**REPUBLIC OF KENYA**

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

**ELC NO. 629 OF 2016**

**THOMAS OPIYO & 123 OTHERS.....PLAINTIFF**

**VERSUS**

**TELEPOSTA PENSION SCHEME REGISTERED TRUSTEES.....DEFENDANT**

**RULING**

I have two applications before me for determination. The first application was brought by the plaintiffs through Notice of Motion dated 8th June 2016. In the application, the plaintiffs have sought an order to restrain the defendant from entering, trespassing and/or interfering with their quiet possession of the properties known as Plot Numbers Nairobi/Block 55/205, 206, 209, 210, 212, 214 ,216, 217, 218, 219, 221, 222, 223, 225, 226 ,227, 228, 230, 231, 232, 233, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246,247,248,249,250,251, 204, 208, 211, 213, 215, 220, 224, 229 and 175 (hereinafter "the suit properties") pending the hearing and determination of this suit.

The application was supported by an affidavit sworn by the 1st plaintiff on 8th June 2016. The plaintiffs have contended that the suit properties were owned by Telkom Kenya and Postal Corporation of Kenya through the defendant herein. The plaintiffs' case is that by virtue of their employment with Telkom Kenya, they were allocated the suit properties for occupation and possible purchase when the properties were to be put up for sale. The plaintiffs averred that they made arrangements to secure finances so to purchase the suit properties. The plaintiffs averred that on 27th May 2016, the defendant published a notice in the Daily Nation newspaper stating that the houses standing on the suit properties were not fit for human occupation and that the same had been condemned by the Nairobi City Council. In the said notice, the defendant gave the plaintiffs 21 days notice to vacate the suit properties. They averred that prior to the notice of 27th May 2016, the defendant had indicated that it had sold the suit properties to third parties. The plaintiffs termed the said notice suspicious and malicious. The plaintiffs averred that on 10th October 2013, the defendant had published a similar notice which they challenged by filing ELC 1348 of 2013 against the defendant which suit was struck out for failure to serve Summons to Enter Appearance.

The plaintiffs averred that the purported condemnation of the said houses was aimed at giving the defendant room to evict them and dispose the suit properties to third parties. They averred that the said houses are not condemned and that the same are fit for human habitation. The plaintiffs averred that their eviction would be unfair and unjust and that the same would render them and their children homeless and destitute thereby subjecting them to irreparable loss.

The application was opposed by the defendant through a replying affidavit sworn by Mr. Peter K. Rotich, the defendant's administrator and trust secretary on 11th August 2016. The defendant stated that this suit is fatally defective since the 1st plaintiff had no written authority to file the same on behalf of 123

unnamed plaintiffs. It averred that the suit properties were vested in it through Legal Notice No. 154 published in Kenya Gazette Supplement No. 59 of 5th November 1999 to enable it discharge its pension liabilities and that the same are the resultant subdivisions of the property described as 221/PT (B) consisting of old dilapidated residential units. The defendant stated that in the year 1998, Kenya Posts & Telecommunications Corporation was wound. This led to the establishment of Postal Corporation of Kenya, Telkom Kenya Limited and Communications Commission of Kenya. Since the defendant was underfunded, the suit properties which were initially owned by Kenya Posts & Telecommunications Corporation were transferred and/or vested on the defendant to enable the defendant meet its funding shortfall and obligations to its members.

The defendant averred that it never entered into any tenancy agreement with the plaintiffs neither did it collect any rent from them since the houses on the suit properties had been condemned. The defendant contended that it had sold the suit properties to third parties and that under the agreement it entered into with the said third parties, it had an obligation to give vacant possession of the suit properties to the said third parties. The defendant stated that it was as a result of this requirement that it proceeded to issue notices to the occupiers of the condemned houses to vacate the same which notices they declined to heed.

The defendant contended that having sold the suit properties to third parties as aforesaid, the reliefs sought by the plaintiffs are not available as the suit properties are no longer available for sale to the plaintiffs. The defendant stated that it had no contractual relationship with the plaintiffs who continued to unlawfully occupy the suit properties. The defendant contended further that it had no legal obligation to sell the suit properties to the plaintiffs on a priority basis.

