



**REPUBLIC OF KENYA**

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

**ELC NO. 1562 OF 2014**

JOSEPH NGANGA NDUNGU .....1<sup>ST</sup> PLAINTIFF  
SIMON KAMAU GIKUNYA.....2<sup>ND</sup> PLAINTIFF  
CATHERINE WANJIKU NDUNG’U.....3<sup>RD</sup> PLAINTIFF  
RUTH NYAMBURA WANYOIKE.....4<sup>TH</sup> PLAINTIFF  
SUSAN WARUKIRA GICHOHI.....5<sup>TH</sup> PLAINTIFF  
JOHN KANGETHE.....6<sup>TH</sup> PLAINTIFF  
JERUSAH N. MWAURA.....7<sup>TH</sup> PLAINTIFF  
AGNES ITABARI.....8<sup>TH</sup> PLAINTIFF  
JOSEPH KAMAU KINYANJUI.....9<sup>TH</sup> PLAINTIFF  
MARIA GORET KIRIA.....10<sup>TH</sup> PLAINTIFF  
SAMUEL MWANGI MUCHIRI.....11<sup>TH</sup> PLAINTIFF

**VERSUS**

**ORIGINAL WAPENDA AFYA BIDII HOUSING CO-OPERATIVE  
SOCIETY LIMITED (O.W.A.B).....DEFENDANT**

**RULING**

The dispute herein concerns the ownership of twelve (12) parcels of land which for ease of identification shall be referred to as plot Numbers 11, 12, 13, 17, 22, 26, 27, 28, 29, 61, 62 and 75. The defendant is a Co-operative Society which was established in the year 1999. In the year 2002, the defendant purchased two parcels of land known as LR. No. 4148/307 and LR No. 4148/308 for its members. After purchasing the said parcels of land, the defendant appointed one John Ngei Vuti, a surveyor, to undertake the process of surveying, sub-dividing and processing titles for the sub-divisions which the defendant intended to allocate to its members. The defendant also appointed the law firm of Kimani Kabucho and Company Advocates to look after the legal aspects of the entire process. Following his appointment as aforesaid, John Ngei Vuti prepared a sub-division scheme for the two parcels of land which were sub-divided into

several plots. Among the subdivisions were plot numbers 11, 12, 13, 17, 22, 26, 27, 28, 29, 61 62 and 75 (hereinafter referred together as “**the suit properties**” where the context so permits).

The plaintiffs brought this suit against the defendant claiming that between March 2009 and April 2010 the defendant sold to them the suit properties for valuable consideration and that the defendant has in breach of the various agreements for sale entered into with them failed to issue them with the titles for the said properties and has instead decided to sell the same to third parties.

Together with the plaint, the plaintiffs, filed an application by way of Notice of Motion dated 18<sup>th</sup> December 2014 seeking a temporary injunction to restrain the defendant from trespassing on, disposing of or in any other way interfering with the suit properties pending the hearing and determination of this suit. This is the application which is before me for determination. The application was brought on the grounds that after the defendant had sold the suit properties to the plaintiffs, the defendant issued them with certificates of ownership and they took possession of the same pending the processing and issuance of title deeds to them. The plaintiffs have contended that instead of issuing them with title deeds, the defendant decided to put up the suit properties for sale to third parties contending that the documents of acquisition held by the Plaintiffs are forgeries. The plaintiffs have contended that the defendant is being driven by greed and its intention is to evict the plaintiffs from the suit properties whose values have since increased exponentially with the construction of the Thika Super highway. In his affidavit in support of the application the 1<sup>st</sup> plaintiff, Joseph NgangaNdungu annexed copies of agreements for sale which he claims to have been entered into between the defendant and the 1<sup>st</sup> and 4<sup>th</sup> plaintiffs in respect of Plot No. 26, the defendant and the 2<sup>nd</sup> plaintiff in respect of Plot No. 27, the defendant and the 3<sup>rd</sup> Plaintiff in respect of Plot No. 29, the defendant and the 5<sup>th</sup> plaintiff in respect of Plot No. 28, the defendant and the 6<sup>th</sup> plaintiff in respect of Plot No. 22, the defendant and the 7<sup>th</sup> plaintiff in respect of plot numbers 12 and 13, the defendant and one, Gilbert Thuo in respect of Plot No. 11 which was subsequently sold to the 8<sup>th</sup> plaintiff jointly with one, Simon WamungundaNjenga, the defendant and the 9<sup>th</sup> Plaintiff in respect of Plot No. 17, and the defendant and one, Simon NjeriMaina in respect of Plot No. 75 which was in turn sold to the 10<sup>th</sup> Plaintiff. The 1<sup>st</sup> plaintiff also annexed to his affidavit, copies of certificates of ownership and receipts said to have been issued to the plaintiffs by the defendant upon receipt of payments for the said parcels of land. The plaintiffs have contended that the defendant’s former advocates Kimani KabuchoKaruga and Company Advocates who prepared the agreements for sale referred to above have confirmed that the same are valid and that the Plaintiffs are the genuine owners of the suit properties. The Plaintiffs have contended that they stand to lose their investments on the suit properties and livelihoods if the orders sought herein are not granted.

The plaintiffs’ application was opposed by the defendant through a replying affidavit sworn by its secretary, Zipporah NdutaWairimu on 30<sup>th</sup> January 2015. In response to the plaintiff’s application, the defendant’s secretary stated as follows. The defendant has only 28 members who have been issued with membership cards. The defendant purchased L.R No. 4148/307 and L.R No. 4148/308 in August, 2002 for its members. In the year 2012, the defendant appointed John NgeiVuti a surveyor to undertake a survey and sub-division of the said parcels of land. As a consideration for his services, the defendant gave John NgeiVuti Plot Numbers 5, 6, 9, 10, 11, 35 and 36 in the survey plan that he had prepared. John NgeiVuti was also supposed to undertake the processing of title deeds for the sub-divisions. As the sub-division process was ongoing, John NgeiVuti advised the defendant to issue the members with certificates of ownership of the various plots that had been allocated to each of them. Following this advice, the defendant prepared certificates of ownership and handed the same to the said surveyor in blank. The said surveyor had told them that he would insert the plot numbers in he said certificates before he presented the same to the land office. The said surveyor also took the defendant’s seal which he told the defendant’s officials that he would use to seal the documents that he was to present to the land office. It is the said surveyor who also introduced the defendant to KamauKabucho and Company Advocates.

The defendant’s secretary deposed that, in the year 2011 the defendant asked the said surveyor to surrender the certificates of ownership that had been given to him by the defendant as aforesaid. The said surveyor failed to release 29 certificates of ownership of the total that had been handed over to him and the matter was reported to the police for appropriate action. The defendant’s secretary deposed that the

defendant had an elaborated procedure to be followed when selling land. She denied that the defendant sold land to any of the plaintiffs. She also denied that the defendant did receive any payment from the plaintiffs as purchase price for the suit properties. She denied further that any of the agreements for sale exhibited by the plaintiffs were executed by the officials of the defendant. She also denied that the receipts that were issued to the plaintiffs for the alleged purchase price that they purportedly paid to the defendant were issued by the defendant. She contended that the defendant has never printed receipts. She denied further that the defendant gave any of the plaintiffs possession of the suit properties. She deposed that when the defendant discovered that John NgeiVuti may have sold some of its plots, the defendant reported the matter to Juja Police Station. After investigations, the said surveyor was arrested and charged in court. She stated that there are a number of criminal cases against the said surveyor which are pending. She deposed that the documents relied on by the plaintiffs in support of their claims over the suit properties were subjected to forensic examination and found to be forgeries. The defendant's secretary deposed that none of the defendant's officials appeared before the advocates who prepared the agreements for sale of the suit properties to the plaintiffs to execute the same. She annexed to her affidavit among others, a list of the members of the defendant together with copies of their identity cards and, a copy of the agreement which the defendant made with John NgeiVuti.

When the application came up for hearing before me on 30<sup>th</sup> September 2015, Mr. Kimathi appeared for the plaintiffs while Mr. Kariba Mbaabu appeared for the defendant. In his address to the court, Mr. Kimathi submitted that the defendant sold the suit properties to the plaintiffs directly or through its agent John NgeiVuti. Mr. Kimathi submitted that some of the documents which are annexed to the affidavit in support of the application herein were signed by the defendant while others were signed by John NgeiVuti as the defendant's agent. He submitted further that the agreements for sale aforesaid were prepared by the defendant's then advocates Kimani KabuchoKaruga and Company Advocates who confirmed to the plaintiffs that the same were duly executed by the defendant's officials. Counsel submitted that the defendant has not placed any evidence before the court showing that the agreement for sale, the certificates of ownership and the receipts annexed to the affidavit in support of the application herein are forgeries. He submitted that the defendant has not even established the existence of the criminal cases which it has claimed to have been preferred against John NgeiVuti. Mr. Kimathi submitted that the plaintiffs have established a prima facie case against the defendant. Counsel urged the court to preserve the suit properties pending the hearing of the suit.

