



## REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND AT MURANGA

ELC NO. 123 OF 2017

DUNCAN GITHIGA MWANGI.....PLAINTIFF

VS

KANU MAENDELEO YA WANA-

WAKE MURANGA BRANCH.....1<sup>ST</sup> DEFENDANT

BETH WANJIRU MWANGI.....2<sup>ND</sup> DEFENDANT

MARGARET WAMBUI KIBE.....3<sup>RD</sup> DEFENDANT

MARGARET WAMBUI KARIUKI .....4<sup>TH</sup> DEFENDANT

MAENDELEO HOUSING COOP-

ERATIVE SOCIETY LIMITED.....5<sup>TH</sup> DEFENDANT

### JUDGMENT

1. By a plaint dated 30/5/2016 and later amended with the leave of the Court the Plaintiff filed suit against the Defendants seeking orders as follows;

a. A declaration that the Plaintiff has a proprietary interest on plot No. **MURANG'A/MUNICIPALITY BLOCK 2/340(suit land)** having bought it for valuable consideration from 1<sup>st</sup> Defendant as represented by the 2<sup>nd</sup>-4<sup>th</sup> Defendants as its bonafide officials.

b. A declaration that the Plaintiff is the legal and lawful owner of plot No. Murang'a/Municipality Block 2/340 to the exclusion of the Defendant's herein.

c. Alternatively, and strictly on a without prejudice to the prayers a and b above an order for the refund of Kshs 5.6 million being the consideration paid to the 1<sup>st</sup> Defendant through the 2<sup>nd</sup> -4<sup>th</sup> Defendants by the Defendants jointly and severally plus liquidated damages calculated at 100% out of the monies paid as per paragraph 8 of the sale agreement dated the 7/7/2001

d. An order for injunction restraining the 1<sup>st</sup> and 5<sup>th</sup> Defendants, their agents, servants, employees or anybody working under them from entering and committing any acts of waste from alienating converting into their own use and from carrying out any construction on plot No. Murang'a/Municipality Block 2/340.

e. Costs of the suit and interest.

f. Any other or better relief the Honourable Court may deem fit to grant

2. The 2<sup>nd</sup> -4<sup>th</sup> Defendants are sued in their capacities as the chairlady, member and treasurer respectively of the 1<sup>st</sup> Defendants as at 7/7/12 when the cause of action arose.

3. The Plaintiff avers that on or about the 7/7/2012 the 1<sup>st</sup> Defendants through its registered officials of the 2<sup>nd</sup> - 4<sup>th</sup> Defendants sold the suit land to the Plaintiff upon which it was duly transferred to him and is now awaiting issuance of a lease from the Commissioner of Lands in his name. It is his case that subsequent to the completion of the purchase the 5<sup>th</sup> Defendants forcefully entered the suit land and erected iron

sheet (mabatis) and purported to carry out developments on the suit land depriving the Plaintiff of the use and enjoyment of the land. He further avers that the 1<sup>st</sup> Defendant has colluded with the 5<sup>th</sup> Defendant to deny the 2<sup>nd</sup>-4<sup>th</sup> Defendants authority and capacity to dispose of the plot to the Plaintiff in order to deprive the Plaintiff his land. He sought the protection of the Court as a bonafide purchaser for value without notice.

4. The 2<sup>nd</sup> – 4<sup>th</sup> Defendants pleaded in a joint statement of defense and admitted the sale of the suit land in the official capacity as representatives of the 1<sup>st</sup> Defendants but deny any collusion with the 5<sup>th</sup> Defendant whom they describe as a stranger. They pleaded that the Plaintiff's title is not being impugned by any of the Defendants and their issue of capacities does not arise. They aver that they are not properly suited in the suit as the land was sold by a body corporate therefore, they should not be sued in their individual capacity. They contend that the Plaintiff's suit is an attempt to rewrite the contract in that once it got possession, the 2<sup>nd</sup>-4<sup>th</sup> Defendants ceased to have any control over the suit land and therefore the issue of refund is untenable.

5. The 1<sup>st</sup> and 5<sup>th</sup> Defendants pleaded and denied the sale of the suit land to the Plaintiff and averred that if indeed there was any then it was fraudulent. They pleaded particulars of fraud under para 3(i) –(ix) of the statement of defence as follows;

a. The sale agreement dated the 7/7/12 was entered into by non members of the 1<sup>st</sup> Defendants that is Margaret Wambui Kibe and Margaret Wambui Kariuki, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants respectively.

b. That the 2<sup>nd</sup> -4<sup>th</sup> Defendants fraudulently misrepresented themselves as officials of the 1<sup>st</sup> Defendant.

