



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.661 OF 2017

MARY WAITHERA GIKIMA.....1ST PLAINTIFF/RESPONDENT

KENNETH NJOROGE GIKIMA2ND PLAINTIFF/RESPONDENT

-VERSUS-

KARIUKI WAIRAGU.....1ST DEFENDANT/APPLICANT

GACHUHI KAMENYA.....2ND DEFENDANT/ APPLICANT

MICHAEL WARUI GIKIMA3RD DEFENDANT/ APPLICANT

LEGORN FEEDS INTERNATIONAL LTD.....4TH DEFENDANT/APPLICANT

RULING

There are *two Notice of Motion* applications both dated *28th February 2018*, for determination.

The first Application is brought by the 1st, 2nd and 3rd Defendants/Applicants under *Order 51, Order 11 Rule 3(2) (a) of the Civil Procedure Rules* and *Sections 1A, 1B, 3A and 63(c) of the Civil Procedure Act*, wherein the Applicants have sought for the following prayers:-

1. That further to the Preliminary Objection dated 19th January 2018, the Court be pleased to strike out the 4th Defendants Notice of Claim against the 1st, 2nd and 3rd Defendants dated 7th November 2016, filed in court on 8th May 2017 together with all the other subsequent pleadings related thereto because it is contrary to Clause 15:1 of the Sale Agreement dated 15th September 2014.

2. That this matter/suit be Stayed pending the hearing & determination of Kiambu HCCA 58 of 2017, because as noted by this Honourable Court vide Ruling dated 19th August 2016, the main issue for determination in this matter is who between the Plaintiffs & 3rd Defendant is the proper representative for the estate of Njoroge Gikima to inherit LR Title No.4953/33/IX (I.R.7259) which issue is the substratum of the matter. The issue is now squarely before the Family/Succession Court in Kiambu with the proper jurisdiction unlike this Court which is Environment and Land Court, in line with Section 6 of the Civil Procedure Act.

3. That the costs of this Application abide the final results of this matter.

This Application is premised on the grounds stated on the face of the application and on the *Supporting Affidavit of Micheal Warui Gikima*. The grounds are:-

1) Clause 15;1 of the Sale Agreement dated 15th September 2014 between 1st 2nd and 3rd Defendant and the 4th Defendants is very clear that if any dispute was to arise, it was to be referred to arbitration.

2) The 3rd Defendant vide Thika Succession Cause No. 26 of 2013, had obtained and had the Grant confirmed in respect to the estate of his late father (Njoroge Gikima) and more specifically Thika LR Title No. 4953/33/IX(I.R 7529) after which he became an owner for and on behalf of his father together with the 1st and 2nd Defendants that is to say Tenants in Common in Equal shares culminating to the Sale Agreement to the 4th Defendant dated 15th September 2014.

3) *Vide application dated 3rd March 2016, the Plaintiffs herein sought for the annulment and/or revocation of the Grant to the 3rd Defendant in the said Thika Succession Cause No. 26 of 2013, which the 3rd Defendant objected inter alia that the Resident Magistrates Court Thika did not have jurisdiction to entertain the Plaintiffs application therein since the property according to the Sale Agreement was valued beyond Kshs.34,000,000/=.*

4) *On 27th April 2017, the Resident Magistrate Thika in the said Succession Cause No. 26 of 2013 made a Ruling that she had jurisdiction. The 3rd Defendant herein appealed the Ruling vide Kiambu HCCA No.58 of 2017.*

5) *The 3rd Defendant said HCCA No.58 of 2017 is pending.*

6) *An Environment and Land Court is not seized of Jurisdiction to hear Family/Succession issues now squarely before the Kiambu High Court, which is the substratum of the matter and this Environment and Land Court cannot adjudicate on pending Succession/Family issues before another competent court.*

In his *Supporting Affidavit*, the Applicant reiterated the contents of his ground in support of the application. He further annexed the sale agreement dated 15th September 2014 as exhibit and averred that the Counsel for the Plaintiff are well aware of all proceedings in *Thika Succession Cause No.26 of 2013* and *Kiambu HCCA No.58 of 2017* and annexed Consent Orders of the court and prayed that the application be dismissed.