The defendant also contended that this suit is res judicata since the plaintiffs had previously filed ELC No. 1348 of 2013 which raised similar issues and concerned the same subject matter as the suit herein. The defendant averred that the plaintiffs' allegation that they were being evicted from the suit property had no legal basis since the plaintiffs were unlawfully occupying the said properties. The defendant contended that the plaintiffs had not demonstrated any contractual obligation that the defendant owed them and/or the irreparable loss and injury they would suffer if the orders sought are not granted. The defendant averred that the plaintiffs had failed to demonstrate that they had a prima facie case with a probability of success against it.

The second application was brought by the defendant through Notice of Motion dated 23rd June 2016. In the application, the defendant has sought orders for the setting aside of the interim injunction which was made in favour of the plaintiffs on 20th June 2016 and the striking out of the plaint dated 8th June 2016 filed herein on 10th June 2016. In the alternative, the defendant has sought an order directing Thomas Opiyo or the plaintiffs to give security for costs in the sum of Kshs 2,315,000/- or such sum as assessed by the court and in default, the suit to stand dismissed.

The application was premised on grounds that the suit and the application grounded thereon are res judicata and further, that no written authority to act was filed by Thomas Opiyo as required under Order 1 Rule 13(1) and (2) of the Civil Procedure Rules. The application was supported by an affidavit sworn by Peter K. Rotich on 23rd June 2016. The defendant averred that no written authority had been filed by Thomas Opiyo from the unnamed plaintiffs authorizing him to act on their behalf as required by Order 1 of the Civil Procedure Rule thereby rendering the suit null and void.

The defendant stated that Thomas Opiyo had previously filed ELC No. 1348 of 2013 purportedly on behalf of 127 unnamed plaintiffs. The defendant annexed to the affidavit of Peter K. Rotich pleadings filed in ELC No. 1348 of 2013 and contended that the two suits raise similar issues. The defendant contended that the interim orders granted herein were obtained through deliberate suppression of material facts and blatant abuse of the court process.

The defendant contended that the plaintiffs had obtained interim order of injunction in ELC No. 1348 of 2013 but failed to take steps to prosecute the application or main suit leading to the dismissal of the suit on 30th November 2015. The defendant contended that Thomas Opiyo was granted liberty to file a formal

application to set aside the dismissal orders which opportunity he had not utilized and had now purported to file this fresh suit even before settling the defendant's costs in the said suit.

The defendant averred that it had no tenant in the suit properties and that the suit herein was founded on a claim of priority to purchase the said properties and not on any tenancy arrangement. The defendant reiterated that it had sold the suit properties to third parties and that Thomas Opiyo who had promised to vacate the premises had blatantly refused to vacate the same and instead continued to abuse the court process by filing vexatious suits with the intent of prolonging their unlawful stay on the suit properties to the defendant's detriment.

The defendant averred that it had executed legally binding contracts with purchasers of the suit properties and had received the full purchase price in excess of Kshs 98,000,000/-.The defendant stated that the continued abuse of the court process by Thomas Opiyo was prejudicial to it as the purchasers had threatened to sue it for breach of contract and specific performance which action would expose it to huge financial costs and inconveniences in addition to rendering it incapable of meeting its monthly pension obligations to its members.

The defendant contended that Thomas Opiyo was yet to pay its costs for the dismissed suit referred to earlier and that in the event that this suit is dismissed, its party and party costs would amount to Kshs 2,315, 000/-. The defendant stated that Thomas Opiyo and his co-plaintiffs had no known assets and had no contractual relationship with it and that it would therefore not recover its costs of the suit from them.

The plaintiffs opposed the application through a replying affidavit sworn by Thomas Opiyo on 25 July 2016 in which he stated that prior to filing this suit, his co-plaintiffs gave him authority to act and plead on their behalf but that the authority which was filed in court on 21st June 2016 was inadvertently not placed in the court file. The plaintiffs admitted to having filed ELC No.1348 of 2013 wherein interim orders had been issued in their favor and averred that the suit was not dismissed for want of prosecution as alleged by the defendants, but for want of summons. The plaintiffs contended that they were at liberty to appeal against the orders dismissing ELC No. 1348 of 2013 or apply to have them set aside but that they chose to file a fresh suit since an application to strike the suit out for want of summons had already been filed and that a year had lapsed without summons been extracted, signed and sealed.

