



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CIVIL CASE NO.77 OF 2017**

**(FORMERLY NAIROBI ELC NO.420 OF 2011)**

**KAMINDI SELFRIDGES SUPERMARKETS LIMITED.....PLAINTIFF**

**VERSUS**

**KIAMBU MURATANI CO. LTD.....DEFENDANT**

**JUDGMENT**

The Plaintiff herein a Limited Liability has sued the Defendant herein which is also a Limited Liability Company which owns the suit property known as **Kiambu Township Block 11/87**, measuring about **0.0780 Hectares**. The Defendant holds a Certificate of Lease dated **10<sup>th</sup> September 1996**. The Plaintiff has sought for the following orders against the Defendant:-

- a) A permanent injunction to restrain the Defendant from dealing with the suit property.*
- b) An Order of specific performance compelling the Defendant to immediately execute all the documents to facilitate the transfer of the suit property to the Plaintiff.*
- c) Mesne profits to be assessed by the court.*
- d) Any other relief the court may deem just and expedient.*
- e) Costs of the suit.*

The Defendant contested the suit and filed its defence dated **30<sup>th</sup> January 2012**, and urged the court to dismiss the Plaintiff's claim. It further filed a **Counter-claim** and urged the court to enter judgment in its favour as per the counterclaim where it had sought for the following orders.

- a) Declaration that the purported agreement date 24<sup>th</sup> October 2009 is illegal, null and void and unenforceable.*
- b) An order directed to the Land Registrar to lift the caution dated 23<sup>rd</sup> February 2010.*
- c) Return of original title documents being held by the advocates that represented the parties in the transaction.*

The facts of the case are that on **13<sup>th</sup> August 2009**, the Defendant allegedly through its appointed agent **M/S Njuakim Commercial Agencies** duly advertised in the Daily Nation Newspaper the sale of the suit property. That in response to the said advert, the Plaintiff offered to purchase the suit property for **Kshs.40,250,000/=** and the offer was duly accepted by the Defendant. Then on **24<sup>th</sup> October 2009**, an agreement for sale was drawn and was duly executed by the parties herein. Further that a deposit of **Kshs.6,037,500/=** being 15% of the purchase price was deposited in the account of the Defendant's agent **M/S Njuakim Commercial Agencies** as per **Clause F** of the said Sale Agreement. The completion date was supposed to be **15<sup>th</sup> January 2010**, as per the special conditions of the said Sale Agreement. However, the Defendant failed to deliver the completion documents as set in the special conditions of the referred Sale Agreement. Despite demand to complete the said transaction, the Defendant without any lawful justification refused to do so and thus breached the said sale agreement. The particulars of the said breach were set out in paragraph 9 of the Plaintiff. That the Defendant has continued to collect rent from the tenants in the said building and has failed to deliver vacant possession to the Plaintiff.

However, the Defendant denied all the claims made by the Plaintiff in its statement of claim. It alleged that the sale agreement in issue was between the Plaintiff and parties who were not authorized by the Defendant. The Defendant further denied receipt of **Kshs.6,037,500/=** that

was paid to **Njuakim Commercial Agencies**. That the Defendant is under no legal obligation to deliver the completion documents to the Plaintiff and it could not honour any terms of the purported sale agreement as the same is unlawful. The Defendant also alleged that the said sale agreement is a nullity and illegal as it was not sealed by the Defendant, no consideration was received by the Defendant; was not signed by the Defendant's signatories and that the Defendant did not appoint the alleged agent to act for it.

Further, the Defendant alleged that the Plaintiff unlawfully obtained the certificate of title and has failed, ignored and/or neglected to return it to the Defendant. Further that the **caution** placed on the Defendants' title is illegal and thus the Counter-claim.

After various interlocutory applications, the matter proceeded for hearing and viva voce evidence was taken on diverse dates between **12<sup>th</sup> October 2017** and **30<sup>th</sup> May 2018**. The Plaintiff called two witnesses to support its case and the Defendant called only one witness.