The 3rd Defendant filed a *Supplementary Affidavit* on the 24th of April 2018, and averred that *Section 6* of the *Arbitration Act* is clear on Staying of proceedings and that the Plaintiffs have chosen not to oppose their Application but tactfully support pleadings by the 4th Defendant and that failure by the Plaintiffs to oppose is a clear admission that this court has no jurisdiction to determine the issue of who ought to be issued with Letters of Administration of the Estate of *Njoroge Gikima*, which issue is the core and substance of this matter. He further alleged that the 4th Defendant are Pleading the Plaintiffs cause though they are pleading not to be privy to *Kiambu HCCANo.58 of 2017*. He reiterated that the Plaintiffs are the legal representatives of *Miriam* and have been duly substituted in *Thika CMCC 1123 of 2000*, ought to go on with execution of the Decree because there are no Stay of Execution Orders in force. It was his contention that from the 4th Defendant own evidence the document of title placed before court is clear who has been and is the current owner. He further averred that the present matter is not a Petition to warrant invocation for provision of Conservatory Orders and this Court has not ruled on whether to Stay proceedings on account of 4th Defendant's claim as against the 1st, 2nd and 3rd Defendants before seeking orders for preservation or even conservation and that the Title to the subject property is in the name of the 4th Defendant and no one is threatening him and therefore the court should not be called to make substantive orders on the basis of inherent powers without any basis.

He averred that proceedings in *Thika CMCC No.1123 of 2000* do not amount to non-disclosure as any party seeking to know ownership of property in Kenya does not go seeking any court proceedings and that the documents of ownership of the suit land are *Re Ipsa Loquitur*. It was his contention that Plaintiffs and 4th Defendant are estopped from referring to *Thika CMCC No.1123 of 2000* as if those are proceedings they are party to because the Defendant therein is *Miriam Waihera Njoroge* whose interest the Plaintiffs purport to represent. He further averred that proceeding with this matter when *Kiambu HCCA No.58 of 2017* is pending is same as conducting parallel proceedings contrary to *Section 6* of the *Civil Procedure Act* in respect to the plaintiffs case and contrary to *Section 6* of the *Arbitration Act* in the 4th Defendant's case and he therefore prayed that his Application be allowed and the 4th Defendant's Application be dismissed.

The Application is opposed and the Plaintiff filed a *Replying Affidavit* filed on 31st May 2018. She averred that the application is an abuse of the court process and an attempt to defeat and delay *just and expeditious* disposal of the suit. She further averred that all prayers sought in the application are facts that have already been presented before court and what remains is for Ruling to be issued. She alleged that the Applicants have done all within their powers to ensure that the suit does not go for hearing. She reiterated the contents of the Reply by her Advocates dated 10th October 2017, and her *Replying Affidavit* sworn on 2nd February 2018 and maintains that the Notice of claim raised by the 4th Defendant can only be canvassed in this suit and not by way of Arbitration as the Notice of claim arose out of their suit challenging the authenticity and the fraudulent nature of the agreement that was entered between the Applicants, and further alleging there was no conflict between the parties as regards the terms of the agreement as provided in *Clause 15.1* of the agreement and thus the same cannot be subjected to Arbitration as the suit only arose out of the illegal and fraudulent actions of the Applicants who concealed information and misrepresented facts to the 4th Defendant and as such he cannot be subjected to rely on the agreement that was fraudulent and void and that is in the process of being challenged before court.

It was her contention that the matter before this court and the suit *Kiambu High Court No.58 of 2017*, before the *Kiambu High Court* do not concern the same parties as the 1st, 2nd and 4th Defendants are nor parties to the suit in *Kiambu High Court* and staying this matter would be greatly prejudicial to the parties not party to the other suit. She averred that the prayers sought in this particular suit is among others that the transfer of the suit property to the 4th Defendant be declared unlawful null and void while the prayers in the *Kiambu High Court No.58 of 2017* seeks a revocation of the letters of Administration issued to the 3rd Defendant herein, staying the suit will greatly prejudice them due to delay of the administration of justice and which is inconsistent with the provisions of *Article 159(2)(b)* of the *Constitution of Kenya*. She averred that the jurisdiction of this court and that of the *High Court in Kiambu* are totally different.

She further alleged that the Applicants remain in contravention of the Court judgment issued in *Thika CMCC No.1123 of 2000*, wherein the court declared that the property did belonged to *Miriam Waihera Njoroge* and not the 1st and 2nd Defendants herein. She further alleged that the evidence presented to court shows that the late *Elias Gikima* and the late *Njoroge Gikima* who were their father and grandfather respectively bought the property from 2nd and 3rd Defendants and the family of *Njoroge Gikima* agreed that it should be given to them. It was her contention that the Application is bad in law, mischievous, and amounts to abuse of the due process of law.

