



**REPUBLIC OF KENYA**

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

**CIVIL CASE NUMBER 50 OF 2006**

**JAMES KIARIE KIMEMIA.....PLAINTIFF**

**VERSUS**

**MARY WANGARI MWANGI..... DEFENDANT**

**JUDGMENT**

1. By a Plaint dated 28<sup>th</sup> February 2006 and filed on the same date, the Plaintiff sought following orders against all the Defendants jointly and severally:

- (a) An order that the defendants jointly and severally do refund to the plaintiff the sum of money received by them jointly and severally pursuant to the Sale Agreement of 6<sup>th</sup> October 2005 and 3<sup>rd</sup> March 2005.
- (b) Costs of the suit
- (c) Interest on (a) above at court rates from the 3<sup>rd</sup> November 2005 until payment in full.
- (d) Interest and costs.

2. The Plaintiff's case as stated in the plaint is that on the 6<sup>th</sup> October 2005, he entered into Sale Agreement with the first Defendant Mary Wangari Mwangi who falsely presented herself as the authorised representative of an entity known as **Mang'u Builders of Nyeri** for the sale of land parcel known as **Naivasha Municipality Block 5/225** for the sum of Kshs.3,700,000/=.

3. Faced with the above misrepresentation as to ownership of the said property, the second, third and fourth defendants who are brothers of the first defendant undertook to resolve the dispute by refunding the sum of Kshs. 1,050,000/= paid by plaintiff to the first defendant but they failed to pay prompting the plaintiff to file this recovery suit against all the defendants stating the case was a land case and that he had not complied with **Order 11 Civil Procedure Rules**. The plaintiff's advocates opposed the same vehemently. Upon consideration of the request, the court made a finding that the said adjournment was unmerited and ordered the case to proceed at 12.000 when the defendants and their advocate Mr. Gakinya failed to appear in court and the case proceeded *ex parte*.

4. Upon service of the Plaint to the defendants, the first defendant filed her defence on the 10<sup>th</sup> August 2006 and denied the plaintiff's claim. Similarly, the third and fourth defendants filed their defences on the 10<sup>th</sup> April 2006 and denied the plaintiff's claim, and that they never entered into any Sale Agreement or received any money from the plaintiff, and urged the court to dismiss the claim against them.

Likewise, the second defendant denied the plaintiff's claim vide his defence dated and filed on the 14<sup>th</sup> March 2006.

The plaintiff filed his list of documents on the 30<sup>th</sup> June 2011 while the defendants list was filed on the 29<sup>th</sup> November 2011.

5. The matter was listed down for hearing on the 22<sup>nd</sup> July 2015. During the call cover, all the parties vide their respective advocates confirmed their readiness to proceed with the hearing and time allocation given for 10.45 a.m. at 10.45 a.m. Mr.Gakinya Advocate requested for an adjournment upon execution of the sale agreement, the plaintiff paid to the first Defendants Kshs.200,000/= in cash and thereafter on the 3<sup>rd</sup> November 2005 ,a further sum of Kshs.850,000/= to the first defendant by bank transfer. It is claimed that about December 2005, the other defendants laid claim on the suit property and another party, Daniel K. Kirui who claimed to have the original title documents to the said property. An official search at the Lands Registry at Nakuru revealed that the suit premises was the property of the said **Mang'u Builders** whose proprietor was the fourth defendant.

## 6. The Plaintiff's Evidence

The Plaintiff James Kiarie Kimemia testified that upon signing of the first and second Sale Agreements with the first defendant Mary Wangari Mwangi, he paid to her Kshs.200,000/= and Kshs.850,000/= on the 6<sup>th</sup> October 2005 and 3<sup>rd</sup> November 2005 respectively. He produced a PExt 1 and 2 the Sale Agreements in respect of **Land Parcel Naivasha/Municipality Block 5/225** registered in the name of **Mang'u Builders of Nyeri**.

The Sale Agreements showed the agreed purchase price as Kshs.3,700,000/= and that the balance was to be paid on completion. It was his evidence that upon signing of the second Agreement dated 3<sup>rd</sup> November 2005, he paid to the plaintiff a sum of Kshs.100,000/= in cash and Kshs.750,000/= by a bankers cheque which he produced as PExt 3, making a total payment to the first Defendant of Kshs.1,050,000/=.

He testified that soon thereafter the second, third and fourth defendants laid claims of ownership of the land parcel leading to the Land Registrar Nairobi, vide his letter dated 14<sup>th</sup> February 2006 produced as PExt 5 clarifying that the lease to Mang'u Builders was not a genuine one and therefore the whole sale transaction was a nullity. Thereafter, a caveat and restriction were registered against the title at Nakuru Lands Registry. It was his testimony that in view of the above, he could not proceed with the sale, and upon request for refund of the Kshs.1,050,000/= the defendants failed to refund the same hence the case.