### PLAINTIFF'S CASE

The Plaintiff called two witnesses **Kennedy Karume Kamithi** one of the Directors of the Plaintiff who averred that on **13<sup>th</sup> August 2009**, the Plaintiff saw an advert in the Daily Nation Newspaper which was advertised by **M/S Njuakim Commercial Agencies** for sale of the suit property. Further that a **Bill Board** had also been placed on the building which is next to the Plaintiff's building. That the Directors of the Plaintiff met and discussed about the advert and they expressed their interest. The Plaintiff met the Director of Njuakim Agencies who showed them a letter dated **31<sup>st</sup> July 2009** authorizing the said Agencies to sell the suit property. The said letter was from the Defendant and was signed by one **Titus N. Kamundia** and that the said authorization was done vide a meeting of the Defendant's Directors dated **30<sup>th</sup> July 2009**. However the witness did not produce the said minutes of the Management Board dated **30<sup>th</sup> July 2009**. That after tendering their bid, the Plaintiff was informed by Njuakim Agencies vide a letter dated **2<sup>nd</sup> October 2009**, that their bid was successful and were required to deposit 15% of the purchase price to the account of Njuakim Agencies. That the Plaintiff did deposit **Kshs.6,037,500/=** on **15<sup>th</sup> October 2009**, in the said account and a sale agreement was drawn on **24<sup>th</sup> October 2009** by the **Law Firm of Walker Kontos Advocates**. Further that **Greg Karugo Advocate**, an advocate in the said Law Firm acted for both the Plaintiff and the Defendant and a sale agreement was prepared and was executed by both parties. That completion date was on **15<sup>th</sup> January 2010** and the Defendant through its agent **M/S Njuakim Commercial Agencies** was to avail completion documents.

Further that the Plaintiff deposited the balance of the purchase price in a fixed deposit account awaiting the completion documents and transfer of the suit property to itself before transferring the said balance of purchase price to the account of Njuakim Agencies as per the sale agreement. However, by **15<sup>th</sup> January 2014**, the completion documents had not been forwarded to their mutual advocate. That thereafter some wrangles arose among the Directors of the Defendant, and the said wrangles caused the delay in fulfillment of the conditions set in the sale agreement. Eventually, the Defendant's new Directors cancelled the said transaction and demanded for return of the certificate of title held by their mutual advocate. However, the Plaintiff was keen to proceed with the said sale and insisted on the completion of the said transaction. When Defendant remained adamant and insisted on the cancellation of the sale, the Plaintiff placed a caution on the suit property and filed this suit. Interlocutory injunction was also granted in favour of the Plaintiff. The witness insisted that the Plaintiff is still keen on completion of the sale and urged the court to enforce the said sale agreement by issuing orders of specific performance.

**PW2 Michael Njuguna** the Director of **Njuakim Agencies** an estate agent stated that his agency had worked for the Defendant for several years. That it was managing the Defendant's properties and he produced a management contract to that effect. Further that on **31<sup>st</sup> July 2009**, the Defendant authorized him to sell the suit property and he placed advertisement to that effect in the Daily Nation Newspaper of **13<sup>th</sup> August 2009**. He identified the said letter of authorization. That his company was to be paid 6% of the purchase price as commission. That after the said advertisement, several bids were received and the Plaintiff was the highest bidder quoting **Kshs.40,250,000/=**. That the Plaintiff's bid was accepted by the Defendant vide their minutes of **8<sup>th</sup> October 2009** He said successful bidding was communicated to the Plaintiff and the Plaintiff was requested to pay 15% deposit of the purchase price to the account of **Njuakim Agencies**. That the Plaintiff did deposit the said amount on **15<sup>th</sup> October 2010** and a sale agreement was drawn. The balance of the purchase price was to be paid into the account of **Njuakim Agencies** to hold it in trust for the Defendant and it was to be transferred by RTGS.

However the same did not happen as wrangles developed among the Directors of the Defendant and they insisted on cancelling the whole transaction. He confirmed that he had never remitted the deposit of **Kshs.6,037,450/=** to the Defendant and that he was charged and convicted for sale of the Defendant other property at **Kangoya** by a **Kiambu Court**. He admitted that he was convicted together with one **Titus N. Kamundia**, who as the secretary to the Defendant and who was the signatory to the letter dated **31<sup>st</sup> July 2009** and the minutes of **30<sup>th</sup> July 2009**, authorizing the sale of the suit property to the Plaintiff. He also admitted that the said sale of **Kangoya** property was done the same time as the sale of the suit property. He did not have the minutes of the Defendant dated **30<sup>th</sup> July 2009**, that authorized the sale of the suit property and appointing him as the agent of the Defendant for the purpose of this transaction. He also did not produce the other bids that had been tendered by other would be interested buyers.

