REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO. 517 OF 2014

LUCY NUNGARI NGIGI……...……1ST PLAINTIFF

MARY MUGURE MAIRANG'A……...……2ND PLAINTIFF

MARY WANJA NGANGA……...……..…3rd PLAINTIFF

SIMON KAMAU KABUNGA…….……...4th PLAINTIFF

JOSEPH GITUANJA KIHARA……...…….5th PLAINTIFF

Versus

NATIONAL BANK OF KENYA LIMITED …….…..…1ST DEFENDANT

PCEA RUIRU PARISH DEVELOPMENT FOUNDATION.....2ND DEFENDANT

RULING

Injunctive relief

[1] There are 133 Plaintiffs in this suit. The initial plaintiffs were five-1st to 5th Plaintiff. The five initial plaintiffs filed the application dated 10th November, 2014 seeking for an injunction to restrain Defendants by themselves their servants, agents, advocates, auctioneers or any other person from advertising, selling, realizing or otherwise disposing off the Plaintiffs' plot nos. 294, 298, 67, 470, 81, and 61, a subdivision within the property registered as Land Reference Number 248/4 pending the hearing and determination of the suit. The other 128 plaintiffs were joined in the suit by the order of the court made on 6th February, 2015. The penultimate order read as follows:-

Accordingly, to enable the court determine the real issues in dispute among all the parties, the intended Plaintiffs must be enjoined in the suit. I order that all the 128 intended Plaintiffs shall be joined as Plaintiffs in the suit. The Plaint shall then be amended as may be necessary to capture the respective plots purchased by each of the 128 Plaintiffs. The amended Plaint shall be served on the Defendants as by law required. For good order, the amended Plaint shall be filed in court within 7 days of today. It is so ordered. Costs shall be in the cause.

[2] The added parties supported the application for injunction and also filed submissions. Therefore, the application will be determined as among all the parties in the suit. I shall so proceed. For

completeness of record, the 6th to 133rd Plaintiffs' plots are as set out in the plaint. These plots are numerous and I need not reproduce them in this ruling as they are already specified in the plaint which is part of the record.

Brief facts

[3] On or about the month of September 2011, the 1st and 2nd Defendants entered into a loan agreement wherein the 1st Defendant advanced to the 2nd Defendant a mortgage loan of **Kenya Shillings Five Hundred and Nineteen Million, Five Hundred and Seventy Thousand (Kshs. 519,570,000.00)** which loan was to be repaid at an interest rate of 13% repayable in thirty six (36) monthly instalments. The suit property was given as security for the loan and a charge was duly registered upon it. subsequent to the above stated agreement, the 1st and 2nd Defendants duly entered into and executed another agreement (herein referred to as the addendum) dated 14th November 2011 wherein it was agreed that the loan repayment to the 1st Respondent would be upon the sale of sub divided plots to the public; the plots would be subdivided and advertised for sale by the 2nd Respondent with the consent of the 1st Respondent. Clause 2 (v), (vi) and (x) of the said addendum dated 14th November 2011 provided that the sub divided plots for sale to the public would be sold on a 1st come, 1st served basis with the 2nd Defendant acting as the 1st Defendant's agent duly authorized to receive purchase price proceeds on its behalf. Upon the payment of the full purchase price by the purchasers, the 2nd defendant would issue out allotment letters and receipts for individual plots and later transmit the money collected to the 1st Defendant who would then release the original deed plan and original partial re-conveyance, duly executed for purposes of transferring title to the said purchasers. The plaintiffs claim they purchased the plots pursuant to the addendum herein and rights accrued to them. This is the basis of the injunction. But let me analyse the arguments by the plaintiffs and the defendants in the matter.

The applicants' gravamen

[4] The Plaintiffs' claim is that they are the bona fide owners of the plots indicated in the plaint. They purchased the said plots from the 2nd Defendant with the full knowledge and consent of the 1st Defendant. This is evidenced by the letter of addendum executed between the 1st and the 2nd Defendants and dated 14th November 2011. In the said addendum, the 1st Defendant agreed and consented that Land Reference Number 248/IV which had been charged to them by the 2nd Defendant to be sub-divided into sub-plots and sold to the general public by the 2nd Defendant and proceeds thereof remitted to the 1st Defendant towards servicing the loan facility extended to the 2nd Defendant. The 1st Defendant further agreed and consented that on payment of the full purchase price the 2nd Defendant would issue all paid-up purchasers with allotment letters together with receipts thereof; and further that upon receipt of the said sums the 1st Defendant would release the original deed plan and original partial re-conveyance duly executed on their part to an advocate in the banks panel jointly appointed by the parties to process the conveyance in favour of such paid up purchaser at the purchaser's cost.