c. The 2<sup>nd</sup> -4<sup>th</sup> Defendants fraudulently misrepresented themselves to enter into a contractual agreement on behalf of the 1<sup>st</sup> Defendants without the same being sanctioned by the 1<sup>st</sup> Defendant.

d. The 2<sup>nd</sup> -4<sup>th</sup> Defendants fraudulently misrepresented the 1<sup>st</sup> Defendants in producing/obtaining the clearance certificates on behalf of the 1<sup>st</sup> Defendants without being sanctioned by the 1<sup>st</sup> Defendant.

e. The 2<sup>nd</sup> -4<sup>th</sup> Defendants fraudulently obtained proceeds on behalf of the 1<sup>st</sup> Defendants without being sanctioned by the 1<sup>st</sup> Defendant

f. The Plaintiff vide a letter dated the 1/12/14 fraudulently obtained consent from Muranga County Government to transfer the said property from the 1<sup>st</sup> Defendants to the Plaintiff .

g. The proceeds of sale were paid to the personal accounts owned by the 2<sup>nd</sup> -4<sup>th</sup> Defendants being Equity Bank Account No 0220199436270 that received Kenya Shillings Four Million Seven Hundred Thousand (Kshs 4,700,000/-) and Barclays Bank Account No. 08210164360 being the name of Margaret Wambui Kibe and others received Kenya Shillings Three Hundred Thousand (Kshs 300,000/-) knowing very well that the 1<sup>st</sup> Defendants had an official bank account for transactions of various activities.

h. The sale was sanctioned by non-officials of the 1<sup>st</sup> Defendant.

6. Further the 5<sup>th</sup> Defendant avers that it is the legitimate owner to the said land and therefore mandated to deal with the land and denies forcefully entering into the land as alleged by the Plaintiff . The 1<sup>st</sup> Defendants denies the allegation of collusion with the 5<sup>th</sup> Defendant to deny the 2<sup>nd</sup> -4<sup>th</sup> Defendants' authority and capacity to dispose the plot to the Plaintiff and asserts that no authority have been granted the 2<sup>nd</sup> -4<sup>th</sup> Defendants to dispose the property to the Plaintiff in the first place.

### **The evidence of the Plaintiff**

7. At the hearing the Plaintiff testified and informed the Court that he entered into an agreement of sale on the 7/7/12 with the 1<sup>st</sup> Defendants in respect to the suit land registered in the name of the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant was an allottee of the suit land vide a letter of allotment dated the 14/12/1990. He produced an agreement of sale in support. The 1<sup>st</sup> Defendant was represented by Beth Muraya, Margaret Wambui Kibe and Margaret Wambui Kariuki the chairlady, member and Treasurer respectively. The consideration being Kshs 6.5 million was paid in three tranches; Kshs 600,000/- on the signing of the agreement on 7/7/12; EFT transfer to Equity bank in the sum of Kshs 4.7 million and the final sum of Kshs 300,000/- vide a cheque No 001023 to the officials of the 1<sup>st</sup> Defendant. He stated that the stated officials had minutes authorizing the sale from other members. Subsequently the 1<sup>st</sup> Defendant sought the transfer of the suit land in his name at the Municipal Council of Muranga then which was approved by the Interim Technical Committee on 27/11/14, which approval was forwarded to the commissioner of lands for purposes of lease preparation in his name.

8. That thereafter he took vacant possession of the suit land and placed building materials on site.

9. He testified that a complaint was filed with the Criminal Investigations Department by one Eunice Wambui Kamotho alleging fraudulent transfer of the suit land but the Criminal Investigations Department vide a letter dated the 12/8/14 closed its file on account that the sale was properly authorized by the members of the 1<sup>st</sup> Defendants in a meeting held on 26/6/12. He stated that the 1<sup>st</sup> and 5<sup>th</sup> Defendants forcefully entered the suit land and fenced with iron sheets and commenced construction. That the 5<sup>th</sup> Defendant is a stranger and a trespasser on to the land whose actions are unlawful and illegal. That he obtained Court orders to stop them from further interference of the Suit land.

10. He contended that in the event that he loses the suit he shall be seeking a refund pursuant to clause 8 of the agreement of sale which

provides refunds of purchase price together with 100% interest.

11. He averred that the 1<sup>st</sup> and 5<sup>th</sup> Defendants are distinct and different entities. He asserted that the 1<sup>st</sup> Defendant has not breached the agreement of sale. He informed the Court that the officials who acknowledged receipt of the Kshs 5.0 million being part purchase monies were Beth Wanjiru Muraya, Margaret Wambui Kibe, Lucy Wangechi Njoroge, Prisca Magiri Macharia and Everlyn Wakonje as per the acknowledgement dated the 16/11/12. Asked by the 2<sup>nd</sup> -4<sup>th</sup> Defendants counsel Mr Mwaniki why he did not sue them, he answered that they were representatives of the 1<sup>st</sup> Defendant.