### DEFENDANT'S CASE

**DW1 – Charles Munyoroku Munyua**, the secretary to the Board of the Defendant averred that the Defendant owns the suit property. That when the new Board was elected into office, they noted that the former Board was involved in a malpractice such as illegal sale of the Defendant's properties. Further that the Defendant did not authorize the said **Michael Njuguna** of **Njuakim Agencies** to sale the suit property. That indeed the suit property was valued at **Kshs.50,000,000/=** but the Plaintiff had allegedly bought it for **Kshs.40,250,000/=** as per the purported sale agreement. He also denied that the Board of Directors did sit on **30<sup>th</sup> July 2009**, and authorized **Njuakim Agencies** to sale the suit property as per the letter dated **31<sup>st</sup> July 2009**. That the said letter was only signed by **Titus Kamundia** and not the other Board members. That the minutes of **8<sup>th</sup> October 2009**, were forged minutes as they were not on the Defendant's letter heard and were signed by the secretary only and not the other Directors. Further that the Directors did not sign the alleged sale agreement as it was only signed by the secretary **Titus Kamundia** and the suit property was undervalued. That the Defendant did not authorize **Njuakim Agencies** to receive the money on its behalf and the said agencies therefore fraudulently received the said 15% deposit and has never remitted the said

monies to the Defendant. He urged the court to direct that the **Law Firm of Walker Kontos Advocates** do return the certificate of title held by them to the Defendant also direct that the caution placed on the title deed be removed forthwith.

The parties did file their respective written submissions as directed by the court. The court has carefully read and considered the rival written submissions. Further the court has considered the pleadings in general, the evidence on record and the exhibits produced and finds as follows:-

There is no doubt that the Defendant herein is the registered owner of the suit property **Kiambu Township Block 11/87**. There is also no doubt that the said certificate of lease for the suit land is held by the **Law Firm of Walker Kontos Advocates**. There is also no doubt that the Plaintiff has alleged that the Defendant had expressed its intention to sell the suit property in the year **2009** as per the advertisement in the Daily Nation Newspaper of **13<sup>th</sup> August 2009**. That the Plaintiff expressed its interest and tendered for the said purchase. The Plaintiff was the successful bidder and proceeded to execute a sale agreement with the Defendant after having paid a deposit of **Kshs.6,037,450/=** to the account of **Njuakim Agencies** as per the sale agreement. Further the Plaintiff had alleged that it did due diligence and confirmed that the Defendant was duly incorporated and was the registered owner of the suit property.

There is also no doubt that the said sale was not completed and the Plaintiff filed this suit. It is evident that the Defendant has denied ever entering into the said sale agreement or any other and has urged the court to direct that the certificate of lease held by **Walker Kontos advocates** be returned to it. However, the Plaintiff has urged the court to direct that the Defendant do specifically perform as per the impugned sale agreement dated **24<sup>th</sup> October 2009**. The above being the undisputed issues, the court finds the issue for determination are as follows:-

*i. Whether there is a valid sale agreement between the Plaintiff and Defendant which is enforceable?*

*ii. Is the Plaintiff entitled to the orders sought in the Plaintiff?*

*iii. Is the Defendant entitled to the orders sought in the counter-claim?*

*iv. Who is to pay costs of the suit?*

**i. Whether there is a valid sale agreement between the Plaintiff and Defendant which is enforceable?**

It is evident that the crux of the matter herein is the impugned sale agreement dated **24<sup>th</sup> October 2009**. The Plaintiff attached a copy of the said sale agreement on page 39 of its bundle of documents. The said sale agreement was allegedly signed by three Directors of the Defendant herein and two Directors of the Plaintiff. The said sale agreement was witnessed by **Gregory K. Ngethe** advocate from **Walker Kontos advocates** who allegedly acted for both parties in the said transaction. The Defendant has alleged that the said sale agreement was unlawful and a nullity as it was not signed by the Defendant; had expired on **15<sup>th</sup> January 2010**; did not have signatures of the Defendant and was not properly executed.