[5] The Plaintiffs annexed documents of purchase as well as the addendum. In the premises the plaintiffs claim to have a right to partial re-conveyances executed in their favour in respect of the plots they have fully paid for them as agreed. Therefore, 1st Defendant has no right to sell or in any other way deal with the aforesaid plots whatsoever as the purported right of redemption over the said plots was extinguished by the performance by the Plaintiffs' of their obligations to both the Defendants. The Plaintiffs stated that the 1st Defendant in their Replying Affidavit in Clauses 6, 9 and 10 have admitted that they had been informed by the 2nd Defendant that the 2nd Defendant intended to service the loan facility extended to them by sale of plots arising from the sub-division of the mortgaged property and it was on this basis that the 1st Defendant agreed to advance the loan facility. Thus, the bank knew all along that the purchasers would acquire rights over the mortgaged property by virtue of paying the purchase price to 2nd Defendant for the benefit of the 1st Defendant. It is therefore unjust and unfair for the 1st Defendant to threaten to sell the entire L.R No. 248/IV without 1st executing the partial re-conveyances in respect of persons who have paid for their portions in full.

[6] By virtue of the addendum, rights were conferred on the Plaintiffs and further impliedly the 2nd Defendant was an authorized agent of the 1st Defendant with regard to collection of purchase price for the said sub divided plots from the Plaintiffs. The plaintiffs conducted due diligence searches and were fully aware that the land is encumbered by a charge in favour of the 1st Defendant. They paid the purchase price in full and were accordingly issued with certificates of completion of payments and allocation letters in respect of their respective purchased plots. Therefore, the 1st Defendant cannot argue that they did not intend any rights or interest to accrue to the Plaintiffs even after inducing them to purchase the aforesaid portions of land and receiving money paid to them as the purchase price thereof. The 1st Defendant knew that all moneys paid to them by the 2nd Defendant came from the plaintiffs pursuant to the Addendum aforesaid. T*he plaintiffs are of the view that the 1st Defendant's decision to auction the said suit land without ascertaining the purchasers for value of the sub divided plots even after receiving in excess of Three Hundred Million (300,000,000.00) as remittance of the purchase prices from the 2nd Defendant was in bad taste and malicious.* Accordingly, the addendum expressly conferred rights on the plaintiffs. Again, the 1st Defendant consented to the sub-division, sale and discharge, and also received the purchase price in repayment of the loan. For those reasons, they 1st Defendant should be estopped from pleading privity of contract in order to defeat the plaintiffs'' claims and rights arising from the letter of addendum dated 14th November 2011. *See the case of Aineah Liluyani Njirah v Agha Khan Health Services [2013] eKLR, Civil Application No. 194 of 2009.*

[7] *The plaintiffs emphasized that agent-principal relationship existed between the 1st and 2nd Defendant. They cited numerous cases to demonstrate that the relationship between the defendant was agent-principal, for instance,* ***Bowstead and Reynolds on Agency Seventeen Edition, Sweets Maxwell Page 1-001****, defines such a relationship to* ***be:-***

"... a relationship which exists between two persons, one whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts."

There was both express authority to sell part of the mortgaged property by virtue of the addendum dated 14th November 2011 and implied consent by conduct on the part of both Defendants when they agreed that the purchase prices would be received by the 2nd Defendant and subsequently transferred to the 1st Defendant. Existence of a consent was considered in the case of ***Branwhite versus Worcester Works Finance Ltd. [1969] 1 A.C. 552 at 587*** *where Lord Wilberforce stated thus;-*

"While an agency must ultimately derive from consent, the consent need not necessarily be to the relationship of principal and agent itself (indeed the existence of it may be denied) <u>but it may be to a state of fact upon which the law imposes the consequences which result from the agency.</u>

The above case took into consideration the case of ***Garnac Grain Co. Inc. versus H.M. Faure & Fair Dough Ltd and Bunge Corporation (1967] 2 All E.R. 353*** *where Lord Pearson with the concurrence of the House used the words-*

"The relationship of the Principal Agent can only be established by the consent of the Principal and Agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, <u>even if they do not recognize it themselves and even if they have professed to disclaim it… the consent must, however, have been given by each of them, either expressly or by implication from their words and conduct</u> ". (Emphasis by applicants)

[8] The Plaintiffs herein borrowed the purchase price from commercial Banks and are repaying loans thereto. *In light of the above, the plaintiffs submitted that their rights will be hurt irreparably.* They cited the case of **Simon Kipngetich Bett vs. Richard C. Kandie (2012) eKLR,** where **Munyao J**. stated what irreparable harm entailed as follows;