The 4th Defendant also opposed the Application and he filed his *Replying Affidavit* on 7th March 2018. He averred that without the Plaintiffs case, he would have no claim hence the issue given life by the Plaintiffs case cannot be detached from this suit. He further averred that the

Applicants have already subjected themselves to the jurisdiction of this court the moment they entered a defence and reply to the claim he lodged. He alleged the Agreement the Applicants refer to is in question as its validity is in doubt since the capacity of the vendors to contract or take part in the sale of suit property is the subject, matter in this case. He further averred that he is not a party to the proceedings in **Kiambu HCCA No.58 of 2017** and were the orders to stay the proceedings be granted, he would suffer prejudice as his claim is put on hold without preservation of the considerations. It was his contention that his claim is against the Applicants who received the consideration of the sale of the suit property whose sale validity is in doubt as the grant issued has been challenged and if the Application is allowed he would suffer prejudice since the Applicants received **Kshs.29,000,000/=** in the alleged sale and they only hold a deed to the property that may be canceled if the Plaintiffs suit succeeds.

The second Application is brought by the 4th Defendant herein, under **Sections 1A** and **3A** of the **Civil Procedure Code Cap 21 Laws of Kenya** and all other enabling provisions of Law, wherein the Applicant has sought for the following prayers;

- 1. That there be preservation orders compelling the 1st, 2nd and 3rd Defendants to deposit in court or an interest earning Bank Account for preservation, the monies paid as consideration in the purported sale of the suit land parcel.**
- 2. That the Court does hold for preservation of the Title Deed to the suit, in the name of the 4th Defendant.**
- 3. That the costs of this application be provided for.**

This Application is premised on the grounds stated on the face of the application and on the **Supporting Affidavit** of **Stephen Waithiru Baiya**. The grounds are:-

- a) That the Judgment in Thika CMCC No.1123 of 2000 ruled out the 1st and 2nd Defendants as proprietors of the suit property and they therefore lacked capacity to contract or participate in the sale of the suit property to the 4th Defendant.**
- b) The Grant of Letters of Administration issued to the 3rd Defendant vide Succession Cause No.26 of 2013 (now Kiambu HCCA 58 of 2017) has been challenged seeking to revoke the same in court as the Grant to the same Estate had been earlier issued to one Miriam Waithera Njoroge and such the capacity to sell the suit property to the 4th Defendant by the 1st and 2nd Defendants is in question.**
- c) That there will be no prejudice suffered as the receipt of the purchase price has not been denied and it will only be preserved until all issues challenged are determined.**
- d) That if the Plaintiffs' case and the 4th Defendant's case are successful, the 4th Defendant's win may be rendered nugatory if these preservation orders are not granted.**
- e) That it is in the interest of Justice the prayers sought should be granted.**
- f) The 4th Defendant shall be bound and is ready to abide by any conditions set by the court in regard to this Application.**

He averred in his **Supporting Affidavit** that he is a Director of the 4th Defendant and the suit land is registered in the Company's name as evidenced by the **Search Certificate** marked **SWB-2**. He alleged that there is no dispute that **Miriam Waithera** prior to her demise was the legal representative of the **Estate of Njoroge Gikima** and **Thika CMCC No.1123 of 2000**, filed by the 1st and 2nd Defendants against her identified and sued her as the same and in the suit the Court ordered that the suit property transferred to her as the 1st and 2nd Defendants had no interest on the same since they had legally sold their rights to the property to **Njoroge Gikima** and another. He averred that when the Defendants purported to sell the suit property to the 4th Defendant, they did so with the knowledge that they had no capacity to do as they had no interest in the property and the Grant that purported to transfer the same had been illegally obtained there being one already on record. He averred the Grant is the subject matter of another suit and its validity has been challenged with a view of having the same revoked and its in the interest of justice that preservation orders be issued. He further averred that if the challenge of the Grant issued to the 3rd Defendant is successful and the sale transaction is nullified and the 1st and 2nd and 3rd Defendants are not in a position to meet the 4th Defendant's claim, it will be prejudiced and his claim made a process in futility if both the deed to the property and the monies paid for the same are or preserved .