7. The court has considered the uncontroverted and unchallenged evidence tendered in support of the claim by the plaintiff, together with the documents and particularly the Sale Agreements.

The first sale agreement dated 6<sup>th</sup> October 2005 was between the plaintiff and the first defendant.

It was witnessed by one David K. Gichuki Advocate, and other six persons. A sum of Kshs.200,000/= was acknowledged as received by the first Defendant.

The second Sale Agreement dated 3<sup>rd</sup> November 2005 between the plaintiff and the first defendant stated how the balance of the purchase price was to be paid on various dates.

It was witnessed by the same advocate, David K. Gichuki and other persons. I have seen a copy of a bankers cheque of Kshs.750,000/= in favour of the first defendant. In total, I find that a sum of Kshs.1,050,000/= was paid to the first Defendant pursuant to the Sale Agreements.

I have also seen various letters, all produced as exhibits No 4-8 that confirm three being ownership dispute between the first defendant and other persons leading to the Chief Land Registrar, Nakuru vide

his letter dated 14<sup>th</sup> February 2006 – PExt 9 recalling for lease to the subject land title for cancellation. I have also seen an entry on the title placed on the 7<sup>th</sup> December 2005 of a restriction by the Land Registrar barring all transactions touching on the subject and parcel.

8. From the above evidence oral and documentary, this court is satisfied that the defendants defences were all mere denials. They opted not to attend court to support their statements of defence. As such, they remains as mere statements. It is trite that he who asserts must prove. **Section 106, 107, and 109 of the Evidence Act Chapter 80 Laws of Kenya** places the burden of proof of a particular fact on the person who wishes the court to believe in the existence of the said facts. That burden placed upon the defendants has not been discharged.

**Order 2 Rule 11 of the Civil Procedure Rules** that states that:

*“----any allegation of fact made by a party in his pleading shall be deemed to be admitted by the opposing party unless it is transversed by that party in his pleading or a rejoinder of issue under rule 10 operates as denial of it.”*

In the case **Bukenya -vs- Uganda (1972) EA 549 and Green Palms Investment Ltd -vs- Kenya Pipeline Co. Ltd Msa HCCC No. 90 of 2003** the courts observed that failure by a party to testify may prompt a court to infer that that party's evidence may not be favourable.

Further, it is trite that where a party fails to call evidence in support of his case, the party's pleadings remain as mere statements as held in the case **Trust Bank Ltd -vs- Paramount Universal Bank Ltd.**

9. Having stated as above, and evaluated the evidence tendered, I find that the plaintiff did make payments amounting to Kshs.1,050,000/- to the first Defendant pursuant to the Sale Agreements dated the 6<sup>th</sup> October 2005. I am also persuaded that the Sale Agreement was frustrated by the defendants jointly and severally and therefore the said sum of Kshs.1,050,000/= ought to be refunded to the plaintiff.

I have not found any evidence indicating that the said sum of Kshs.1,050,000/= was paid to any of the three defendants by the plaintiff save to the first defendant. There is no link between the plaintiff and the second, third and fourth defendants – save their claim that they did not authorise the first defendant to enter into the Sale Agreement or receive the money from plaintiff. The court finds that the sum of Kshs.1,050,000/= was paid to and received by the first Defendant **Mary Wangari Kimemia**. It is her who ought to refund the said sum to the plaintiff. The courts finds no privity of contract between the plaintiff and the second, third and fourth defendants.

10. The plaintiff has claimed interest on the principle sum of Ksh.1,050,000/= from the 6<sup>th</sup> October 2005. I agree that interest ought to be paid at court rates from the dates indicated in the Sale Agreement that is Kshs.200,000/= from the 6<sup>th</sup> October 2005 and from the 3<sup>rd</sup> November 2005 on the sum of Kshs.850,000/= until payment in full.

Consequently, the court enters judgment in favour of the plaintiff against the **first Defendant Mary Wangari Mwangi** in the sum of Kshs.1,050,000/=with interest at court rates from the 6<sup>th</sup> October 2005 until payment in full. The court having found that no money was paid to or received by the second, third and fourth defendants, the suit is dismissed against them. However, there shall be no order on costs to the second, third and fourth defendants as it is apparent that they were parties to the frustration of the sale transaction.

The costs of the suit to the plaintiff shall be borne by the first Defendant.

It is so ordered.

**Dated, signed and delivered in open court this 28<sup>th</sup> day of January 2016.**

**JANET MULWA**

**JUDGE**