



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL CASE NO. 648 OF 2015**

**BETWEEN**

**GEORGE NTHIGA NYAGA.....1<sup>ST</sup> PLAINTIFF**

**BEATRICE GATWIRI MUGAMBI.....2<sup>ND</sup> PLAINTIFF**

**AND**

**KENCOM CO-OPERATIVE SAVINGS &**

**CREDIT SOCIETY LIMITED.....1<sup>ST</sup> DEFENDANT**

**PETER MUTUA.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiffs case is that they purchased plots from the 1<sup>st</sup> defendant known as the Kiambu property. The 1<sup>st</sup> plaintiff was allocated plots 8 and 9 while the 2<sup>nd</sup> plaintiff was allocated plot 10. The 1<sup>st</sup> plaintiff paid Kshs. 10,000,000/- in full and final payment of Plot 8 and a deposit of Kshs. 3,000,000/- for plot 9. He alleged that the sums were acknowledged by the 1<sup>st</sup> defendant in letters dated 28<sup>th</sup> October 2011 signed on behalf of the chairman by the 2<sup>nd</sup> defendant, the General Secretary of the 1<sup>st</sup> defendant at the material time. The 2<sup>nd</sup> plaintiff paid a deposit of Kshs. 3,000,000/- for Plot 10 which was acknowledged by the letter dated 28<sup>th</sup> October 2011.

2. On 7<sup>th</sup> June 2013, the 1<sup>st</sup> defendant decided not to proceed with the sale of the plots and elected to establish a controlled development. It therefore offered to refund all monies paid by the plaintiffs. As at 6<sup>th</sup> July 2015, the 1<sup>st</sup> defendant had refunded Kshs. 5,700,000/- to the 1<sup>st</sup> plaintiff leaving Kshs. 7,300,000/- while no refund had been made on account of the 2<sup>nd</sup> plaintiff. The plaintiffs' therefore claim Kshs. 10,300,000/- from the defendants.

3. The 1<sup>st</sup> defendant filed a statement of defence dated 22<sup>nd</sup> February 2016 in which it denied the contents of the plaintiff. It denied owning the Kiambu property, offering the subdivisions of the same for sale to the plaintiff or receiving any money from the plaintiffs. It pleaded that in the absence of a written agreement and proof of payment, the plaintiffs claim was frivolous, fake and baseless.

4. Following a mediation, the parties in a consent recorded by their advocates dated 29<sup>th</sup> October 2018 agreed as follows:

1. *THAT Judgment be entered for the Plaintiff against the Defendant for the sum of Kenya shillings Four Million Three Hundred Thousand (ksh. 4,300,000/=).*

2. *THAT the Defendant has paid Kenya shillings Four Hundred and Thirty Thousand (ksh. 430,000/=) out the above thus the balance is Kenya shillings Three Million Eight Hundred and Seventy Thousand (ksh. 3,870,000/=) which sum the Defendant shall settle in monthly instalments of Kenya shillings Four Hundred and Thirty Thousand (ksh.430,000/=) from 31<sup>st</sup> January, 2018 until payment in full.*

3. *THAT in the event of default on payment of any single instalment, the outstanding balance become due and execution to issue.*

4. THAT the outstanding issue of Kenya shillings Six Million (ksh.6,000,000/=) plus interest be argued at the main hearing of the suit.
5. THAT cost be agreed or taxed.
6. THAT parties herein be and hereby at liberty to apply.

5. After judgment was entered for the agreed sum, the plaintiffs filed a Notice of Motion dated 2<sup>nd</sup> December 2019 under **Order 36 rule 1(1)(a)(2)** and **Order 51** of the **Civil Procedure Rules** seeking summary judgment for the balance of Kshs. 6,000,000/-. The application was supported by the affidavit of David Njeru Nyaga sworn on 2<sup>nd</sup> December 2019. The basis of the application was the clause in the mediation agreement in which it was stated that, “The defendant undertakes to pay the plaintiff the remainder of Six million Kenyan Shilling (Ksh. 6,000,000) once there is proof of receipt of the amount in their records.” In support of the application, the deponent produced an Application for Funds Transfer dated 2<sup>nd</sup> November 2011 which was received on 2<sup>nd</sup> November 2011 at KCB University Way Branch according to the date stamp and whose particulars were as follows

*Applicant: Totalsure Insurance Agency.’*

*Beneficiary Bank: Co-operative Bank, Parliament Road Branch*

*Beneficiary Information: A/C No. \*\*\*\*\* Makhandia and Makhandia Company Advocates*

*Purpose of Payment: Kiambu Plots 9 & 10*

The same amount was duly acknowledged by a banking slip dated 3<sup>rd</sup> September 2019.

6. The application was opposed through the Secretary of the 1<sup>st</sup> Defendant, Josephat Mutuku, sworn on 14<sup>th</sup> January 2020. While he admits the contents of the mediation agreement, he states that the sum of Kshs. 6,000,000/- was not deposited with the lawyers for the benefit of the plaintiffs but it was deposited on the understanding that the it was on the account of the 2<sup>nd</sup> defendant and his cousin Gregory Kivindy and that the sum of Kshs. 6,000,000/- was paid to the 2<sup>nd</sup> defendant who acknowledged receipt thereof by signing an acknowledgment dated 3<sup>rd</sup> November 2011.

7. In response to the deposition of Josephat Mutuku, George Nthiga, the 1<sup>st</sup> plaintiff, swore a supplementary affidavit on 31<sup>st</sup> January 2020 in which he stated that from the RTGS form, it was clear that the Kshs. 6,000,000/- was paid to the 1<sup>st</sup> defendant’s advocates for the purchase of the Kiambu plots and that he was not privy to the any payments made to the 2<sup>nd</sup> defendant and or any third party.

8. The application before the court is for summary judgment under **Order 36 rule 1** of the **Civil Procedure Rules**. The Court of Appeal stated in the case of **ICDC v Daber Enterprises Ltd [2000] 1 EA 75** summarized the applicable principles as follows:

*The purpose of the proceedings in an application for summary judgment is to enable the plaintiff to obtain a quick judgment where there is plainly no defence to the claims. To justify summary judgment, the matter must be plainly and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where if necessary, there has been discovery and oral evidence subject to cross examination.*

9. In light of the principles I have cited, the issue is whether the 1<sup>st</sup> defendant has raised any triable issue. In resolving this issue, I note that the plaintiff’s also sued the former general secretary of the 1<sup>st</sup> defendant and prayed for judgment against both defendants jointly and severally. Thus in as much as the RTGS shows that the Kshs. 6,000,000/- was paid to the 1<sup>st</sup> defendant’s Advocates account, the issue raised by the 1<sup>st</sup> defendant that the money was paid on account of the 2<sup>nd</sup> defendant and his cousin is not idle and it constitutes a bona fide triable issue.

10. Thus I find that the Notice of Motion lacks merit and it is dismissed. The issue for determination whether the sum of Kshs. 6,000,000/- was paid on account of the 2<sup>nd</sup> defendant shall proceed for trial. In the meantime, I note that judgment in default of appearance and defence was entered against the 2<sup>nd</sup> defendant was entered on 20<sup>th</sup> October 2018.

11. Costs in the cause.

**DATED and DELIVERED at NAIROBI this 28<sup>th</sup> day of FEBRUARY 2020.**

**D. S. MAJANJA**

**JUDGE**

Mr Nyagah instructed by Njeru, Nyaga and Company Advocates for the plaintiffs.

Mr Otenyo instructed by Makhandia and Makhandia Advocates for the 1<sup>st</sup> defendant.