"To me, the assessment of irreparable harm has to be done on a case by case basis. The court must assess whether the subject matter of the case will be so wasted as to make the final determination, if in favour of the applicant, a nullity. In my view, if the subject matter of the suit is capable of substantially being maintained in no worse a state at the conclusion of the suit as it is at the time of application for injunction, then there is no irreparable harm. Such harm must also be harm that cannot be adequately compensated by an award of damages. In other words it is the sort of harm which will render victory in the suit empty and devoid of any substance. It is however arguable that in land matters, the denial to a proprietor of land, of the enjoyment of his proprietary rights by the unlawful action of another party would result in irreparable harm. This is because it is almost impossible to quantify the loss occasioned to a proprietor by denying him the enjoyment of his bundle of rights. Indeed it may be a loss that is not capable of being adequately compensated by an award of damages. If I am to go by this argument then the applicant is bound to suffer irreparable harm." (Emphasis by applicants)

Moreover, it is the Plaintiffs' submission that the price of the said land has since more than tripled on account of the newly constructed Thika Super highway, the price is still estimated to surge upwards. The loss cannot be compensated by way of damages. See the case of **Shah v. Akiba Bank Ltd (2005) 2 KLR at page 434, Azangalala J.** (as he then was) held as follows in relation to a matter where the disposal of land by way of public auction was in dispute:

"As regards whether the plaintiff would suffer irreparable loss and injury unless the injunction sought is granted, I have no doubt she would. To lose a matrimonial home on account of debts the plaintiff alleges she does not know about will in my view occasion irreparable injury to the Plaintiff that damages would not be able to adequately compensate." (Emphasis by applicants)

And also relied on the case of **Olympic Sports House Limited v. School Equipment Centre Limited [2012] eKLR** , **Mabeya J** was of the opinion that once a party establishes that a defendant has breached an express provision of the law, a prima facie case has been established and an injunction should issue to aid the law. He went on to hold that;

"1st an applicant MUST SHOW a prima facie case with a probability of success. 2ndly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. As it can be noted from the quotation above, whilst the East African Court of Appeal in its wisdom couched the 1st limb in mandatory terms, the court couched the 2nd limb in permissive terms

'… an injunction will not normally be granted …' it is my understanding of the said portion of the Court of Appeal for East Africa's holding to mean that there may be circumstances where although damages may be adequate but nevertheless an injunction would issue. Each case has to be dealt with according to its own peculiar circumstances. I am not alone in this. In Kanorero River Farm Ltd and 3 others –vs- National Bank of Kenya Ltd (2002) 2 KLR 207 Ringera J (as he then was) held at page 216:-

"I would for those reasons alone accede to the Plaintiff's prayer for interlocutory injunction in respect of the two properties on the grounds that the 1st and 2nd Plaintiffs have a very strong prima facie case with a probability of success. I would not be deterred by any argument that the National Bank could compensate them in damages if it failed at the trial. In my opinion, no party should be allowed to ride roughshod on the statutory rights of another simply because it could pay damages."" (Emphasis by applicants)

Further judicial decisions were cited; the case of **Waithaka v. Industrial and Commercial Development Corporation (2001) KLR 374** where **Ringera J.** (as he then was) in consideration of the same issue delivered himself as follows:-

"As regards damages, I must say that in my understanding of the law, it is not an inexorable rule that where damages maybe an appropriate remedy, an interlocutory injunction should never issue. If that

were the rule, the law would unduly lean in favour of those rich enough to pay damages for all manner of trespasses. That would not only be unjust but it would also be seen to be unjust. I think that is why the East African Court of Appeal Couched the 2nd condition in very careful terms by stating that normally an injunction would not issue if damages would be an adequate remedy…… if the adversary has been shown to be highhanded or oppressive in its dealings with the applicant this may move the court of equity to say: 'money is not everything at all times and in all circumstances and don't you think you can violate another citizen's rights only at the pain of damages.' In the instant case, although I have found myself in doubt as to the existence of a prima facie case. I have said enough to show that the Plaintiff has an arguable case and that the Defendant's conduct may be regarded as high handed and probably unfounded in law." …..

[9] In all the foregoing, the plaintiffs saw the balance of convenience falling towards granting of injunction to maintain the status quo as was reiterated by the court of Appeal in **Ougo & Another -vs-Otieno (1987)KLR 364** where the court held that;

"The general principle is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided at the trial."

[10] On the basis of the forgoing reasons, the plaintiffs are convinced they deserve court's intervention by way of an injunction restraining the Defendants from disposing the L.R No. 248/IV. They believe they have satisfied the principles of granting interlocutory injunction in the *locus classicus* case of **Giella v. Cassman Brown & Co. ltd (1973) EA 358 and as further buttressed by Madan & Potter JJA and Kneller Ag JA in the case of Thomson Smith Aikman, Alan Malloy & others v. Muchoki & others [1982] eKLR as follows: they have** established a prima facie case with a high chance of success and further that damages are not adequate remedy as they would be adversely affected if they were to lose their parcels of land in that locality given the property market in Kenya where prices change overnight. It would also be grossly unfair and unjust for the 1st Defendant to sell the entire Land Reference No. 248/IV under its purported power of sale and at the same time keep the entire purchase price paid by the Plaintiff's to the 1st Defendant's agents, the 2nd Defendant. The balance of convenience tilted towards granting a temporary order of injunction as prayed pending the hearing and determination of the main suit.

The 2nd Defendant's submissions

[11] The 2nd Defendant reiterated the contents of its Replying Affidavit dated 28th November 2014 and stated that at the time of charging its property to the 1st Defendant it was made clear that the 2nd Defendant intended to service the loan facility through the subdivision of the said property and sale of the subdivision thereof to the members of the PCEA Ruiru Parish congregation and the general public. It was for this reason that the 2nd Defendant sought to have the Addendum to the loan agreement dated 14th November 2011 executed so as to protect the interest of the would be purchasers. The 1st Defendant agreed to the subdivision and further consented to recognize third parties who would pay the purchase price fully by allowing the 2nd Defendant to issue them with receipts and allotment letters. It was further agreed that the 1st Defendant on receipt of the sale proceeds from the 2nd Defendant it would execute partial re-conveyances in favour of all persons who will have purchased the sub divisions and paid for them in full. It is for this reason that the 2nd Defendant submits that there is need for the Defendants to agree on the third parties who have fully paid for their portions whereof partial re-conveyances should be executed as was agreed with the 1st Defendant.

The submissions by the 1st Defendant

[12] The 1st Defendant filed a Replying Affidavit sworn by RAPHAEL ORIMBA, a Remedial Manager with the Bank. They also filed written submissions and made oral submissions. Mr Wambua made oral submissions on the issue raised. He insisted that the plaintiffs are strangers as there is not contractual relationship between them and the 1st Defendant. He stated that on a mortgage between the defendants

exists. His arguments were based on the principle of privity of contract. He submitted that there is no evidence that the bank received any money as alleged. But if any money was paid to the bank as alleged, the plaintiffs should recover it from the 2nd Respondent. He further argued that the addendum herein is not signed. There is also no written contract for sale of land as required by section 3(3) of the Law of Contract Act. Counsel relied on judicial authorities which they filed in court to support his position in the matter. Therefore, the plaintiffs have no realisable rights on which an injunction should issue. He urged the court to dismiss the application with costs.

[12] The 1st Defendant, National Bank of Kenya opposed the application and filed a Replying Affidavit sworn by Raphael Orimba on 21st November, 2014 as well as submissions. The 1st Defendant submitted that, at the time of applying for the mortgage loan facility the 2nd Defendant informed the Bank that it planned to service the aforesaid mortgage loan facility through amounts raised after the subdivision of the said property and sale of the individual plots therein to members of the public and for these reasons the Bank and the 2nd Defendant executed an Addendum to the Facility Letter, dated 14th November, 2011. Except, that the Addendum included, *inter alia*, the following:

i. ***The Addendum was to run concurrent with the Facility Letter and particularly under Clause 16, the Addendum was a supplement to the Facility Letter and in the event of conflict between it and the Facility Letter, the provisions contained in the Facility Letter prevailed;***
ii. ***The 2nd Defendant would appoint a reputable surveyor to subdivide the mortgaged property into various portions, prepare and submit an approved subdivision scheme together with the original deed plans to the Bank and the 2nd Respondent for their records, the deed plans have yet to be submitted to the Bank to date;***
iii. ***The portions as subdivided above would be advertised and sold to the members of the public by the 2nd Defendant who would then utilize the monies collected to redeem the term loan facility granted by the Bank on 14th September 2011;***

In addition, the 2nd Defendant was required to remit the full purchase price derived from the sale of the portions to members of the public within seven (7) days to the 2nd Defendant's collection account No. 0102059740501 held with the Bank and thereafter inform the Bank of the same together with producing the requisite documents i.e. an allotment letter together with receipt copies.