12. Further he stated that he had no evidence of collusion that the 1<sup>st</sup> and 5<sup>th</sup> Defendants to deny him the plot.

13. Cross-examined by Mr Ndegwa for the 1<sup>st</sup> and 5<sup>th</sup> Defendants, he admitted that the 2<sup>nd</sup> Defendants is listed as No 28 in the members list of the 5<sup>th</sup> Defendant, however the 3<sup>rd</sup> and 4<sup>th</sup> are not members of the 5<sup>th</sup> Defendant. Out of the three additional members who signed the acknowledgment of Kshs 5 million in addition to the 2-4<sup>th</sup> Defendants, only Prisca Magiri Macharia is a member of the 5<sup>th</sup> Defendant.

14. The witness on being shown the certificate of incorporation of the 5<sup>th</sup> Defendants dated the 4/4/95 and minutes dated the 19/7/12 maintained that the principal vendor in the agreement of the suit land was the 1<sup>st</sup> Defendants represented by the 2<sup>nd</sup> -4<sup>th</sup> Defendants who presented themselves as the duly authorized officials of the 1<sup>st</sup> Defendant. That the letter of allotment was in the name of the 1<sup>st</sup> Defendant. Emphatically he stated that the 5<sup>th</sup> Defendant was not a party to the agreement and at no time did he deal with the 5<sup>th</sup> Defendant. He sued the 5<sup>th</sup> Defendants for interference with his plot through fencing and wrongful occupation of the suit land.

15. He admitted that he paid the monies into a group account in the name of Margaret Wambui Kibe & others as instructed by the officials of the 1<sup>st</sup> Defendant. That he did not know who the others in the said account referred to. He denied paying any monies into the account of the 1<sup>st</sup> Defendant.

16. He added that though para 11 of the agreement of sale provided that the officials of the 1<sup>st</sup> Defendants would undertake to provide minutes/resolutions of the members of the 1<sup>st</sup> Defendants authorizing and sanctioning the sale of the suit land to the purchaser and the relevant authorities, none were provided by the time of signing the agreement and none was given even at the time of testifying in court. Neither were there minutes authorizing the signatories to sign the agreement of sale. That he trusted the officials to avail the minutes prior to completion of the sale as undertaken at the signing of the agreement.

17. PW2- Thomas Mwangi Njoroge, Advocate testified and informed the Court that he drew the agreement of sale dated the 7/7/12. The vendor was the 1<sup>st</sup> Defendants and represented by the 2<sup>nd</sup> -4<sup>th</sup> Defendants and the purchaser was the Plaintiff. He witnessed the execution of the agreement of sale by all the parties. On the 16/11/12 he drew an acknowledgement of Kshs 5 million and witnessed the signatures of all the parties. On the 23/7/12 he wrote a letter to the Town Clerk Murang'a introducing the officials of the 1<sup>st</sup> Defendant. He contended that the officials of the 1<sup>st</sup> Defendants presented the minutes of the members of the 1<sup>st</sup> Defendants dated the 26/6/12 to him before he drew the agreement.

18. On cross examination by Mr Ndegwa for the 1<sup>st</sup> -5<sup>th</sup> Defendants, the witness stated that he did not peruse the by laws of the 1<sup>st</sup> Defendant. He admitted that he did not carry out a search on the membership of the 1<sup>st</sup> Defendants nor its officials. Pressed further he stated that he thought the officials had the resolution. Asked why the Lucy Wangechi Njoroge, Everlyn Wakonje and Prisca Magiri Macharia signed the acknowledgement and yet they were not signatories to the agreement of sale, the witness replied that they were members of the 1<sup>st</sup> Defendants and had signed the resolution, which resolution he admitted he did not have. He further could not confirm if the purchase monies were received by the 1<sup>st</sup> Defendant. He indicated that he was presented with a search that showed that the plot was owned by the 1<sup>st</sup> Defendants by Beth Wanjiru Muraya. He however did not produce the search in Court.

19. Maintaining that he did not deal with the 5<sup>th</sup> Defendant, he informed the Court that he was unable to confirm who the officials of the 5<sup>th</sup> Defendants were. Shown a statutory affidavit dated the 16/4/2009 he stated that he had no knowledge about alleged change of name of the 1<sup>st</sup> Defendants to the 5<sup>th</sup> Defendant.

20. In conclusion the witness stated that as a general legal practitioner he drew the agreement of sale dated the 7/7/12 between a willing buyer and willing seller represented by its officials, witnessed the purchaser pay the 1<sup>st</sup> installment of the purchase price in the sum of Kshs 600,000/-, drew an acknowledgement of the sum of Kshs 5.0 million and also confirmed that the vendors had the requisite capacity to act as the representatives of the 1<sup>st</sup> Defendant.

### **The 2<sup>nd</sup> -4<sup>th</sup> Defendant's case**

21. DWI- Eunice Wambui Kamotho stated that she is the chairlady of the 5<sup>th</sup> Defendant. She gave the background history of the 1<sup>st</sup> Defendant which she claimed is a national wide umbrella women organization formed in 1952 to mobilize women for purposes of economic and social prosperity.

22. In 1990 the 1<sup>st</sup> Defendant was allocated the suit land vide letter of allotment dated the 14/12/90. That on the 25/1/95 while being a treasurer of the 1<sup>st</sup> Defendant, members agreed to incorporate the 5<sup>th</sup> Defendants and also resolved to change the allottees name from the 1<sup>st</sup> Defendants to the 5<sup>th</sup> Defendant. The resolutions were confirmed on the 14/12/95.

23. On the 4/4/95 the 5<sup>th</sup> Defendant was issued with a certificate of incorporation. The officials of the 5<sup>th</sup> Defendant were; Rhoda Gititi Beth

Muraya Eunice Kamotho and Nancy Wamuchie as chairlady, Vice chair, Secretary and Member respectively. That Beth Muraya was appointed treasurer from 1998 -2013 when she was expelled from the society.

24. The witness stated that the 5<sup>th</sup> Defendants operates bank accounts and runs its operation as in accordance with its bye laws. Members resolutions, AGMs and special meetings minutes are also maintained. Membership is contributory with the minimum shares being 3 worth Kshs 5000/- .

25. In respect to the suit land she informed the Court that she learnt in 2013 that the suit land had been sold fraudulently and she filed a complaint with the CID at Muranga who later closed their file without informing her the outcome of their findings. She learned later through the court filings that the CID found no culpability and hence closed their file.

26. That the position of change of name of the allottee from 1<sup>st</sup> Defendant to 5<sup>th</sup> Defendant was communicated to the Commissioner of Lands through the Municipal Council of Muranga who did not have any objection as per their letter dated the 13/5/96. She also contended that the Municipal Council had no objection to the change of name. She averred that she and Beth Muraya being chairlady and Treasurer on 16/4/2009 swore an affidavit deponing that the 1<sup>st</sup> and 5<sup>th</sup> Defendants as members resolved to merge the two entities and that the suit land was transferred to the 5<sup>th</sup> Defendant. She informed the Court that the 5<sup>th</sup> Defendant has always paid rates to the County Government of Murang'a and its predecessor.

27. The witness further testified that the officials who purported to sell the land on behalf of the 1<sup>st</sup> Defendants did not have the authority of the 5<sup>th</sup> Defendant. That by 2012 the 1<sup>st</sup> Defendant had transformed to the 5<sup>th</sup> Defendants and the suit land was now registered under the 5<sup>th</sup> Defendant. That Margaret Wambui Kibe and Margaret Wambui Kariuki were neither members of the 5<sup>th</sup> Defendant. That the 5<sup>th</sup> Defendants members did not give authority to the alleged representatives in form of members resolution. She averred that she holds the original letter of allotment to date.

28. The witness added that the purchase price was not paid to the 1<sup>st</sup> nor the 5<sup>th</sup> Defendant but to an individual account namely Margaret Wambui Kibe & others.

29. In cross examination by Mr Mwaniki for the 2<sup>nd</sup> -4<sup>th</sup> Defendants, she stated that the 1<sup>st</sup> Defendant is an affiliate of a national organization whose current chairlady is not known to her. That the 1<sup>st</sup> Defendant has its own Constitution. The 1<sup>st</sup> allottee of the suit land was the 1<sup>st</sup> Defendant. In 1990 she admitted that the officials of the 1<sup>st</sup> Defendant were herself, Beth Wanjiru Muraya and Rosalind Wairimu (deceased).

30. She explained that in 1995, to enable members contribute for land outgoings such as rates and land rent, the 5<sup>th</sup> Defendant was set up so that members could acquire shares. Pressed further the witness stated that she had minutes of the 1<sup>st</sup> Defendant resolving to change its name to the 5<sup>th</sup> Defendant. Maintaining that the sale of the land was fraudulent, she confirmed that the suit land is registered in the name of the Plaintiff.

31. On being cross examined by Mr Kirubi for the Plaintiff, the witness admitted that she did not know the name of the chairlady of the 1<sup>st</sup> Defendant. She insisted that in 2012 the allottee of the suit land was the 5<sup>th</sup> Defendant. She asserted that the change of name from the 1<sup>st</sup> Defendant to the 5<sup>th</sup> Defendant was done by the Council and confirmed in writing to her as the chairlady of the 5<sup>th</sup> Defendant. She stated that the minutes of the 1<sup>st</sup> Defendants changing its name to the 5<sup>th</sup> Defendant are stated on page 28 of the 1<sup>st</sup> and 5<sup>th</sup> Defendant's bundle and dated the 25/1/95. She conceded that she has not filed any suit challenging the sale.

32. In conclusion she stated that Kenya African National Union Wanawake was not registered and therefore there was no need to have a resolution to authorize the change of the allottees name to the 5<sup>th</sup> Defendant, since the outfit was not registered. She clarified that the 5<sup>th</sup> Defendants is not related to the 1<sup>st</sup> Defendant neither to the KANU wanawake national organization. That the 5<sup>th</sup> Defendant was registered for purposes of members contributing to the development of the plot as well as payment of the rates and land rents as it could not be developed by the 1<sup>st</sup> Defendant. That the council allocated the land to the 5<sup>th</sup> Defendant as the change of ownership was communicated to it and had no objection as per the letter dated the 13/5/1996. She stated that at page 94 of her bundle she has annexed the rates payment receipts.

33. DW2- Lydia Wairimu Kimani stated that she is currently not a member of the 1<sup>st</sup> Defendant neither does she know its officials then and as at 2012. She also does not know if the 1<sup>st</sup> Defendant still exists. She stated that in 1990s she was a member of the 1<sup>st</sup> Defendant when the plot was allocated to it but ceased in 1995. She stated that she had no documentary evidence to show that the suit land is registered in the name of the 5<sup>th</sup> Defendant. She stated that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants were not members of the 5<sup>th</sup> Defendant. She clarified that the 5<sup>th</sup> Defendants has not been issued with any title.

34. DW3- Joyce Wangari Gichuca reiterated the evidence as given by the DW2 and stated that she was a member of the 1<sup>st</sup> Defendants in the 1990s and that the 1<sup>st</sup> and 5<sup>th</sup> Defendants are one and the same. She stated that there is no agreement where the 2<sup>nd</sup> -4<sup>th</sup> Defendants purported to represent the 5<sup>th</sup> Defendant. She stated that she is asserting a right on behalf of the 5<sup>th</sup> Defendants in the suit land.

35. DW4- Beth Wanjiru Muraya stated that she was the chairlady of the 1<sup>st</sup> Defendants which is distinct from the 5<sup>th</sup> Defendants where she was an official as well. That she had full authority to sell the suit land from the 1<sup>st</sup> Defendant. That the land is already transferred to the Plaintiff. She admitted signing the agreement of sale with the other two officials and received the full purchase price. The money as distributed to the members of the 1<sup>st</sup> Defendant. She denied that there was any change of name of the 1<sup>st</sup> Defendants to the 5<sup>th</sup> Defendant. She stated that the affidavit dated 16/4/09 was just a proposal to change the land from the 1<sup>st</sup> Defendants to the 5<sup>th</sup> Defendant. She stated that there was a resolution of the 1<sup>st</sup> Defendants to sell the land. She and the other officials were the divisional chairs and were mandated to

transact for the 1<sup>st</sup> Defendant. They banked the cash in an account at Equity bank belonging to the 1<sup>st</sup> Defendant. She however could not produce the list of all the members of the 1<sup>st</sup> Defendants. The account was in the names of the chairladies of the various branches in Muranga. She distributed the monies to the members except the sum of Kshs 300,000/- which she authorised for the expenses of the committee members. She stated that she stopped attending meetings of the 5<sup>th</sup> Defendants because she disagreed with the chairlady, Mrs Kamotho. She did not produce the minutes authorizing her and her officials to sell the land to the Plaintiff.

36. DW5- Margaret Wambui Kibe reiterated the evidence of DW4 and stated that she is a member and official of the 1<sup>st</sup> Defendants and she had authority to sell the suit land. That the 1<sup>st</sup> Defendants has not merged with the 5<sup>th</sup> Defendant. They sold the land to the Plaintiff received full purchase price and distributed the same to members of the 1<sup>st</sup> Defendant. She was the chairlady of Kahuro branch. She stated that though there were minutes of the general meeting of members authorizing them, she did not produce any in court. She stated that the six chairladies under the chairmanship of Beth Muraya agreed to sell the land. Further that they had the mandate to handle the finances of the 1<sup>st</sup> Defendants although she did not produce any minutes to support the same.

37. DW6- Margaret Wambui Kariuki stated that she is a life member of Kenya Africa National Union Wanawake National chapter. She is also a member of the 1<sup>st</sup> Defendant, No 27684. That she represented Mathioya division as the Secretary. She witnessed the agreement of sale on the 7/7/12 but was not present when the Kshs 5 million was received. That 1<sup>st</sup> Defendant is in existence and has never merged with the 5<sup>th</sup> Defendant. That they were mandated to open an account at Equity for the 1<sup>st</sup> Defendant. The cash was distributed to the members. She insisted that before the sale of the land there were two meetings that mandated her alongside the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to represent the 1<sup>st</sup> Defendants in the transaction. She however stated that the said minutes are with her lawyer who is not in Court. She denied knowledge on the affidavit of 2009, letter from the council and the commissioner of lands that they did not have any objection to the change of the land from the 1<sup>st</sup> Defendants to the 5<sup>th</sup> Defendant. She denied any fraud as alleged by the 5<sup>th</sup> Defendant.

38. On the 9/10/18 the parties with the concurrence of the Court elected to file Written Submissions.

39. The Plaintiff submitted that he is a bonafide purchaser for value without notice. That the Plaintiff bought the suit land from the 1<sup>st</sup> Defendants who was duly represented by the 2<sup>nd</sup> -4<sup>th</sup> Defendants in their capacities as officials of the 1<sup>st</sup> Defendant. Neither the 2<sup>nd</sup> -4<sup>th</sup> Defendants have denied executing the agreement, acknowledging full purchase price.

40. He submitted that he satisfied all the ingredients that qualify one as a bonafide purchaser for value without notice. The 1<sup>st</sup> Defendants had a valid interest in the suit land. The 2<sup>nd</sup> -4<sup>th</sup> Defendants were duly authorized to commit the 1<sup>st</sup> Defendant.

41. The Plaintiff submitted that the particulars of fraud raised by the 1<sup>st</sup> and 5<sup>th</sup> Defendants are not directed to him and invariably the 1<sup>st</sup> and 5<sup>th</sup> Defendants have not challenged the Plaintiff's title in any way.

42. The Plaintiff submitted that the 1<sup>st</sup> and 5<sup>th</sup> Defendants have not proved any fraud on the part of the 2<sup>nd</sup> -4<sup>th</sup> Defendants. The findings of the DCI showed that there was no fraud on the transaction. This was a transaction based on a willing seller willing buyer. He urged the Court to protect the Plaintiff as an innocent purchaser for value without notice.

43. The Plaintiff further submitted that the 1<sup>st</sup> and 5<sup>th</sup> Defendants have contradicted their pleadings because they have admitted that the 1<sup>st</sup> Defendants is a body corporate with power to sue and be sued. They cannot turn around and deny the existence of the 1<sup>st</sup> Defendant. In the absence of a counterclaim by the 1<sup>st</sup> and 5<sup>th</sup> Defendants their joint defense is a mere sham devoid of triable issue, he submits.

44. In conclusion the Plaintiff urged the Court as a Court of equity to do equity to an innocent purchaser like the Plaintiff to the extent of declaring that the suit land belongs to the Plaintiff or grant him his alternative prayers.

45. The plaintiff was later amended on 4/7/16 to include the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> Defendants who are sued in their personal capacity as officials of the 1<sup>st</sup> Defendant, to seek orders for refund of purchase price and restraining orders against 1<sup>st</sup> Defendant. The Plaintiff also avers that he was an innocent purchaser for value without notice of dispute in respect to officials of 1<sup>st</sup> Defendants and the three (3) officials of the 1<sup>st</sup> Defendants presented themselves as bona-fide officials thereof.

46. The 2<sup>nd</sup> -4<sup>th</sup> Defendants submitted that the transaction was above board and proved that they were members of the 1<sup>st</sup> Defendants with full capacity to sell the land to the Plaintiff. They submitted that the 5<sup>th</sup> Defendants labored under a misguided notion that they could resolve to acquire the property of the 1<sup>st</sup> Defendants without the legal permission /consent of the 1<sup>st</sup> Defendant. The Plaintiff has acknowledged that the 1<sup>st</sup> Defendants has fulfilled its side of their obligation and it is the 5<sup>th</sup> Defendants that is a stranger in the whole scheme of things. The 2<sup>nd</sup> Defendants was a member of the 5<sup>th</sup> Defendants and the affidavit she swore with other that the 1<sup>st</sup> and 5<sup>th</sup> Defendants are one and the same entity was a nullity because the 1<sup>st</sup> and 5<sup>th</sup> Defendants are separate and distinct entities.

47. They submitted that the Plaintiff has not proved any collusion between the 1<sup>st</sup> and 5<sup>th</sup> Defendant. The transfer was concluded and the only remaining issue is to issue the title in the name of the Plaintiff. They argued that the sale was above board and if there was any issue the Plaintiff would have a Counterclaimed against them.

48. The 1<sup>st</sup> & 5<sup>th</sup> Defendants submitted that neither the Plaintiff proved collusion on the part of the Defendants nor sufficiently rebutted the claim of fraud by the 1<sup>st</sup> and 5<sup>th</sup> Defendants' averments of fraud. He submitted that the Plaintiff did not seek the authority of the 5<sup>th</sup> Defendants to sell the land nor inquire of the capacity of the 2<sup>nd</sup> -4<sup>th</sup> Defendants to represent the 5<sup>th</sup> Defendant. They submitted that there was no resolution by the members of the 5<sup>th</sup> Defendants to sell the land. He referred the Court to section 28 (3) of the Cooperatives Societies

Act where the executive committee is allowed in law to bind a society. The sale was neither ratified by the 1<sup>st</sup> nor the 5<sup>th</sup> Defendant.

49. In respect to the doctrine of bonafides, they submitted that none of the 2<sup>nd</sup> -4<sup>th</sup> Defendants had capacity to sell the land and the proceeds were never received by the 1<sup>st</sup> and 5<sup>th</sup> Defendants. That the doctrine is not available to the Plaintiff. The contract of sale which is vitiated with illegalities is therefore vitiated and is null and void.

50. Having evaluated the pleadings the evidence of the parties, the submissions and all the materials placed before me the issues that fall for determination are as follows;

- a. Was the Plaintiff a bonafide purchaser for value?
- b. Whether the Plaintiff is entitled to refund of purchase monies
- c. Who meets the cost of the suit?

#### **Was the Plaintiff a bonafide purchaser for value?**

51. The term bonafide purchaser for value is defined in **Black's Law Dictionary, 9<sup>th</sup> Edition** at page 1355 as follows

“one who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defect in or infirmities, claims, or equities against the sellers title. One who has in good faith paid valuable consideration for property without notice of prior adverse claims?”

52. In the Ugandan case of **Katende v. Haridar & Company Limited [2008] 2 E.A.173** it was held:-

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that: he holds a certificate of title; he purchased the property in good faith; he had no knowledge of the fraud; he purchased for valuable consideration; the vendors had apparent valid title; he purchased without notice of any fraud; he was not party to any fraud. A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”

53. In the case of **Samuel Kamere Vs Land Registrar (2015) EKLK** the Court of Appeal held that;

“ in order to be considered a bonafide purchaser for value, a person must prove that he had acquired a valid and legal title, secondly that he carried out the necessary due diligence to determine the lawful owner from whom he acquired legitimate title and thirdly that he paid valuable consideration for the purchase of the suit property.” (emphasis is mine).

54. The Plaintiff and his witness informed the Court that he bought the land from the 1<sup>st</sup> Defendant through its representatives the 2<sup>nd</sup> -4<sup>th</sup> Defendants and that the full purchase price was paid and vacant possession was handed over to the Plaintiff . The Murang'a council through its interim technical committee granted its consent to the transfer of the suit land from the 1<sup>st</sup> Defendant son the 27/11/2014 and on the 1/12/2014 he wrote to the commissioner of Lands annexing the relevant documents to facilitate the transfer of lease from the 1<sup>st</sup> Defendant to the Plaintiff.

55. The Plaintiff produced an agreement for sale dated the 7/6/12. The agreement is expressed to be between him and Kenya Africa National Union Maendeleo Ya Wanawake represented by the 2<sup>nd</sup> -4<sup>th</sup> Defendants as the District Chairlady, member and Treasurer respectively. The three are corporately referred to as “Vendors”.

56. The interest of the 1<sup>st</sup> Defendant is comprised of an allotment letter dated the 14/12/1990 in respect of Uns. Commercial Plot No 3 - Murang'a which later was registered as MURANG'A MUNICIPALITY/BLOCK 2/340. This is not in issue.

57. During the hearing of the case the Plaintiff led evidence that he entered into agreement with the 2<sup>nd</sup> -4<sup>th</sup> Defendants, paid them the purchase price in cash and through bank transfers into an account held by the 2<sup>nd</sup> -4<sup>th</sup> Defendants and later signed an acknowledgement of the full purchase price in conjunction with others. It was the evidence of the Plaintiff that he dealt with the 2<sup>nd</sup> -4<sup>th</sup> Defendants who represented themselves as representatives of the 1<sup>st</sup> Defendant. It admitted in evidence that he did not pay any monies to the 1<sup>st</sup> Defendant.

58. The 2<sup>nd</sup> -4<sup>th</sup> Defendants admitted signing the agreement of sale ostensibly on behalf of the 1<sup>st</sup> Defendant. They also admitted receiving monies with others in the sum of Kshs 5.6 million in their own accounts. They also admitted that they did not pay the monies into the account of the 1<sup>st</sup> Defendant. They led evidence that the monies on receipt were paid to the women. There is no evidence placed before this court who the women were, their names, whether they were members of the 1<sup>st</sup> Defendant and the purpose for which they were receiving the monies (if any). They did not show that they had authority to receive the monies nor that they paid the 1<sup>st</sup> Defendant or used it for the authorized purposes of the 1<sup>st</sup> Defendant.

59. The Plaintiff was represented by counsel in the transaction who led evidence that he carried out due diligence on the property and prepared the agreement of sale, the acknowledgement of the full purchase price by the 2<sup>nd</sup> -4<sup>th</sup> Defendants dated the 16/11/12 and wrote a

letter dated the 23/7/12 introducing the 2<sup>nd</sup> -4<sup>th</sup> Defendants to the Town Clerk, Municipal Council of Murang'a as the bonafide officials of the 1<sup>st</sup> Defendant.

60. According to Section 109 of the Evidence Act, the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

61. The Plaintiff in this case failed to lead evidence which discloses the existence of the 1<sup>st</sup> Defendant by way of certificate of incorporation, list of members, its officials and more importantly its constitution. Such evidence could have disclosed the official's members and governance structure by which the 1<sup>st</sup> Defendant binds itself in contractual relationships such as sale of real property. The 1<sup>st</sup> Defendant has been variously defined in the plaint as a body corporate with perpetual succession and an affiliate of Maendeleo Ya Wanawake Organization, a Non-Governmental Organization registered in 1952 with its offices in Murang'a Town. In the agreement little attention was paid to the 1<sup>st</sup> Defendant in terms of description and more emphasis was placed on the 2<sup>nd</sup> -4<sup>th</sup> Defendants who are described as vendors which expression shall where the context so admits include their personal representatives and assigns of the one part.

62. The 1<sup>st</sup> Defendant has denied selling the suit land to the Plaintiff nor receiving any monies from the 2<sup>nd</sup> -4<sup>th</sup> Defendants.

63. To call in aid the doctrine of bonafides, it was the cardinal obligation of the Plaintiff to place before the court the above documents in addition to the resolution of the 1<sup>st</sup> Defendant authorizing the 2<sup>nd</sup> -4<sup>th</sup> Defendants to sell the suit land and receive monies on its behalf. It failed to prove that he dealt with the 1<sup>st</sup> Defendant nor the authorized officials of the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> -4<sup>th</sup> Defendants as well failed to produce any minutes mandating them to deal with the suit land in the form of a sale.

64. The sale agreement therefore between the 1<sup>st</sup> Defendant and the Plaintiff was null and void for want of capacity of the 2<sup>nd</sup> -4<sup>th</sup> Defendants to purport to represent the 1<sup>st</sup> Defendant, dispose of its asset, receive monies and deploy them for uses other than that of the 1<sup>st</sup> Defendant.

65. From the reasoning in the **Katende and Samuel Kamere** cases above, there is therefore no basis in law or fact for me to make a finding that the Plaintiff was an innocent purchaser for value and without notice. The Plaintiff did not obtain a transfer from the owner of the title/interest in the suit land but from third parties who had no claim/authority to the suit land. The 2<sup>nd</sup> - 4<sup>th</sup> Defendants had no title or interest to pass to the Plaintiff.

66. It is the finding of the court that the Plaintiff cannot be said to have been a bonafide purchaser for value without notice.

#### **Whether the Plaintiff is entitled to refund of purchase monies**

67. It is clear from the analysis of the 1<sup>st</sup> issue that the 2<sup>nd</sup> -4<sup>th</sup> Defendants sold the land, received monies and applied them without the authority of the 1<sup>st</sup> Defendant. They have not denied that they transferred the suit land of the 1<sup>st</sup> Defendant or used the funds for the purposes of the 1<sup>st</sup> Defendant or showed that they were possessed with capacity to sell the land receive monies on behalf of the 1<sup>st</sup> Defendant. Their actions can only be described as fraudulent.

68. It is the finding of the Court that they should refund the money to the 1<sup>st</sup> Defendant.

#### **69. Final orders;**

a. The Plaintiff's claim for declaration of ownership in Murang'a Municipality Block 2/340 is declined.

b. The 2<sup>nd</sup> -4<sup>th</sup> Defendants are ordered to severally and jointly refund to the Plaintiff the sum of Kshs 5.6 million from the date of filing suit until payment in full.

c. The 2<sup>nd</sup> -4<sup>th</sup> Defendants shall pay to the Plaintiff, 1<sup>st</sup> & 5<sup>th</sup> Defendants costs of the suit.

**Orders accordingly.**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 28<sup>TH</sup> DAY OF MARCH 2019**

**J G KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Kirubi for the Plaintiff

Kamande HB for Ndegwa for the 1<sup>st</sup> Defendant

Mwaniki Warima for the 2<sup>nd</sup> – 4<sup>th</sup> Defendants

Kamande HB for Ndegwa for the 5<sup>th</sup> Defendant