REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 414 OF 2017

JOHN ASANGA GUDA.....1st PLAINTIFF

MICHAEL OKUKU OBONDO.....2nd PLAINTIFF

MOSES MUNGAI GITAU…….....…… 3rd PLAINTIFF

CHARITY WAIRIMU MUNIU…….....… 4th PLAINTIFF

RUTH WANGECI NJAGI…….....… 5th PLAINTIFF

TOM KABIRI WAWERU……..... 6th PLAINTIFF

NAFTALI NYAKENYANYA NYAMBANE…….....… 7th PLAINTIFF

JACOB OKUMU ODALLO…….....… 8thPLAINTIFF

JUNE AKINYI ONUNGA…….....…… 9th PLAINTIFF

KELVIN KARANJA KIARIE……..…..... 10th PLAINTIFF

GABRIEL KIMANI MUNGAI…….....…… 11th PLAINTIFF

EVANS SIBWOGA NYAMONGO…….……..... 12th PLAINTIFF

ADDAH ONUNGA……..…..... 13th PLAINTIFF

JAYNE MUTAHI…….…….....… 14th PLAINTIFF

NICHOLAS SENGE c/o NGONG AKAMBA

WELFARE ASSOCIATION.....15th PLAINTIFF

MIA WAIRIMU KEN MUATHI.....16th PLAINTIFF

WYCLIFFE PINYA OMENYA.....17th PLAINTIFF

PETER NAMBENGERE…….....…… 18th PLAINTIFF

VERSUS

MARGARET WARIARA KAARA t/a RINGUTI YOUTH RESOURCES alias

RENGUTI RESOURCES YOUTH CENTRE.....1st RESPONDENT/DEFENDANT

FRANCIS JOMO MURAITHE t/a RINGUTI YOUTH RECOURSE CENTRE alias

RENGUTI RESOURCES YOUTH CENTER….2nd RESPONDENT/DEFENDANT

ESTHER NDUTA KIMANI purported administrator to the estate of

DAVID KIMANI WANG'ANG'A…..….....…3rd RESPONDENT/DEFENDANT

RULING

The application before court is the Plaintiffs Notice of Motion dated 17th February, 2017 brought pursuant to Order 40 Rules 1,2,3 & 4 and Order 51 Rule 1 of the Civil Procedure Rules, Section 3, 3A and 63 (c) and (e) of the Civil Procedure Act and all the other enabling provisions of the law.

The Application is based on the grounds which in summary is that the Plaintiffs are the owners of their respective portions of property known as NGONG/NGONG/6010 hereinafter referred to as the 'suit property'. Most recently the 3rd Defendant who is the principle to the 1st and 2nd Defendants has been threatening the Plaintiffs with forceful eviction. The Defendants have no legal right to threaten the Plaintiffs with forceful eviction notices without going through the due process of law.

The application is supported by the affidavits of JOHN ASANGA GUDA, MICHAEL OKUKU OBONDO, MOSES MUNGAI GITAU, CHARITY WAIRIMU MUNIU, RUTH WANGECI NJAGI, TOM KABIRI WAWERU, NAFTALI NYAKENYANYA NYAMBANE, JACOB OKUMU ODALLO, JUNE AKINYI ONUNGA, KELVIN KARANJA KIARIE, GABRIEL KIMANI MUNGAI, EVANS SIBWOGA NYAMONGO, ADDAH ONUNGA, JAYNE MUTAHI, NICHOLAS SENGE C/O NGONG AKAMBA WELFARE ASSOCIATION, MIA WAIRIMU KEN MUATHI, WYCLIFFE PINYA OMENYA, PETER NAMBENGERE who are the 1st to 17th Plaintiffs herein.

They all aver that they are bona fide purchasers for value with notice of their respective portions out of the suit property, which they each purchased from 1st and 2nd Defendants trading as Ringuti Youth Resource Centre alias Renguti Resources Youth Centre. They claim the 3rd Defendant is the principle to the 1st and 2nd Defendants who were acting as her agents as far as the sale of the suit property was concerned. Further that the 3rd Defendant has held herself as the purported administrator of the estate of David Kimani Wanganga. The suit property is registered in the name of the late David Kimani Wanganga and the 3rd Defendant is allegedly the legal wife to the deceased. They state that on a variety of dates between 18th July, 2009 and 1st December, 2015 the 1st and 2nd Defendants as agents to the 1st Defendant sold to the Plaintiffs their respective portions of the suit land and throughout the duration they never informed them of any dispute on the said land. They contend that some of the Plaintiffs have developed their respective portions of the suit land and throughout the years the 3rd Defendant was well aware the Plaintiffs had bought portions of the suit land with some developing theirs as she had visited the said land severally but never complained. The Plaintiffs state that sometime in December, 2016 a dispute arose between the 1st, 2nd and 3rd Defendants regarding the monies that had been advanced to the 1st and 2nd Defendants but not reached the 3rd Defendant. They reiterate that apparently the 1st and 2nd Defendants were receiving monies for sale of portions of the suit land and not remitting the said monies to the 3rd Defendant and due to this disagreement, the 3rd Defendant sent them a demand letter dated 8th December, 2016 seeking to evict all of them from the suit land. They insist they were not privy to the contract between the 1st, 2nd and 3rd Defendants and aver that the Defendants have been fraudulent in their actions with them by failing to inform each of them of the encumbrances over the suit parcel at their respective times of purchase. They all affirm that the 1st and 2nd Defendants misled each of them that they were owners of the suit land and what was remaining was for them to transfer their