[13] The 1st Defendant argued that, when the Bank and the 2nd Defendant signed the Addendum dated 14th November 2011, the intention of the parties thereto, which were the Bank and the 2nd Defendant, was to ensure that the 2nd Defendant came up with an appropriate arrangement as to how it would service the mortgage loan facility issued to it by the Bank, and hence that arrangement was to the Bank's benefit. The sub-division of the mortgaged property by the 2nd Defendant's own admission, is incomplete therefore the 2nd Defendant has not provided to the Bank an approved sub-division scheme together with the original deed plans for the individual plots. See admission of this fact by the 2nd Defendant at paragraph 12 of the Replying Affidavit. Thus, as there is no sub-division scheme, original deed plans and individual titles for the said plots have no factual and legal basis for the grant of the Orders sought by the Plaintiffs. The 2nd Defendant is indebted to the Bank and as a result of 2nd Defendant's default which continues and after service of the requisite notices the Bank sought to redeem its security by Sale of the mortgaged property by auction. Therefore, the court should determine:-

i. ***Whether the Plaintiffs have met the threshold for grant of a temporary injunction restraining inter alia, the Bank from disposing of the said property pending the hearing and determination of this suit; and***
ii. ***Who should be awarded costs?***

[14] According to the 1st Defendant, the plaintiffs have not met the principles which guide the Court in grant of injunctions as set out in **Giella v. Cassman Brown & Co. Ltd [1973] EA 358. T**he Plaintiffs have failed to prove that they have a *prima facie* case with a probability of success in the standard defined

in the case of **Mrao v. First American Bank Limited & 2 Others [2003] eKLR**, i.e. there is no evidence to show an infringement of a right, and the probability of success of the Applicants' case upon trial The Plaintiff's suit turns on the Addendum to the Facility Agreement entered into and duly executed as between the Bank and the 2nd Defendant; the said Addendum was supplemental to and run concurrent to the mortgage loan facility agreement which already exists between the Bank and the 2nd Defendant. The Plaintiffs are not parties to the addendum and so they cannot purport to rely on or enforce the said Addendum. It is well settled that as a general rule at common law that the doctrine of privity of contract cannot confer rights or impose obligations on strangers to it, that is, persons who are not parties to it. This was stated in **Kanyenje Karangaita Gakombe v. Automobile Association of Kenya & Another [2006] eKLR**. The essence of this doctrine of Privity of contract is that only the persons who negotiate and sign an agreement and therefore privy to the same are entitled to enforce its terms. See the case of **Aineah Liluyani Njirah v Agha Khan Health Services [2013] eKLR** para 4.

[15] On whether the Addendum was for the benefit of the 3rd parties, the 1st Defendant urged the court to examine the contractual relationship between the Bank and the 2nd Defendant as a whole. Reference is made to the findings of Mabeya J. in **Antoine Ndiaye v African Virtual University [2012] eKLR** that to construe the intention of the parties a Court has to look at the whole agreement of the parties. However, the courts have recognized an exception to the general rule of privity of contract as far as third parties are concerned. In **Aineah Liluyani Njirah case (***supra)* the Court of Appeal opined that "*..a third party should be able to enforce a term of the contract when the contract* ***expressly*** *states that the third party has a right of enforcement…*" See alos decision by Justice Angote quoting the **Aineah Liluyani Njirah** case in **Vital Plantation Lease Company Ltd & Another v. Agricultural Development Corporation [2014] eKLR**, where he set out the exception to privity of contract as follows:

"the only exception to the privity of contract rule is where the contract is made for the benefit of a third party; where the contract expressly states that a third party has a right of enforcement and where it was the intention of the parties to give a third party a right to rely on a term of contract…"

This position finds support in the express provisions of Section 3(2) of the Law of Contract Act, CAP 23 Laws of Kenya which provide that no rights accrue to third parties on the basis of representation/assurances not made expressly, in writing, to the said third parties. They have not shown that the Facility Agreement and the Addendum thereto were Agreements made for their benefit and further that there is an express provisions in the said Agreements stating that third parties have a right to enforce the terms thereof. In fact, the Addendum expressly provides under clause 11 that the rights and interest contained in the Addendum shall not be assigned or otherwise transferred to a third party without the written consent of the Bank; the Plaintiffs have not demonstrated such written consent. Further the said Addendum, being supplemental to the Facility Agreement already in existence between the Bank and the 2nd defendant, this Honourable Court in interpreting the intention of the parties in executing the said Addendum will have to look at the Facility Agreement.

[16] The whole relationship between the parties in the said Addendum was for the benefit of the Bank in order to reassure the latter that the 2nd Defendant had concrete scheme of arrangement as to how it would service the mortgage loan facility that had been extended to it by the Bank. (Refer to the 2nd Defendant's Application for Loan Facility detailing how the 2nd Defendant intended to service the Loan sought being exhibit **RO.1** on page 10 of the 1st Defendant's Replying Affidavit. Furthermore, the said Addendum does not expressly state that a third party has the right of enforcement and the Plaintiffs, therefore, have no standing to rely on the same in support of their Application. It was neither the intention of the Bank nor of the 2nd Defendant to give a third party a right to rely on any term of the Addendum. The latter document, which ought to be read with the Bank's Facility Letter of 14th September, 2011 clearly portray that the two documents were binding on only two parties, namely the Bank and the 2nd Defendant. As such, the intention of these two parties was to bind only them, and only these two parties could enforce rights under the said two documents. Section 3(3) (a) and (b) of the Law of Contract Act, Chapter 23 of the Laws of Kenya is very clear that a contract for the disposition of an interest in land must be in writing, signed by the parties thereto and the signature of each party signing must be attested by a witness who is