In the course of the hearing, the Plaintiff produced the documents that were in its list of documents as exhibits in court. The court marked all the documents in the Plaintiff's list and supplementary list of documents as exhibits produced by the Plaintiff in support of its case. However, after the close of the defence, the Plaintiff's advocates sought to produce the **original** sale agreement as exhibit in support of its case. The same was opposed by the Defendant. However, the court allowed the handing over of the said original document and stated that **"production of the said document does not mean that the court will wholly believe its contents"**. Further the court did allow the defence to punch holes on the said original document during submissions time. The Defendant has done so and relied on the case of **Douglas Odhiambo Apel & another vs Telkom Kenya Ltd**, where the court held that:-

*"...a Plaintiff is under a duty to present evidence to prove his claim. Such proof cannot be supplied by the pleadings or the submission. Cases are decided on actual evidence that is tendered before the court....unless a consent is entered into for a specific sum, then it behoves the claiming party to produce evidence to prove the special damages claimed...."*

*Submission, as he correctly observed, are not evidence. The only way the receipts would have been produced and acted upon by the court would have been by the Plaintiffs taking the stand and producing them on oath or the parties agreeing expressly that they be the basis for special damages. This did not occur."*

Further, in the case of **Delta Haulage Services Ltd vs Complast Industries Ltd & Another (2015) eKLR**, the court stated:-

**"In Halsbury's Law of England, 4<sup>th</sup> Edition**, it was observed that:-

*"The mere admission of documents does not make them evidence. They must be formally put in at the trial and in the chancery division must be marked by the registrar."*

It is evident that the original sale agreement produced at the **tail-end** of the trial did not form part of evidence at the trial. The said document was not identified by any of the Plaintiff's witnesses and was not tested during cross-examination. The court finds that the said document was not properly produced in court as an exhibit.

See the case of **Kenneth Nyaga Mwise vs Austin Kiguta & 2 others (2015) eKLR**, where it was held that:-

*“The marking of a document is only for purposes of identification and is of proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of a document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.*”

*Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and unauthenticated account”.*

Having found that the **original** sale agreement produced at the tail end of the proceedings was not properly produced, the court will now rely on the sale agreement produced in court by the Plaintiff and which was not objected to by the Defendant.

As the court observed earlier, both the Plaintiff and the Defendant are Limited Liability Companies. They allegedly entered into the sale agreement which is dated **24<sup>th</sup> October 2009**. It is evident that though Limited Liabilities Companies are juridical persons, for the purposes of transactions, they are represented by their Directors or duly authorized persons as per their Memo and Articles of Associations.

In the alleged sale agreement, the sale agreement was allegedly signed by the Directors of both companies. The Plaintiff has alleged that the Directors of the Defendant did authorize the sale in issue and even signed the sale agreement. The Defendant has denied such authorization and has alleged that the said authorization was fraudulently done by **one Titus Kamundia** who was the secretary to the Board and he did not have authority to authorize such a sale. The Plaintiff is the one who has alleged. It is trite that he who alleges must prove.

See the **Evidence Act, Section 107 & 109**, which states:-

**107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

**109. 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.**

The Plaintiff alleged that the Defendant appointed **Njuakim Agencies** to sale the suit property on its behalf. That the said appointment was done vide a letter dated **31<sup>st</sup> July 2009**, which was produced in court as exhibit. The said letter is signed by the secretary to the Board, one **Titus Kamundia**, and it was alleged that the said appointment was done following the Management Board Meeting of **30<sup>th</sup> July 2009**. However the minutes of the said Management Board Meeting were never produced in court as exhibit. Since the Defendant had denied having appointed **Njuakim Commercial Agencies** as their agent, the Plaintiff ought to have produced the said minutes of **30<sup>th</sup> July 2009** as exhibit to confirm the said allegation or even called one of present members of the management as its witness. Further the Defendant disputed the said appointment and averred that such appointment letter ought to have been signed by the three Directors of the Company and not the Secretary alone. See the case of **Homes Africa Ltd..Vs..Henderson & Others (2004) 1KLR 473**, where the court held that:-

**“A Company can only make decisions through the agency of its organs which are primarily the Board of Directors or the general meeting of its shareholders”**

It is evident that the authorizing letter was signed by only **Titus Kamundia** and not the Board of Directors. Further there was neither authorization of the sale by the Board of Directors nor resolution of the shareholders during a General Meeting of the Defendant’s shareholders. If such resolution existed, it was not produced by the Plaintiff who is the one who has alleged’

DW1 had stated in his evidence that such an appointment ought to have been done procedurally but in this case, **Titus Kamundia and Njuakim Agencies** had colluded to deprive the Defendant of its property and therefore there was no authority to sale the suit property. Therefore if **Titus Kamundia** the Secretary to the Board did not have authority to appoint **Njuakim Commercial Agencies** to sale the suit property, was the advertisement done in the Daily Nation Newspaper of **13<sup>th</sup> August 2009** valid?