The plaintiffs averred that the present suit was not res judicata since ELC No. 1348 of 2013 was not heard on merit. The plaintiffs contended that although the issues directly and substantially in issue were similar in both suits, the issues were still open and not res judicata since a final determination had not been made. The plaintiffs denied knowledge that the suit premises had been sold to third parties and contended that the allegations could only be confirmed after proper investigation during the hearing of the suit.

With regard to costs, the plaintiffs averred that the purported party and party costs in ELC No. 1348 of 2013 cannot be dealt with in these proceedings since they did not arise in this suit. The plaintiffs averred further that the defendants had not lodged the bill of costs for taxation in the proper forum since this court's jurisdiction on taxation can only be exercised after the taxing officer has given his/her reasons on the bill of costs.

The two applications were heard through written submissions. The plaintiffs filed separate submissions both dated 3rd July 2016 for each application. With regard to their application dated 8th June 2016, the plaintiffs cited the case of Giella vs. Cassman Brown & Co. Ltd (1973) EA 358 and averred that ordinarily, the test applicable in injunction applications are three fold. The plaintiff submitted that a new threshold being public interest was now in existence and reference was made to the case of Symon Gatutu Kimamo & 587 others vs. East Africa Portland Cement Company Ltd Machakos HCCC No. 333 of 2011(OS) where the court stated that a temporary injunction will not normally issue if there will be harm to the public interest resulting from its issuance.

The plaintiffs cited the cases Patel vs. East African Cargo Handling Services (1974)EA 75 and Shah vs. Mbogo (1967)EA 116 and submitted that Article 165 of the Constitution and section 3A of the Civil Procedure Act preserved the court's inherent jurisdiction to make such orders as was necessary to meet

the ends of justice.

The plaintiffs submitted that they had established a prima facie case as defined in Mrao Ltd vs. First American Bank of Kenya Ltd & 2 others(2003)KLR 125. The plaintiffs argued that by virtue of their employment with Telkom Kenya Ltd, they were allocated staff quarters on the suit properties and were to be granted first priority when the properties were to be sold. They contended that the defendant had filed HCCC No. 72 of 2008 seeking their eviction and published notices in the newspaper stating that the houses on the suit properties were not fit for human occupation. The plaintiffs submitted that the purported condemnation of the houses on the suit properties was intended to be used as a means of evicting them from the suit properties and to allow the defendants to dispose of the same to third parties.

The plaintiffs argued that the evidence tendered by the defendant as proof that the suit properties had been sold to third parties was inconclusive. The plaintiffs contended that the defendant had not followed due process in procuring their eviction and that the 21 days notice issued on 27th May 2016 was inadequate for the plaintiffs who had lived on the suit property for more than a decade as was found in the case of, Ibrahim Sangor Osman vs. Minister of State for Provincial Administration & Internal security & 3 others (2011) eKLR.

The plaintiffs contended that unless the defendant was restrained from evicting them, they would suffer great loss as they would be rendered destitute and homeless. The plaintiffs contended that they had over the years undertaken repairs on the houses on the suit properties and had also sought financial arrangements for purchasing the same. The plaintiffs submitted that awarding damages as opposed to an injunction would be tantamount to rewarding the defendant for its selfish acts while punishing the plaintiffs. The plaintiffs argued that the balance of convenience was in their favour and that having lived on the suit properties for over a decade, the auxiliary test of public interest was also in their favour.

In respect to the defendant's application of 23rd June 2016, the plaintiffs referred to section 7 of the Civil Procedure Act and the cases of DSV Silo vs. The Owners of Sennar(1985)2All ER 104 and Bernard Mugo Ndegwa vs. James Nderitu Githae & 2 others(2010)eKLR where the court enumerated what constitutes *res judicata*. The plaintiffs submitted that although both suits raised similar issues, ELC No. 1348 of 2013 was not conclusively determined on merits and that the instant suit was therefore not be res judicata.

In further submission, the plaintiffs stated that Thomas Opiyo had filed the requisite authority from his co-plaintiffs authorizing him to act on their behalf as required by Order 1 Rule 13 of the Civil Procedure Rules. The plaintiffs contended that the authority was not void or defective and that any objection as to the exact date when the authority was filed was a technicality which should be ignored as provided by the Constitution. On the issue of security for costs, the plaintiffs submitted that a superior court's jurisdiction in taxation matters can only be exercised after the taxing officer has given reasons for his/her decision and that this court is therefore not the proper forum to decide quantum of costs.