present when the contract was signed by such party. It would therefore follow that if such contracts are in writing, an intention to bind third parties would have to be expressly stipulated therein; and no such intention had been stipulated in the Bank's Facility Letter or the Addendum. Therefore, the Court cannot proceed to imply an intention to bind third parties where such intention has not been expressed in the contract.

[17] Without prejudice to the foregoing, the 1st Defendant submitted that the Addendum would have only given rise to a right of enforcement for a third party if the 2nd Defendant had submitted sums it received together with the requisite documents in respect of purchase of any individual plots comprised in L.R. No. 248/4 under Clause 2(x) therein in order to enable the Bank begin the process of release of the Original Deed Plan and Partial Re-conveyance in respect of the alleged plots. In the absence of satisfaction of this *condition precedent*, the Plaintiffs cannot rely on the Addendum to enforce any alleged rights as there are no rights accruing. Further, the obligation to repay the loan has always been on the 2nd Defendant and thus where the 2nd Defendant chooses to do so through sub-division and sell of the resulting plots thereof, does not create an agency express or otherwise between the Bank and Plaintiffs as claimed by the Plaintiffs.

[18] Without prejudice to the aforesaid paragraph, the Plaintiffs contention of alleged implied agency is a matter of conjecture that needs rebuttal before orders on that basis can be granted thus an implied agency cannot be the subject matter of the present application. In view of the foregoing, the Plaintiffs failed to show that they have a *prima facie* case with a likelihood of success warrants. And **so the second and third conditions in Giella case can only be addressed if the first one is satisfied. The entire application fails and should be dismissed with costs. See Karen bypass Estate Limited v. Print Avenue and Company Limited (2014) eKLR, quoted with approval in Msabaha Victory Secondary School v. Gaetano Grasso [2014] eKLR. In any event, in** prayer (IV) of the Amended Plaint the Plaintiffs recognize that damages are adequate compensation. The Plaintiffs in the said prayer (IV) pray for alternative order for "…*compensatory damages for the above bought plots at the current market value."* It is trite that when a property is offered as security it becomes a commodity for sale. See the decision by Ochieng J in **Andrew Muriuki Wanjohi v Equity Building Society Ltd & 2 others [2006] eKLR.** The Bank's intended sale of the said property is pursuant to its statutory power of sale contained in the Mortgage Instrument executed between the Bank and the 2nd Defendant on 13th October, 2011, and which term was within the knowledge of both the 2nd Defendant and the Plaintiffs herein. The mortgage is valid and existing. There is default by the 2nd Defendant. And as the Plaintiffs knew of the status of the entire property, cannot complain as any loss they will incur will be compensable by damages sought against the 2nd Defendant. Any injunction will occasion great loss to the bank, thus, balance of convenience tilts in favour of refusing the injunction. See the decision of Ochieng, J. in ***Andrew Muriuki Wanjohi (supra)*** in which he stated:

"… In my considered view, if the 1st and 2nd Defendants were restrained from selling off the property until the suit was heard and determined, there is a very real risk that the debt may outstrip the value of the property as the borrower has not made repayments for more than three years…"

[18] The *Court should award costs to the 1st Defendant. See t*he Supreme Court Ruling in **Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others [2014] eKLR**, where it was held as follows:

"…the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation."

DETERMINATION

Issues

[19] Whereas the ultimate question is whether an injunction should issue, I think the adjudication of this application revolves around one major and nascent issue; the addendum and third-party purchasers. Parties also argued the issue in a very eminent manner. I would formulate the issue broadly as follows:-

a) Whether the plaintiffs can sue on the Addendum to the facility Agreement dated 14th November, 2011. Under this title matters to do with validity of the Addendum, whether chargor can sell charged property, privity of contract, rights of plaintiffs under the addendum, and agent-principal relationship will be discussed.

[20] First things first. The 1st Defendant in the Replying affidavit set out all the terms of engagement between the defendants in respect of the loan facility as well as the addendum herein. The Replying Affidavit by the Bank acknowledged the addendum and its terms and application in relation to the mortgage. Paragraphs 6 and 9 are particularly relevant. They depose that the 2nd Defendant informed them that repayment of the loan was to come from the sale of plots which would be hived off the suit property through some intended sub-division thereof. The deponent even annexed the Addendum to the Facility Agreement between the defendants as exhibit RO5. Now, contrary to Mr Mutua's submissions, the addendum was duly executed by the defendants and was as a result of mutual agreement between them. It is prima facie enforceable. Therefore, the only questions which remain are; a) whether there exist agent-principal relationship between the 1st and 2nd defendant; b) whether the plaintiffs acquired rights under the addendum; b) whether they could sue on the addendum. I will house these issues under Privity of Contract.