The Application is opposed and the 3rd Defendant filed his **Replying Affidavit** on **29th March 2018**. He averred that the Application has no merit and it ought to be dismissed as it is incompetent and fatally defective as the jurisdiction of the Court to make such envisaged orders cannot be said to be properly invoked through **Sections 1A** and **3A** of the **Civil Procedure Act** and further that there is no Decree or Order that has been competently obtained before this or any other court against the 1st, 2nd and 3rd Defendants to warrant a deposit of **Kshs.29,000,000/=**. It was his contention that the Decree holder in **Thika CMCC No.1123 of 2000** have not demonstrated why they have not executed the Judgment yet there is no stay order. They allege that **Miriam Waithera Njoroge** whose interest the Plaintiffs allege to bequeath was never a registered owner of the suit property and they were the Valid owners of the property and they passed a clean title to the 4th Defendant. He averred that the 4th Defendant is the registered owner of the suit property and the title and valuable consideration cannot be within its expected control which is what its attempting as due diligence was carried out.

The Applicant filed a further Affidavit on **17th March 2018** and averred that the Application by the 1st, 2nd and 3rd Defendants is seeking orders that would affect its interest who is not a party to the proceedings before **Kiambu High Court** hence the purpose of seeking for Conservatory Orders. It was his contention that the Court in its inherent Jurisdiction can make any orders that are deemed just and conservatory in nature. He further contended that one does not need a Decree to seek Conservatory Orders when the other party is keen on

delaying the matter before court. He further averred that the Judgment in **Thika CMCC No.1123 of 2000** holds the key to the case wherein the 1st and 2nd Defendants were ruled out of the legal interest in the suit premises and without a successful appeal against the Judgment, they could not pass a good or clean title concerning the suit property.

He averred that the Title transferred to the 4th Defendant was not done with due diligence and was clear that the vendors had no capacity to transfer the same. It was therefore his contention that the court can order for the deposit of any considerations that a party may be enjoying and may be wasted making the final case nugatory and a nullity and that the considerations are the Title and the sale proceeds of the premises.

The two applications were canvassed by way of written submissions which this Court has carefully read and considered. The Court has too considered the cited authorities and the relevant provisions of law and gives the following rendition.

The suit herein concerns ownership of the suit property **LR.No.4953/33/IR 7529/1**, in which by a Judgment delivered by the **Subordinate Court at Thika** on **3rd August 2009**, the Court ordered the Plaintiff thereon in **Thika CMCC No.1123 of 2000**, to transfer the suit property to **Miriam Waihera Njoroge**. The Plaintiffs in the above stated suit (**CMCC No.1123 of 2000**) are the 1st and 2nd Defendants herein.

However, instead of the 1st and 2nd Defendants transferring the suit property to the said **Miriam Waihera Njoroge**, the 3rd Defendant herein took out **Letters of Administration** in **Thika CMC Succession Cause No.26 of 2013**, over the estate of **Njoroge Gikima** and consequently, the 3rd Defendant was declared the sole beneficiary of $\frac{1}{3}$ share of **LR.7529**. The above grant and its confirmation was taken and confirmed while there existed a Judgment in favour of **Miriam Waihera Njoroge**, which Judgment had not been upset.

However, the Plaintiffs herein sought for revocation of the said Grant and the said **Succession Cause** matter is pending before Kiambu High Court being **Kiambu HCCC No.58 of 2017**. Further, the 1st, 2nd and 3rd Defendants sold the suit property to the 4th Defendant, who is now in possession of title deed in his favour and 4th Defendant is at the instant moment the registered owner of the suit property.

The Plaintiffs herein have sought for a declaration to be issued to the effect that the suit property form part of the estate of **Miriam Waihera Njoroge**, and that the transfer of the suit property to 4th Defendant was **unlawful, null and void ab initio** and that the same should be cancelled. The 4th Defendant has admitted that it indeed purchased the suit property from the 1st, 2nd and 3rd Defendants and has filed a Cross-claim against the 1st, 2nd and 3rd Defendants herein.