Without the production of the minutes of **30<sup>th</sup> July 2009** approving appointment of **Njuakim Commercial Agencies**, as the agent to sale the suit property for the Defendant, and without any resolution of the share holders authorizing the sale of the suit property, the court finds that the subsequent advertisement in the Daily Nation Newspaper of **13<sup>th</sup> August 2009** by **Njuakim Agencies** did not have the blessings of the Defendant and as such not binding to the Defendant.

Further the Plaintiff alleged that after responding to the said advertisement, they tendered their bid and their bid for purchase of suit property at **Kshs.40.25 million** was successful.

PW2 said that there were several other bids that were forwarded to the Defendant management board. However he did not produce the other bids that had been tendered by other parties. Further PW1 had averred that the Defendant management board sat on **8<sup>th</sup> October 2009** and approved the Plaintiff’s bid. The said minutes of **8<sup>th</sup> October 2009** were only signed by **Titus N. Kamundia** and not the other Board members. Further the letter dated **19<sup>th</sup> October 2009**, confirming the current Directors was also only signed by **Titus N. Kamundia** the secretary and not copied to any of the Directors. The involvement of **Titus Kamundia** solely in the transaction casts doubt as to whether the

said sale had been authorized by the Defendant. It is also evident that **Kshs.6,037,450/=** was paid into the account of **Njuakim Commercial Agencies** on **15<sup>th</sup> October 2009**, and not into the account of the Defendant. The said deposit was done **9 days before** the sale agreement was drawn. Can the court find and hold that the said money was received by the Defendant? It is clear that the PW2 testified that he has never remitted this money to the Defendant. The Defendant cannot be said to be a party to the sale agreement, where the proceeds are being held by a different party whom it has denied that it appointed to act for it. The Plaintiff therefore cannot claim that the Defendant continue to collect rent from the suit property yet the Defendant has not benefitted from any sale proceeds and again the full purchase price has not yet been paid so that the court can hold that the Plaintiff now has unregistered interest over the suit property and should not be deprived of rent proceeds from it.

The Plaintiff is the one who has alleged that the Defendant intended to sale the suit property and the sale agreement was signed by its Directors. The names of the Directors who allegedly signed the said agreement are given. Since the Plaintiff alleged that the sale could not go through because of the wrangles among the Defendant's Directors and that the Directors who were in office during the signing of the sale agreement were removed and new Directors installed, why couldn't the Plaintiff call the earlier Directors as its witness to confirm that indeed they authorized the sale and signed the sale agreement? Failure to call the said Directors left the court with no option but to belief that this sale agreement was only authorized by **Titus N. Kamundia** alone and the said **Titus Kamundia** was only a secretary to the board and did not have authority to act alone. That was the reason why he was charged and convicted in a Kiambu Court for Criminal activities involving sale of the Defendant other property at **Kangoya** which sale was authorized the same time as the disputed one herein.

The Defendant alleged that the said **Titus Kamundia**, and PW2 were involved in fraudulent sale of the Defendant's suit property. There is no evidence that the Management Board of the Defendant authorize the sale of the suit property. The Defendant alleged that the suit property was undervalued and it produced a valuation report dated **16<sup>th</sup> April 2009**, which showed the suit property was worth **Kshs.50 million**. PW2 had also alleged the suit property was valued at **Kshs.45 million** at the time of sale. Why was it then sold to the Plaintiff at **Kshs.40.25 million**?

Having found that the Defendant did not authorize the sale of the suit property to the Plaintiff, then it is automatic that the subsequent sale agreement drawn on **24<sup>th</sup> October 2009** did not have the blessings of the Defendant and could not bid them.

If the said sale was not authorized by the Defendant, is the sale agreement enforceable against the Defendant?