In support of this submission, the plaintiffs relied on the cases of Donholm Rahisi Stores (suing as a firm) vs. East Africa Portland Cement Ltd (2005) eKLR and Lubullellah & Associates Advocates vs. Nasser Ahmed t/a Ahmed Airtime Business Solutions (2010) eKLR and submitted that the defendant was yet to lodge a bill of costs for taxation. The plaintiffs contended that the party & party costs which arose in ELC No. 1348 of 2013 cannot be dealt with in this suit as the same did not arise in these proceedings.

The defendant filed its submissions in respect of the two applications on 14th September 2016. The defendant made reference to Order 1 Rule 13(1) and (2) of the Civil Procedure Rules and submitted that in the absence of a written authority, Thomas Opiyo lacked legal capacity to sue on behalf of 123 parties on whose behalf he has purported also to have brought the suit. On the issue of *res judicata*, the defendant referred to section 7 of the Civil Procedure Act and submitted that the issues raised in ELC No. 1348 of 2013 were similar to the issues raised in this suit. The defendant also relied on Order 24 Rule 7(1) and Order 5 Rule 1(6) of the Civil Procedure Rues and argued that ELC No. 1348 of 2013 was dismissed after the court found that it had abated and accordingly, no fresh suit or cause of action could be founded on the same subject matter or issues.

In its further submissions, the defendant argued that the plaintiffs concealed material facts to the court when they came for ex parte orders. The defendant contended that the plaintiffs failed to disclose to the court that they had failed to honour a written promise to vacate the suit properties which they had made to the defendant. The defendant argued further that plaintiffs knew that the suit properties had been sold to third parties and that the orders they were seeking had been overtaken by events. The defendant argued further that plaintiffs did not disclose any known contractual or legal relationship between them and the defendant to substantiate their contention that they were entitled to priority rights to purchase the suit properties.

With regard to its alternative prayer for security for costs, the defendant submitted that the plaintiffs were yet to pay its costs arising from the dismissal of ELC No. 1348 of 2013 and further, that the plaintiffs had no known assets which it could attach in the event this suit was dismissed. The defendant argued that Order 26 Rule 1 of the Civil Procedure Rules gives the court power to order for provision for the whole or any part of its costs. In support of its submission, the defendant relied on the cases of Hussein Ali vs. & 4 others vs. Commissioner of Lands & others HCCC No. 47 of 2012, Seven Sea Technologies Ltd vs. Erick Chege (2014) eKLR, Aviation Airport Service Workers Union (K) vs. Kenya Airports Authority & another (2014) eKLR and Peter Ngugi Kabiri vs. Esther Wangari Githinji & another (2013) eKLR.

With regard to the plaintiffs' application dated 8th June 2016, the defendant submitted that the plaintiffs had not demonstrated a prima facie case with a probability of success. The defendant argued that the plaintiffs were not tenants of the defendant and that the houses on the suit properties had been condemned. The defendant submitted that the plaintiff had not tendered any legal instrument showing that it was obligated to sell the suit properties to the plaintiffs on a priority basis. The defendant reiterated that the suit herein is res judicata.

As to whether damages were an adequate remedy, the defendant submitted that the plaintiffs had not pleaded any known contractual right or laid down any basis that would entitle them to a relief or remedy with regard to the suit properties and that their occupation was therefore illegal. The defendant argued that the plaintiffs had not demonstrated that they had any cause of action against the defendant within which the court could consider whether damages would be an adequate remedy. Lastly, the defendant submitted that the balance of convenience was in its favour.

I have considered the two applications, the submissions by the parties' respective advocates and the authorities cited in support thereof. I will consider plaintiff's application first as it was first in time. I will then consider the defendant's application which in my view is in away a response to the plaintiff's application. What is before me is an application for interlocutory injunction. The principles upon which this court exercises its discretion in applications of this nature are now well settled. In the case of Giella vs. Cassman Brown and Co. Ltd. (supra) which was cited by both parties in support of their respective submissions, it was held that an applicant for a temporary injunction must establish:-

(i) A prima facie case with a probability of success

(ii) That if the injunction is not granted, he will suffer irreparable injury that cannot be compensated by an award of damages and;

(iii) If in doubt, the court shall determine the application on a balance of convenience.

In the of Mrao Limited vs. First American Bank Limited & 2 Others (supra), the court defined a prima facie case as;

> *"a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."*

In the case of Nguruman Limited vs. Jan Bonde Nielsen& 2 others[2014]eKLR, the court stated that;-

> *"The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion."*

The court went further to state that;

> *"……in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation."*

On the material before me, I am not satisfied that the plaintiffs have established a prima facie case against the defendant with a probability of success. In their plaint dated 8th June 2016, the plaintiffs have sought as their main reliefs, a declaration that they are entitled to be given first priority to purchase the houses on the suit properties and that the defendant be compelled to give the plaintiffs first priority when selling the suit properties. From the material on record, the plaintiffs took possession of the suit properties by virtue of their employment either with Kenya Posts and Telecommunications Corporation or Telkom Kenya Limited. The services of the plaintiffs were terminated by Telkom Kenya Limited between 2007 and 2008 majorly on account of restructuring. The suit properties were owned by Kenya Posts and Telecommunications Corporation. After it was wound, the suit properties were transferred to the defendant. None of the plaintiffs are employees of the defendant. There is no landlord and tenant relationship between the plaintiffs and the defendant in respect of the suit properties. There is no agreement of any nature before the court between the plaintiffs and the defendant concerning their continued occupation of the suit properties which belongs to pensioners. It is common ground that the defendant expressed an intention to sell the suit properties and that the defendants were being considered as potential buyers. The defendants have contended that they have already sold the suit properties to third parties. They have placed before the court evidence of such sale. The plaintiffs who have claimed that they were entitled to be given first priority during the sale of the suit properties have not laid before the court any basis in support of that claim. The plaintiffs have not exhibited any agreement between them and the defendant which entitled them to such right. The plaintiffs have exhibited the letters through which they were allocated the houses on the suit properties and their termination letters none of which contains an undertaking either by their former employers or the defendant to accord them first priority to purchase the suit properties. Since the plaintiffs' case is based solely on the defendant's alleged undertaking to give them first priority to purchase the suit properties, in the absence of any evidence of such undertaking, I am not satisfied that the plaintiffs have a prima facie case against the defendant. That being my view on the matter, it is not necessary for me to consider whether or not the plaintiffs would suffer irreparable injury which cannot be compensated in damages. The plaintiffs had urged me to consider public interest as a factor which militates against the refusal of the orders sought. I have done so. My view is that it would not be against public interest if the plaintiffs vacate the suit properties. Due to the foregoing, I am not satisfied that the plaintiffs have met the conditions for granting interlocutory injunction and as such the plaintiffs' application dated 8th June 2016 is not for granting.

The disposal of that application takes me to the defendant's application. The defendant had sought three prayers. With the findings which I have made above, the first prayer in the defendant's application which sought the discharge of the interim order of injunction which was issued herein on 20th June 2016 is spent and does not merit further consideration. If I was to consider the prayer, I would have declined to grant the same because the order of 20th June 2016 was made by the court after hearing both parties and if the defendant was not satisfied with the same, the only remedies which were available to it were to either seek a review of the same or file an appeal but not to seek the setting aside of the same. That leaves the prayers for striking out the plaint and security for costs. The order for striking out the plaint has been sought on the ground that this suit is *res judicata* and that ELC No. 1348 of 2013 having been dismissed, it was not open to the plaintiffs to bring a fresh suit. In the case of Kibogy vs. Chemweno Civil Appeal No 41 of 1980, the court stated that;

> *"Where a matter is directly and substantially in issue between the same parties, it is a condition*

*precedent to the application of the doctrine of res judicata that the issue has been finally decided"*

In the case of,Uhuru Highway Development Limited vs. Central Bank of Kenya & 2 others Nrb. CA 36 of 1996, the court stated that;

*"In order to rely on the defence of res judicata there must be:*

*(i.) a previous suit in which the matter was in issue;*

*(ii.) the parties were the same or litigating under the same title.*

*(iii.) a competent court heard the matter in issue;*

*(iv.) the issue has been raised once again in a fresh suit.*

Applying the foregoing principles to this case, I am not satisfied that this suit is *res judicata*. It is admitted by the plaintiffs that the issues raised in this suit are similar to the ones which were raised in ELC No.1348 of 2013. The plaintiffs have contended that the said issues were not determined in ELC No. 1348 of 2013 which was dismissed on a technicality and I am in agreement with them on that point. It is my finding therefore that this suit is not *res judicata*.

It is admitted that the ELC No. 1348 of 2013 was dismissed for want of summons. I am not in agreement with the argument by the defendant that the plaintiffs were precluded from bringing afresh suit. I am of the view that the provisions of Oder 24 Rule 7 (1) of the Civil Procedure Rules which was cited by the defendant in support of this submission is not applicable. That rule applies where the suit has abated on account of death or bankruptcy of parties. Order 5 Rule (6) of the Civil Procedure Rules which provides for abatement of suit where summons are not taken out has no similar provisions as Order 24 Rules 7(1) of the Civil Procedure Rules. I am of the view that if the rules committee intended that no fresh suit be brought on the same cause of action where a suit has a bated for failure to take out summons or to collect the summons they would have provided for such eventuality in Order 5 of the Civil Procedure Rules. There is no justification for importing the provisions of Order 24 Rule 7 (1) to Order 5. On the same issue, I have noted that this suit was brought following a new quit notice which was issued by the defendant on 27th May 2016. I am in agreement that this notice gave the Plaintiffs a new cause of action although the facts they have relied on are the same as those which they raised when they challenged the earlier notice which gave rise to ELC No.1348 of 2013. In the circumstances, the provisions of Order 24 Rule 7(1) of the Civil Procedure Rules would not apply. I am of the view that no proper basis has been laid warrant justify the striking out of the suit herein. In the case of, Peter Ngugi Kabiri vs. Esther Wangari Githinji & another Nyeri CA No. 36 of 2014, the court stated that;

*"There are various principles of law that fall for consideration in this appeal namely the right to be heard on merit; litigation must come to an end; a litigant must take steps to prosecute his claim promptly; no party is allowed to abuse the court process; justice must be administered without undue regard to technicalities and the need for substantive justice between the parties. It is not in dispute that the appellant's claim has never been heard on merit since 1995…; it is not in dispute that the Originating Summons was dismissed for non attendance on the part of the appellant's counsel on the date scheduled for hearing; it is not in dispute that the appellant is still in occupation of five (5) acres of the disputed properties and he has lived thereon for over 50 years.*

*A right to a hearing is a fundamental right and as this Court stated in the case of Richard Ncharpi Leiyagu -vs- Independent Electoral and Boundaries Commission and 2 others, Nyeri C.A. No. 18 of 2013, "The right to a hearing has always been a well protected right in our Constitution and is also the cornerstone of the rule of law". On the facts of this case, a balance needs to be struck between the right to be heard and the principle that a litigant should prosecute his claim promptly and there should be no abuse of the court process. We note that for over 28 years, the appellant's claim has not been heard and determined on merit. The learned Judge correctly found that issues of customary trust, overriding interest and limitation period can only be determined after a full*

*hearing of the case. On our part, we take note that the appellant is in actual physical occupation of five (5) acres of the suit properties; we have considered that striking out the appellant's suit still leaves him in possession of part of the suit properties and the respondents cannot evict the appellant without instituting a suit against him. Practical and substantive justice dictates that it is prudent that the dispute between the parties should be resolved and determined through a full hearing on merit. The right to be heard is a fundamental principle of the rule of law and in striking out the appellant's suit without hearing on merit, the learned judge erred".*

The other limb of the defendant's application sought security for costs. Order 26 Rule 1 provides as under;

> **"***In any suit the court may order that security for the whole or any part of the costs of any Defendant or third or subsequent party be given by any party."*

In my view the determinant factor for consideration in an application for security for costs is whether the defendants recovery of its costs, if it is successful in litigation would be difficult and costly. I am not satisfied that the defendant has laid a proper basis for this relief. There is no evidence that the defendant's costs in ELC No. 1348 of 2013 have been taxed and the plaintiffs called upon to settle the same and they have been unable to do so. The defendant has not demonstrated that it would be difficult and costly for them to recover their costs from the plaintiffs if it is successful in its defence. From the foregoing, I find no merit in the defendant's application dated 23rd June 2016.

In conclusion, the two applications before namely, the plaintiffs' application dated 8th June 2016 and the defendant's application dated 23rd June 2016 fails and both are dismissed accordingly. Each party shall bear its own costs.

**Delivered and Signed at Nairobi this 31st day of March, 2017.**

**S. OKONG'O,**

**JUDGE.**

**In the presence of:-**

N/A for the Plaintiffs

Mr. Bundotich for the Defendant

Kajuju Court AssistantA