In his submissions in reply, Mr. Kariba relied on the replying affidavit of Zipporah NdutaWairimu mentioned above. He submitted that the content of the said affidavit has not been controverted by the plaintiffs. Mr. Kariba reiterated that the defendant did not sell the suit properties to the plaintiffs and that no payment was made by the plaintiffs to the defendant. Counsel submitted that when the defendant discovered that its former advocates Kimani Kibucho& Company Advocates were colluding with the surveyor, John NgeiVuti to defraud the defendant, the defendant withdrew instructions from the said firm of advocates. He submitted that the said firm could not commit the defendant through the letter which it addressed to the plaintiffs' advocates after their instructions had been withdrawn. Counsel submitted that only the 7<sup>th</sup> and 8<sup>th</sup> plaintiffs are in illegal occupation of some of the suit properties and the defendant has filed a counter-claim for their eviction. He submitted that when the suit was filed, the other plaintiffs were not in occupation of the suit properties which explains why they were not joined in the counter-claim. As to why the defendant has not placed before the court the police report showing that the documents submitted to court by the plaintiffs are forgeries, counsel submitted that the said report is awaiting production in a criminal case pending in Thika against John NgeiVuti. He submitted that some of the plaintiffs have also made a report to the police that John Ngei Vuti had obtained money from them by false pretenses. Counsel wondered how the defendant can be made liable for the criminal acts of the said John NgeiVuti. Mr. Kariba submitted that the plaintiffs do not deserve the orders sought and urged the court to dismiss their application.

I have considered the plaintiffs' application and the affidavit filed in opposition thereto. I have also considered the submissions by the advocates for the parties. The application being one for a temporary injunction, the same shall be considered in light of the principles that were laid down in the case of **Giellavs. Cassman Brown & Company Limited (1973) E. A. 358**. The plaintiffs had a duty to establish a prima facie case against the defendant and also to demonstrate that unless the injunction

sought is granted they stand to suffer irreparable injury which cannot be compensated for in damages. The plaintiffs' case against the defendant is based on breach of contract. The plaintiffs have contended that each of them entered into separate agreements for sale with the defendant in respect of the suit properties and fulfilled their part of the bargain by paying the purchase price. The plaintiffs have contended that the defendant has failed to meet its side of the bargain and has attempted to frustrate the agreements aforesaid by putting up the suit properties for sale to third parties. The plaintiffs have placed before the court a number of documents in proof of the sale transactions which they claim to have entered into with the defendant. These comprises of agreements for sale, receipts for payments made and certificates of ownership. The defendant on its part has denied having entered into any sale transaction with the plaintiffs in respect of the suit properties. The defendant has also denied having received any monies from the plaintiffs on account of the purchase price of the suit properties. The defendant has termed the documents produced before this court by the plaintiffs as forgeries which are subject to police investigations and in respect of which two (2) criminal cases have been preferred against John NgeiVuti who is alleged to have been the author thereof.

I have considered the material which has been placed before me. It is admitted that the firm of Kimani Kabucho, Karuga & Company Advocates was at all material times acting for the defendant with regard to the transactions involving LR No. 4148/307 and LR No. 4148/308 until their instructions were withdrawn by the defendant in February 2013. All the agreements for sale relied on by the plaintiffs were drawn by the firm of Kimani Kabucho Karuga & Company Advocates between March 2009 and November 2010. The agreement for sale dated 12<sup>th</sup> October 2009 which is said to have been made between the 1<sup>st</sup> and 4<sup>th</sup> Plaintiffs and the defendant in respect of Plot No. 26 was drawn by Kimani Kabucho Karuga and Company Advocates who are indicated in the said agreement as vendor's advocates. The purchaser's advocates are indicated as Kahari and Kiai Advocates. The agreement is indicted as having been signed by the Chairlady, Secretary and Treasurer on behalf of the defendant. Their signatures are indicated to have been witnessed by one, Maria M. Mutua Karuga advocate. The agreement is also signed by the 1<sup>st</sup> and 4<sup>th</sup> plaintiffs whose signatures are witnessed by Kiai Julius Maina, advocate. The agreements for sale said to have been made between the defendant and the 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 9<sup>th</sup> plaintiffs were executed in a similar manner. The 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 9<sup>th</sup> plaintiffs have also exhibited copies of receipts said to have been issued to them by the defendant for the payments they made towards the purchase price for their respective plots. As I have stated above, the defendant's contention is that it never executed the said agreements for sale and that the said receipts do not belong to it. The defendant has contended that a forensic examination done on the said agreements and receipts revealed that the same are forgeries. The defendant did not however place before the court for perusal a copy of the forensic examination report on the said agreements and receipts. The defendant had also contended that John Ngei Vuti who was its surveyor had been charged in relation to the said documents. The case against Vuti is said to be pending. There is at the moment no finding that he was involved in the alleged fraud.