It is not in doubt that a court of law did order that the suit property herein be transferred to **Miriam Waihera Njoroge** (deceased) and the Plaintiffs are alleging that she bequeathed the suit property to themselves. It is also not in doubt that the 3rd Defendant did take out Letters of Administration on behalf of the estate of **Njoroge Gikima** and obtained $\frac{1}{3}$ share of the suit property. Together with the 1st and 2nd Defendants, the three Defendants sold the suit property to the 4th Defendant. It is also apparent that the Grant issued to the 3rd Defendant has been challenged and Plaintiffs have sought for its revocation. If the said application for revocation is allowed, then it means the 3rd Defendant did not have capacity to sell the suit property to the 4th Defendant. However, the issue for **Revocation of Grant** is not a preserve of this Court but falls under the Jurisdiction of **Kiambu High Court** and indeed **Kiambu HCCA No.58 of 2017** is pending.

The court had earlier held in its **Ruling of 19th August 2016**, that the issue for determination herein is who is the proper legal representative of the estate of **Njoroge Gikima** and therefore holds the right to inherit the suit property **LR.No.4953/33/IX(IR 7259)**

Again the above issue can only be determined by **Kiambu High Court**, in a Succession Cause but not in this matter. It is therefore apparent that the issues herein are similar to the issue that are to be determined by the **Kiambu High Court** in a **Succession Cause**.

Section 6 of the **Civil Procedure Act** addresses such a situation as this one. It provides as follows:-

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Therefore the Court finds that since there is a pending **Succession Cause** at **Kiambu High Court**, which is the proper forum for dealing with Succession matters, then this Court finds that it has no option but to stay this suit until **Kiambu High Court Succession Cause No.HCCCA 58 of 2018** is heard and determined. Therefore this finding settles the 1st, 2nd and 3rd Defendants' **Notice of Motion** dated **28th February 2018** in terms of **prayer no.2**.

However, in respect of prayer no.1 of the said application, the Court finds that the said prayer is not tenable as it was not brought within a reasonable time as provided by **Section 6(1)** of the **Arbitration Act (1995)** which provides:-

“A court before which proceedings are brought in a matter is subject of an Arbitration Agreement shall, if a party so applies not later than the time when the party enters appearance or files any pleadings or takes any step in the proceedings stay the proceedings and refer the parties to the arbitration...”

The 1st, 2nd and 3rd Defendants are relying on **Clause 15:1** of the **Sale Agreement** entered between them and the 4th Defendant. The 4th Defendant filed its **Cross-claim** on **18th May 2017**. Thereafter the 1st, 2nd and 3rd Defendants entered their Reply to the Cross-claim and therefore took more than 14 days to file the instant application. The 1st-3rd Defendants therefore waived their rights to arbitration. See the

case of *Fairlane Supermarket Ltd...Vs...Barclays Bank Ltd, HCCC No.102 of 2011*, where the Court held that:-

“The option to refer the matter to arbitration was sealed when the Defendant herein entered appearance and followed it with a Defence.....any party who wishes to take advantage of arbitration clause in a contract should either at the of entering appearance make the application for reference to arbitration”

The Court will also be guided by the case of *Lofty...Vs...Bedouch Enterprises Ltd EALR (2005) 2 EA*, where the Court also held that:-

“We respectfully agree with these views that even if the conditions set out in paragraph (a) & (b) of Section 6(1) are satisfied the court would still be entitled to reject an application for Stay of proceedings and referral thereof to Arbitration if the application to do so is not made at the time of entering appearance....”

The 1st, 2nd and 3rd Defendants took unreasonable long period to file this application to refer the matter for arbitration. They did not do so while responding to the 4th Defendant’s claim and they therefore waived their right to have the dispute referred to arbitration.

These findings consequently answers the 1st, 2nd and 3rd Defendants’ ***Preliminary Objection*** dated ***19th January 2018*** in terms of prayer no.1 of their ***Notice of Motion*** dated ***28th February 2018***.

In respect to the 4th Defendant’s ***Notice of Motion*** dated ***28th February 2018***, which has sought for preservation of the deposit paid to the 1st, 2nd and 3rd Defendants and preservation of the title deed to the suit property, the said application is brought under the inherent powers of the court.

The 4th Applicant has relied on ***Section 1A*** of the ***Civil Procedure Act*** which Section deals with the overriding objective of the Act which is:-

(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and

orders of the Court.

The Court therefore among other things has a duty to ***facilitate*** the ***just*** and ***proportionate*** resolution of disputes before it.

Further, the Applicant has relied on ***Section 3A*** of the said Act which Section donates the power to court to issue or make such orders that may be necessary for the ends of justice and/or prevent abuse of the process of the court.