The answer to the above question is in the negative. See the case of

**Reliable Electrical Engineers Ltd.....Vs.....Mantrac Kenya Limited (2006) eKLR**, wherein Justice Maraga (as he then was) stated that:-

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

Given that the court has found that the Defendant did not authorize the sale of the suit property, then the sale agreement herein is **not** enforceable as against the Defendant.

**ii. Is the Plaintiff entitled to the orders sought in the Plaintiff?**

The Plaintiff has sought for various orders against the Defendant. The court has found that the sale agreement that was relied on by the Plaintiff is not enforceable against the Defendant herein. That being the case, then the Plaintiff is not entitled to orders of specific performance, mesne profit and or permanent injunction as there was no binding sale agreement between the Plaintiff and the Defendant herein. The court finds and holds that the Plaintiff is not entitled to the prayers sought in their Plaintiff.

**iii. Is the Defendant entitled to the orders sought in the counter-claim?**

Having held that there is no evidence to prove that the Defendant intended to sale the suit property to the Plaintiff and that the actions of **Titus N. Kamundia** and PW2 amounted to fraudulently attempting to defraud the Defendant of its property, then the court further finds that there is no justification in having the certificate of lease being retained by **Walker Kontos advocates**. The Defendant are the owners of the suit property and have not sold it yet to the Plaintiff. They have all rights as provided by **Section 24(a)** of the **Land Registration Act**. The said right can only be taken away by operation of law as provided by **Section 25(1)** of the **Land Registration Act** which was formerly **Section 28** of the **Registered Land Act**, which states:-

*“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging hereto, free from all other interests and claims whatsoever”*

The court further finds that the Plaintiffs has no reason to **Caution** the suit property as the court has found that the persons who intended to sell the suit property to the Plaintiff were not the Defendant's proper authorized Directors and or agents. The Defendant has also not benefitted from the sale proceeds herein.

For the above reasons, the court finds that the Defendant herein is entitled to the prayers sought in the Counter-claim as it is the duly registered owners and has its rights protected under **Section 24(a)** of the **Land Registration Act** and which provisions were formerly captured in **Section 27(1)** of the **Registered Land Act Cap 300 (now repealed)** which provides as follows:-

*Subject to this Act—*

*(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”*

The court considered the evidence tendered and the submissions by the Plaintiff and the authorities cited thereon and finds that the circumstances of this case are totally different from the circumstances in the authorities cited in the said submissions. There is no prove that the Defendant herein authorized the sale of the suit property and therefore the Sale Agreement cannot be said to be binding to it and thus enforceable against the Defendant.

***iv) Who is to pay costs of the suit?***

Ordinarily costs are awarded at the discretion of the court. However, costs normally follow the event. The Defendant herein is the successful litigant and it is therefore entitled to costs of the suit herein.

Having now carefully considered the available evidence, the court finds that the Plaintiff has not proved its case on the required standard of balance of probabilities and consequently the Plaintiff's case is dismissed entirely with costs to the Defendant. However the Defendant has proved its case on the required standard on its counter-claim. Consequently, the court enters Judgment for the Defendant against the Plaintiff as prayed in its counter-claim with costs to the successful litigant that is the Defendant.

It is so ordered.

***Dated, Signed and Delivered at Thika this 15<sup>th</sup> day of November 2019.***

**L. GACHERU**

**JUDGE**

**15/11/2019**

In the presence of

M/S Kimachia holding brief for M/S Njoroge for Plaintiff

Mr. Kiwanga for Defendant

Jackline - Court Assistant.

**L. GACHERU**

**JUDGE**

**15/11/2019**

**Mr. Kiwanga** – On the issue of release of the Certificate of Lease held by Walker Kontos Advocates, may the Court direct that the same be released to us within a period of 7 days after service of the Court Order and the Caution be removed forthwith.

**L. GACHERU**

**JUDGE**

**15/11/2019**

**M/S Kimachia** – No objection. The original Sale Agreement can be released to the Plaintiff's Advocate.

**L. GACHERU**

**JUDGE**

**15/11/2019**

**Court** – Further, **Walker Kontos Advocates** to release the Certificate of Lease over the suit property to the Defendant’s Advocate within 7 days after service of this Court Order. The caution to be removed forthwith upon service of the Court Order to the Land Registrar, Kiambu.

ii). Original Sale Agreement to be released to the Plaintiff’s Advocate forthwith.

**L. GACHERU**

**JUDGE**

**15/11/2019**