On the material before me, I am unable to decide without a hearing whether or not the defendant's officials signed the agreements for sale annexed to the affidavit filed in support of the present application in respect of the plots which are said to have been sold to the 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 9<sup>th</sup> plaintiffs. I am also unable to determine whether the certificates of ownership and receipts which are said to have been issued by the defendant to the 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 9<sup>th</sup> plaintiff are forgeries. These are issues which this court cannot determine on affidavit evidence. I have noted that although the defendant has claimed that the said agreements for sale were prepared without its instructions, there is no evidence before the court that the defendant has made any complaint against the firm of Kimani Kabucho Karuga & Company Advocates who prepared the said agreements and indicated that it was acting for the defendant. No complaint has also been lodged against Maria Mutua Karuga advocate who is said to have witnessed the execution of the said agreements by the defendant's officials. The said firm of advocates has confirmed in writing that the said agreements for sale were signed by the defendant's officials. In her affidavit, the defendant's secretary has not commented on this claim by the firm of Kimani Kabucho, Karuga & Company Advocates. The defendant's advocates only mentioned in passing from the bar that the letter that was written by the said firm after their instructions were withdrawn could not bind the defendant.

From what have set out above, I am satisfied that the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 9<sup>th</sup> plaintiff have

established a prima facie case with a probability of success against the defendant. As concerns the 3<sup>rd</sup>, 8<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> plaintiffs, there is no evidence placed before this court that they entered into any agreement for sale with the defendant in respect of the suit properties being claimed by them. The 3<sup>rd</sup> plaintiff has not exhibited a copy of the agreement for sale which she claims to have entered into with the defendant. The 11<sup>th</sup> plaintiff has similarly not exhibited the agreement for sale which he claims to have entered into with the defendant. On her part, the 8<sup>th</sup> plaintiff has produced a copy of the agreement for sale which she entered into with one, Gilbert Thuo Macharia and Simon Wamungunda Njenga on 4<sup>th</sup> September 2011. These two gentlemen are not parties to this suit and it is not clear from the pleadings why that defendant should take responsibility for their contractual obligations to the 8<sup>th</sup> plaintiff. The same position obtains with regard to the 10<sup>th</sup> plaintiff. The agreement placed before the court as concerns the 10<sup>th</sup> Plaintiff was made between her and one, Simon Maina Njeri who again is not a party to this suit.

Section 38(1) of the Land Act, 2012 provides that no suit shall be brought upon a contract for the disposition of an interest in land unless the contract upon which it is founded is in writing and is signed by all the parties thereto. I have no evidence before me of any such contract between the 3<sup>rd</sup>, 8<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Plaintiffs and the defendant on the basis of which this suit can be maintained by the said plaintiffs against the defendant. I am therefore not satisfied that a prima facie case has been established by the 3<sup>rd</sup>, 8<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Plaintiffs against the defendant.

For the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 9<sup>th</sup> Plaintiffs, I am convinced that they stand to suffer irreparable injury if the injunction sought is not granted. There is reasonable apprehension that if the defendant is not restrained from selling the suit properties which are said to have been sold to the said plaintiffs, it may dispose of the same thereby putting the said properties beyond the reach of the said plaintiffs. As for the 3<sup>rd</sup>, 8<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> plaintiffs it is not necessary for me to consider whether or not they would suffer irreparable injury if the orders sought are not granted since they have not established a prima facie case against the defendant.

In conclusion, I will allow the application dated 18<sup>th</sup> December, 2014 as concerns the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 9<sup>th</sup> plaintiffs only and plot numbers 12, 13, 17, 22, 26, 27 and 28. The application is dismissed as concerns the 3<sup>rd</sup>, 8<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Plaintiffs. For the avoidance of doubt, this order shall not prevent the defendant from continuing with the sub-division of LR No. 4148/307 and 4148/308 provided that the titles which shall be issued for the parcels of land comprised in plot numbers 12, 13, 17, 22, 26, 27 and 28 shall be preserved in terms of the orders issued herein. The costs of the application shall be in the cause.

**Delivered, Dated and Signed at Nairobi** this 29<sup>th</sup> day of January, 2016

**S. OKONG'O**

**JUDGE**

In presence of

Mr. Kimathi for the Plaintiffs

Mr. Ombete for the Defendant