PRIVITY OF CONTRACT

Third party rights

[21] The oral submissions by Mr Mutua on the execution of the addendum and the rule on Privity of contract were puzzling. The submissions on privity of contract were quite indefensible and obstinate; were completely defiant to and oblivious of the reality and dynamic nature of law; for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. See the decision by Ojwang Ag. J (as he then was) in the case of **Suleiman vs Amboseli Resort Ltd (2004) e KLR 589 at page 607.** But, when I read the written submissions, he acknowledged the fact that there is exception to the rule of privity of contract. I will, however, proceed on the basis of the written submission.

[22] *Privity of Contract refers to the relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so. But the requirement of privity of contract has been relaxed under modern law, statutory as well as constitutional law, and doctrines of implied warranty and strict liability which allow a third-party beneficiary or other foreseeable user to sue. See* ***Black's Law Dictionary***, ***Ninth Edition***. For instance, cap 405 of the laws of Kenya provides a statutory exception to the doctrine of privity of contract of insurance for the benefit of third parties. Similarly, where a contract expressly benefits the third party, there is *a presumption that the contracting parties intended the third party to have a right of enforcement. On this see the case of* ***Aineah Liluyani Njirah v Agha Khan Health Services [2013] eKLR, Civil Application No. 194 of 2009,*** *where the Court of Appeal while considering the concept of third party rights under a contract held as follows:-*

"There is, however, an important distinction made between express and implied benefits which are enforceable under a contract by a third party. When a contract expressly benefits the third party, there is a presumption that the contracting parties intended the third party to have a right of enforcement. However, if the contract only impliedly benefits a third party, there is no such presumption, and the third party has no rights unless the contract expressly gives that third party a right to enforce the contract. This creates certainty for, and protects, contracting parties, in that third parties cannot enforce contracts which only incidentally benefit them unless the contract expressly states that they may do so."

[23] Contrary to the submissions by the 1st Defendant, other than the benefits to the defendants, the addendum was expressly for the benefit of third-party purchasers of plots subdivided from the suit property. The benefits included; release of the original plan and original partial re-conveyance duly executed to an advocate in the Bank's panel jointly appointed by the parties to process conveyance to the purchaser at the purchaser's cost. Accordingly, I find and hold that, the addendum *expressly benefits the third-party purchaser, and, therefore, there is a presumption that the contracting parties intended the third-party purchaser to have a right of enforcement***. *And, d**espite the arguments that the 2nd Defendant breached the addendum, prima facie, the plaintiffs can sue on the addendum. The basis of this answer will be clear when the court has answered the question:* Did the addendum create agent-principal relationship between the 1st and 2nd Defendant?

Agent-principal relationship: sale of mortgaged property

[24] The plaintiffs emphasized that agent-principal relationship existed between the 1st and 2nd Defendant. They cited numerous cases to demonstrate that the relationship between the defendants was agent-principal. The 2nd Defendant argued on the contrary and stated that there was no agency created for the benefit of third-party purchasers. The arguments coming through on this subject should be handled carefully especially because they are made within the framework of a mortgage which is ordinarily governed by the mortgage instrument and the law. But, the peculiar circumstances of this case should provide the answer to this question. One cannot escape to ask; what is the place of the addendum herein within the scheme of the mortgage? Mortgages as well as the law provides that the chargor shall not sell or part with possession of or alter the mortgaged property in any manner unless with the consent of the mortgagor. Therefore, the law allows sale or parting with possession or alteration of the mortgaged property but with the consent of the mortgagor. The addendum was in exercise of this option allowed by law. Therefore, it is incorrect to proclaim an absolute prohibition on the basis that the addendum is supplemental or contrary to the mortgage and law for it sought the selling of the mortgaged property by the chargor. Having settled that question, I will revert to the arguments on agent-principal relationship.

[25] Ample judicial authorities were cited by both sides on agent-principal relation arising from the addendum herein. I am content to rely on the literary work in ***Bowstead and Reynolds on Agency Seventeen Edition, Sweets Maxwell Page 1-001****, which defines such a relationship to* ***be:-***

"... a relationship which exists between two persons, one whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts."