respective portions into the Plaintiffs' names and it was only in December, 2016 at the Chief's office in Kibiko where they disclosed that the suit land was not theirs but they were agents of the 3rd Defendant. The Plaintiffs further depose they have never been issued with their respective title deeds and that the 3rd Defendant claims to be the administrator of the estate of David Kimani Wanganga but she is yet to file a succession cause. Further that the 1st and 2nd Defendants held themselves as a duly registered company yet in essence they are not registered in the Nairobi Company Registry. Further that the 1st, 2nd and 3rd Defendants have failed to furnish the Plaintiffs with their agency agreement despite several requests.

The application is opposed by the 3rd Defendant who filed a replying affidavit where she deposed that she is widow and one of the administrators of the estate of David Kimani Wanganga who was the proprietor of the suit land which he purchased in 1983. She claims persons unknown to her have been occupying the suit land, commenced construction thereon without her knowledge and approval and her frequent visits to the said land to persuade them to vacate have proven futile. She states that based on this, she advised Rachier & Amolo Advocates to send them a demand letter to vacate the suit land as they were in illegal and unlawful possession. She contends that she was baffled by the Plaintiffs responses to her demand letter that they were bona fide purchasers and there existed an agency agreement between the deceased and 1st and 2nd Defendants which she insists she is a stranger to. Further that there is no proof by the Plaintiffs of the monies paid to the 1st and 2nd Defendants and she has never received any monies from them in respect to the suit land. She blames the Plaintiffs for failing to conduct due diligence over the suit land and states that she cannot be held liable or made an accessory to the devious schemes orchestrated by the 1st and 2nd Defendants against the Plaintiffs. She reiterates that she is a stranger to the alleged Sale Agreements which have been furnished by the Plaintiffs and denies appointing the 1st and 2nd Defendants at any time to collect monies on her behalf over the suit land. She affirms that the suit land has never been sold and the fact that the Plaintiffs have constructed thereon does not confer ownership to them . She further states that the application has failed to disclose any collusions or direct nexus between herself and the 1st and 2nd Defendants herein to support the fraudulent accusations against her. Further that the Application fails to disclose a prima facie case with a probability of success to warrant the injunctive relief sought.

The 1st Defendant filed as replying affidavit sworn by MARGARET WARIARA KAARA where she deposed that she is not a business partner to the 2nd Defendant but were entrusted with the marketing and sale of the suit land by the 3rd Defendant who held herself as the administrator of the estate of her late husband. She contends that pursuant to the said agreement together with the 2nd Defendant and authority from the 3rd Defendant they received monies from potential buyers and passed it to the 3rd Defendant. Further that the 3rd Defendant also appointed one JAMES WAITHUMBI to receive monies on her behalf. She confirms that the applicants after paying the requisite agreed amounts were allowed to occupy the portions of the suit land with the full knowledge of the 3rd Defendant who never objected to such an arrangement as she already received the sums due to her from the Sale. She claims the Applicants have developed their respective plots to various levels and no objection was raised by the 3rd Defendant. She insists they did not deal with the 5th, 6th, 7th, 8th, 9th, 11, 13th and 14th applicants as they bought their plots from the previous owners and they had a duty to verify the facts. She reiterates that since the suit land did not have individual titles, they were waiting the for outcome of the succession cause, so as to issue the Plaintiffs with their respective title deeds. Further that the 3rd Defendant mandated them to keep a register for buyers and consequently they charged the fees for the service being any registration fee as new members and transfer fee for re issue of certificates in the events of sale. She affirms that it is just if the court can issue orders as necessary to enable the parties complete the ongoing process.

1st to 17th Plaintiffs filed further affidavits where they reiterated their claim and averred that the 1st and 2nd Defendants define their business entity as a community based organization and that they are business partners. They state that the 1st Defendant's replying affidavit supports their claim and they should be granted orders sought.

Parties filed their respective submissions which were highlighted on 25th September, 2017, that I have considered.

Analysis and Determination

Upon perusal of the application together with the supporting affidavit, the replying affidavits, further affidavits and the parties' submissions, at this juncture the only issue for determination is whether the interim and mandatory injunctions sought by the Plaintiffs ought to be granted pending the hearing and determination of the main suit.

The principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** as follows:

> **"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."**

In line with this principle, the Court will proceed to interrogate whether the applicants have established a prima facie case with a probability of success at the trial.

In the first instance as to whether the applicants have demonstrated a prima facie case with probability of success, it is not in dispute that the 1st to 17th Plaintiffs' are in actual possession of the suit land and have been developing their respective portions. What is in contention is that the 1st to 17th Plaintiffs bought portions of the suit parcel from the 1st and 2nd Defendants who were agents of the 3rd Defendants who is one of the Administrators of the estate of David Kimani Wanganga who was the owner of the suit land. Further that the 3rd Defendant has threatened to evict them claiming they are illegally and unlawfully on the suit land and issued them with a demand letter. She denies any knowledge of the transactions over the suit land between the Plaintiffs and the 1st and 2nd Defendants. The 3rd Defendant insists they should vacate the said land as she does not know them nor was aware of any transactions they had with the 1st and 2nd Defendants in relation to it. She denies any knowledge of an Agency Agreement between herself and the 1st and 2nd Defendants.

The 1st Defendant has on the other hand has admitted knowledge of the transactions and contend that the Plaintiffs indeed bought portions from the suit land and paid for it through them, which monies they transmitted to the 3rd Defendant. She however states that they did not directly deal with the 5th, 6th, 7th, 8th, 9th, 11th, 13th and 14th Plaintiffs who bought their respective portions from the previous owners. The 1st Defendant confirms that the 3rd Defendant was well aware that the Plaintiffs' took possession of the respective portions, commenced developing them as they awaited for the various title deeds to be processed. The 1st Defendant also admitted that the delay in processing the title deeds was ocassioned by the pending succession cause. What is curious is that the Plaintiffs' claim that on a variety of dates between 18th July, 2009 and 1st December, 2015 they bought portions of the suit land and commenced construction therein which is a period of 8 years and yet the 3rd Defendant who saw them never instituted any legal process to have them evicted if they were indeed trespassers. Further from the Grant of Letters of Administration Intestate issued to the 3rd Defendant as one of the Administrators, she failed to include the suit land as part of the deceased estate. All these circumstances point to the fact that she was well aware of the transactions between the Plaintiffs and the 1st and 2nd Defendants who were her agents to sell the suit land. From the foregoing I find that the Plaintiffs have indeed established a prima facie case with a probability of success.

On the second principle as to whether the Applicants will suffers irreparable loss which cannot be compensated by way of damages. It is not in dispute that the Plaintiffs are in actual possession of the suit land and commenced developments thereon. The 3rd Defendant has threatened them with eviction. The 1st Defendant states that the 3rd Defendant allowed the Plaintiffs to take possession of their respective portions of the suit land as they awaited their title deeds. Both the Plaintiffs and 3rd Defendant claim ownership of the suit land. The 3rd Defendant has however not stated whether she can compensate the Plaintiffs for their investments. From the foregoing, I find that the Plaintiffs will indeed suffer irreparable loss which cannot be compensated by way of damages.

On the question of balance of convenience, from the evidence presented by the parties, I am not in doubt

that the balance tilts in favour of the Plaintiffs, and if the title to the suit land is not preserved, it may be wasted away.

As regards mandatory injunction, an applicant must prove that it is a clear case that the Court will be assured that the same will succeed after the trial. In the case of **Kenya Breweries Limited vs. Washington Okeyo (2002) EA 109** the Court of Appeal stated that, **' a mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally, be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application.'**

The mandatory injunction sought by the Plaintiffs over the suit land can only be granted in special circumstances where the Court thinks it ought to be decided at once, and after full trial, it will be evident that the injunction was properly granted. Even though both the Plaintiffs are staking a claim over the suit land, they do not have their respective title deeds to it. The 1st Defendant states that the delay to issue title deeds to each of the Plaintiffs was because they were awaiting for the outcome of the succession cause. The Court has taken judicial notice that the succession cause was concluded but the suit land was not indicated as part of the estates for distribution.. It is in these circumstances that I decline to grant the mandatory injunction sought pending the determination of the suit.

Since both the Plaintiffs are staking claim over the suit land but the 3rd Defendant denies any knowledge of the transaction, while the 1st Defendant admits there was indeed a transaction, with the sanctity of the title being in dispute and the Plaintiffs being innocent purchasers for value, who have invested heavily thereon, the Court finds that these are issues best determined at a full trial, I will allow prayers 2, 3 and 4 of the Plaintiffs' Notice of Motion dated 17th February, 2017 and further make the following order:

An inhibition order be and hereby registered by the Land Registrar Kajiado North as against land parcel number NGONG/NGONG/6010 of any dealings, lease or charge pending the hearing and determination of the suit.

The costs will be in the cause.

The parties are urged to comply with Order 11 and set the suit down for hearing as soon as possible.

Dated signed and delivered in open court at Kajiado this 15th day of November, 2017.

CHRISTINE OCHIENG

JUDGE

<u>REPRESENTATION:</u>

Badia for plaintiff/applicant

No appearance for 1st and 2nd Defendants

No appearance for 3rd defendant

Court Assistant Mpoye