As the Court observed earlier, there is no doubt that a court of law in its ***Judgment*** delivered on ***3rd August 2009***, ordered that the suit property be transferred to one ***Miriam Waithera Njoroge*** by the 1st and 2nd Defendants. In disregard of the said Judgment which has not been upset in any Appeal, the 3rd Defendant obtained Grant in respect of the estate of ***Njoroge Gikima***, and cited the suit property as the only property subject of the said ***Succession Cause***. At the Confirmation of Grant, the 3rd Defendant was granted $\frac{1}{3}$ portion of the suit property vide ***Succession Cause No.Thika CMCC Succession Cause No.26 of 2013***. After the said ***Confirmation of Grant***, the 3rd Defendant in corroboration with 1st and 2nd Defendants who were aware of the ***Judgment*** in ***Thika CMCC No.1123 of 2000***, sold the suit property to the 4th Defendant. The suit property was allegedly sold for ***Kshs.34,000,000/=*** as per ***Sale Agreement*** referred by the parties dated ***15th September 2014***.

However, the Grant issued to 3rd Defendant has been challenged by the Plaintiffs herein. Even if the suit property is registered in the name of the 4th Defendant, there is a danger in that if the Grant issued to 3rd Defendant is revoked, then the subsequent sale of the suit property to 4th Defendant risk being declared ***null*** and ***void*** and the title deed in possession of 4th Defendant may be cancelled.

However, it is not in doubt that the 4th Defendant has already paid ***Kshs.29,000,000/=*** to the 1st, 2nd and 3rd Defendants. The 4th Defendant should be guaranteed that it will not be prejudiced in case the Plaintiffs’ application for Revocation of Grant sails through.

The 1st – 3rd Defendants sold the suit property while there was in existence a valid Judgment which had not yet been set aside in an Appeal. Even without going to the merit of this case, the Court finds the actions of 1st – 3rd Defendants mired with deceit and material non-disclosure. Therefore the Court finds that in order to ***facilitate just*** and ***proportionate*** resolution of the dispute herein, the deposit already paid to the 1st, 2nd and 3rd Defendants should be preserved.

Consequently the 1st – 3rd Defendants are hereby compelled to deposits the monies already paid to them as consideration in an interest earning account in the names of both Advocates for the 4th Defendant and Advocate for the 1st – 3rd Defendants herein. The said interest earning Account should be opened forthwith and the monies paid as consideration be deposited within a period of 45 days from the date of

this Ruling.

Further, as provided by **Section 3A** of the **Civil Procedure Act**, the Court finds that the necessary order herein in order to prevent abuse of the court process is to have the title deed to the suit property herein preserved by having the same deposited in this Court where it will be kept under key and lock until the final determination of the matter at **Kiambu High Court being HCCA No.58 of 2018** or until further orders of this Court.

In a nutshell, the Court dismisses the 1st, 2nd and 3rd Defendants' **Notice of Preliminary Objection** dated **19th January 2018**, and also **prayer No.1** of the **Notice of Motion** dated **28th February 2018** by the said 1st – 3rd Defendants/Applicants. The said dismissal is with costs to the 4th Defendant.

However, the Court allows **prayer no.2** of the **Notice of Motion** application dated **28th February 2018**, filed by the 1st – 3rd Defendant as provided by **Section 6** of the **Civil Procedure Act**.

Further, the Court allows the 4th Defendant's/Applicant's **Notice of Motion** application dated **28th February 2018**, entirely in terms of **prayers no.2** and **3** with costs being in the cause. The said interest earning Account to be opened forthwith in the names of Advocates for the 1st – 3rd Defendants and 4th Defendant in a Bank of their choice. However, the said monies already paid as consideration to be deposited in the said interest earning Account within a period of 45 days from the date of this Ruling.

Again the title deed held by the 4th Defendant over the suit property should be deposited in court and be held under lock and key until the final determination of **Kiambu High Court HCCA No.58 of 2018** and/or until further orders of this Court.

It is so ordered.

Dated, Signed and Delivered at Thika this 18th day of March 2019.

L. GACHERU

JUDGE

In the presence of

Mr. Monari holding brief for Bosek for Plaintiffs/Respondents

Mr. Kimemia holding brief for Mr. Wambugu for 1st – 3rd Defendants/Applicants/Respondents

M/S Rungare for 4th Defendant/Applicant/Respondent

Lucy - Court Assistant

L. GACHERU

JUDGE

18/3/2019