The addendum dated 14th November 2011 expressly gave the 2nd Defendant authority to sell part of the mortgaged property to third parties. It was executed by the 1st Defendant. By that execution, the 1st Defendant gave its consent for the 2nd Defendant to transact the business designated in the addendum for and on behalf of the 1st Defendant. The business under the addendum was; sale of plots hived off the mortgaged property to third parties and apply the proceeds thereof towards repayment of the loan; doubtless, this affects relations with third parties. It was also executed by the 2nd Defendant and so similarly consented to so act. The addendum provided for terms and conditions of engagement. The addendum also made a solemn promise to any person who responded to and complied with those terms and conditions that the 1st Defendant will release the Original Plan and Original Partial Re-conveyance duly executed to an advocate in the Bank's panel jointly appointed by the parties to process conveyance to the purchaser at the purchaser's cost. Ultimately, those who responded to the offer derived rights of re-conveyance of their respective plots. The alleged breach of some or any of the terms of the addendum by the 2nd Defendant is a matter which should be canvassed in a trial, but it should not be used to injure third-party purchasers. See *the case of* ***Branwhite versus Worcester Works Finance Ltd. [1969] 1 A.C. 552 at 587*** *where Lord Wilberforce stated thus;-*

"While an agency must ultimately derive from consent, the consent need not necessarily be to the

relationship of principal and agent itself (indeed the existence of it may be denied) <u>but it may be to a state of fact upon which the law imposes the consequences which result from the agency.</u>

Even where the consent to create the agent-principal relationship is not express, parties to the contract will be held to have consented if what they have agreed upon amounts in law to such a relationship. Sometimes they may not recognize it themselves and may have even professed to disclaim it but the consent to create the agent-principal relationship may be found to exist by implication from their words and conduct.

Thresholds in Giella Case met

*[26] It is worth repeating that, the addendum agreement entered into between the 1st and 2nd Defendant dated 14th November 2011 expressly confer proprietary rights upon third parties who purchase the plots under the addendum. Such third-party purchaser who comes to court to enforce a right under the addendum is not a stranger at all. Such conclusion should only come after full-scale evidence has been adduced and evaluated in a trial. I am not, however, saying that their claims must succeed at the trial as that will depend on the evidence adduced. I am simply saying that, this court, properly directing itself on the material presented to the Court, can safely conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. See what prima facie entails as per t*he Court of Appeal in ***Mrao Ltd Vs 1st American Bank Of Kenya Ltd & 2 Others 2003 KLR 125*** that:-

"A prima facie case in a civil application includes but is not confined to "a genuine and arguable case". It is a case which, on the material presented to the Court, a tribunal property directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

I am also aware that the 1st Defendant has raised issues in respect of the mortgage herein, their right to exercise the statutory power of sale, breach of the addendum, default of repayment of the loan etc. They have also raised some accountability issues from the 2nd Defendant on the purchase price. But even these queries should be reserved for and determined at the trial. These issues are in direct conflict with issues raised by the Plaintiffs and the 2nd Defendant. At this stage I should not make any comments or findings, or express opinions on the substantive issues in controversy in order to avoid hurting the trial herein. And as this court has said before, a breach of a right, prima facie entitles the aggrieved party to an injunction in order to prevent further breach. In such case, the remedy of damages is never an alternative to an injunction. In all fairness, the balance of convenience tilts towards granting an injunction but on such terms which will not prejudice the 1st Defendant. I hereby grant an injunction on the following conditions and terms:-

a. ***The injunction is limited to restrain the 1st Defendant from selling the plots listed in the Amended plaint until the hearing of this suit. In effect, and for the avoidance of doubt, the plots listed in the Amended Plaint and forming part of the mortgaged property shall not be sold by the 1st Defendant and or the 2nd Defendant until determination of this suit.***
b. ***The injunction does not affect the portion which is not part of the plots identified in the plaint. Accordingly, the injunction does not affect the exercise of the statutory power of sale upon the portion of the mortgaged property which does not form part of the identified plots herein.***
c. ***The injunction does not preclude the 2nd Defendant from servicing the loan herein.***

Other orders:

d. ***The 2nd Defendant should provide the 1st Defendant a schedule of all the money received by it from the third-party purchasers within 14 days of today. And, thereafter, and not later than 14 days of receipt of the schedule, the Defendants shall file in court an agreed account of receipts of purchase price from the plaintiffs.***
e. ***Given the circumstances of this case, I will not condemn any party to costs. Each party shall***

bear own costs.

f. ***In the same breath, this matter should be fast-tracked. Accordingly, I direct parties to file all the necessary papers and comply with practice directions for the division within 30 day of today. I will assign the case a date for mention for purposes of confirming compliance and to set a date for hearing. It is so ordered.***

Dated, signed and delivered in court at Nairobi this 13th day of May 2015

F. GIKONYO

JUDGE