herein.
- e. An order is hereby issued compelling the Defendant to honor their undertaking with respect to 1st, 2nd, 4th, 5th, 7th and 9th Plaintiffs and Plot No. 12,13,17,26,27 and 28 situate at Juja in Kiambu County in Nairobi.
- f. The costs of the suit and the counterclaim are in favour of the 1st, 2nd, 4th, 5th, 7th and 9th Plaintiffs.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 8TH DAY OF FEBRUARY 2024

.....

MOGENI J.

JUDGE

In the virtual presence of; -

Mr Kimathi for the 1st, 2nd, 4th, 6th, 7th and 9th Plaintiffs

Mr Mbaabu for the Defendant

None appearance for the 11th Plaintiff

None appearance for the 3rd, 5th, 8th and 10th Plaintiffs

Caroline Sagina: Court Assistant

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MOGENI J.

JUDGE

Administrator	0
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