



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPL. NO. 803 OF 2013

DAVID MUHORO KARARI.....APPLICANT

VERSUS

ANTHONY KAMAU CHEGE..... RESPONDENT

RULING

1. David Muhoro Karari, the applicant herein, took out the originating summons dated 16.08.2013 in which he sought for the following orders *inter alia* against Antony Kamau Chege, the Respondent:

a. THAT this Honourable court be pleased to order the Respondent to pay or deliver up cash money in the sum of Kenya Shillings six Hundred Thousands (Ksh.673,500/=) received from PAUL KARIUKI GICHUI for onward transmission to DAVID MUHORO KARARI ad refund of deposit for purchase consideration together with interest as the rate of 12% from 13th July 2011.

b. THAT this Honourable court does further order that the Respondent do pay the costs of these proceedings.

2. The originating summons is supported by the affidavit of the Applicant. When served, the Respondent merely filed an appearance but failed to file an answer to the summons. On 16.12.2014, this court issued orders directing the summons to be disposed of by affidavit evidence and by written submissions.

3. I have considered the grounds stated on face of the originating summons plus the facts deponed in the supporting affidavit. I have also considered the written submissions filed by the Applicant.

4. The history behind this motion can be gleaned from the affidavit filed in support of the originating summons.

On or about 30.10.2009, the Applicant entered into a sale transaction with one Paul K. Gichui over L.R. No.7418/21, at Ruiru off Thika/Nairobi Highway for a consideration of Ksh.950,000/=.

5. Payments were to be made by three monthly instalments of Kshs.300,000/=, Ksh.350,000/= and Ksh.300,000/=.

It would appear the Respondent represented both the vendor and the purchaser. The first instalment of Ksh.300,000/= was paid on 30.10.2009.

6. In mid December 2009 the Respondent received from the Applicant for onward transmission to the vendor a sum of Ksh.373,000/= as the second instalment.

7. The Applicant avers that when he made inquiries from the Respondent on the payment of the third instalment, he was informed by the Respondent that the vendor had suspended the transaction. The Applicant avers the Respondent in breach of his instructions and professional duty only paid the vendor Ksh.200,000/= while pocketing Ksh.473,000/=.

8. The Applicant further averred that he came to discover through the vendor that the sale transaction was cancelled due to default of payment on agreed timelines. He also argued that there were correspondence showing that the vendor's advocates Messrs Mungai J.N. & Co. Advocates had informed the Respondent that the vendor had undertaken to refund Ksh.500,000/= less 10% of the purchase price of Ksh.950,000/= i.e. Ksh.95,000/= The Applicant avers that he therefore expected to be paid Ksh.405,000/=.

9. The Applicant also presented affidavit evidence showing that the Respondent was given a cheque for Ksh.243,000/= from the vendor's advocate. The Applicant further presented evidence showing that the vendor's advocate paid the Respondent a sum of Ksh.162,000/= thus making the total sum refunded to be Ksh.405,000/=.

10. It is also apparent that the Respondent had entered into an agreement to refund to the Applicant a total sum of Ksh.600,000/= which agreement was breached too.

11. Having outlined in brief, the chronology of the events leading to this dispute let me now determine the questions posed to this court to answer. The first issue relates to liability. There is no doubt that the applicant and the Respondent had a client/advocate relationship.

There is also no dispute that the client (Applicant) paid to the Respondent Ksh.673,500/= for onward transmission to the vendor.

There is also no dispute that the sale transaction was frustrated due to late disbursements and payments made outside the agreed timelines of the consideration. It is apparent that the consideration paid was refunded to the Respondent less the penalty fee upon the cancellation of the transaction.

12. It is clear in my mind that the Respondent has not refunded the Applicant the consideration despite entering into an agreement to do so.

I am convinced that the Respondent is liable. The other issue relates to costs. It is obvious that costs follows the event. The Applicant being a successful litigant is entitled to be paid costs by the Respondent.

13. In the end I allow the originating summons in terms of prayer

a. but limited to 578,500/= (i.e. 673,500 – 95,000 =

578,500/=.

There is no basis for payment of interest therefore, the prayer for interest is declined. The Applicant is awarded costs of the suit.

Dated, Signed and Delivered in open court this 20th day of December, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent