



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**CIVIL CASE NO. 67 OF 2008**

**KRISHINA KUMAR SHIVLAL LAKHANI ..... PLAINTIFF**

**VERSUS**

**JULIUS MUNYURI MUTURIA .....1<sup>ST</sup> DEFENDANT**

**CYPRIAN KUBAI ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**CONSOLIDATED BANK OF KENYA LTD ..... INTERESTED PARTY**

**JUDGMENT**

1. The plaintiff through a plaint dated 5<sup>th</sup> June, 2008 sued the 1<sup>st</sup> and 2<sup>nd</sup> defendants, seeking judgment jointly and severally for KSh.3,000,000/= for breach of contract, with costs and any other relief the Court may deem fit and just. The defendants filed defence, followed by amended defence and counterclaim. The interested party meanwhile applied to be jointed to the suit and upon being joined filed defence dated 26<sup>th</sup> August 2009. The defendants filed further amended statement of defence and counterclaim dated 10<sup>th</sup> May 2010 to which the plaintiff filed defence to the counterclaim dated 26<sup>th</sup> August 2010 provoking the defendants to file Reply to defence to counterclaim dated 2<sup>nd</sup> September 2010.

2. The plaintiff in support of his claim gave evidence and called one witness, whereas the defendants gave evidence through the 2<sup>nd</sup> defendant and called no witness. After the close of the plaintiff's case and the defence, the interested party did not attend court nor did it give evidence. The plaintiff's submissions were filed on his behalf by M/s. Mwangi E.G. & Company Advocates on 3.6.2015 whereas M/s. Kiautha Arithi and Company Advocates filed the submissions on behalf of the defendants on 26<sup>th</sup> June 2016. The suit was subsequently on 21.7.2016 placed before my brother Hon. Justice F. Gikonyo, who directed that this matter be forwarded to me for judgment writing as I had, before my transfer to Siaya High Court, heard all the witnesses. The file was received by the Deputy Registrar at Siaya High Court on 1.8.2016 by which time the Court was on vacation and was not delivered to me till 20.9.2016 when I resumed duty from my annual leave hence the delay in writing of the judgment in this case to which the court apologizes to the parties bearing in mind the delay in writing the Judgment was due to the reasons stated herein above.

3. The plaintiff's case is that in June 2006 the two defendants approached PW1 offering to sell a plot next to his, which plot PW1 knew very well. They were offering to sell the plot at KSh.8,000,000/= and wanted Kshs.2,000,000/= immediately, however the plot offered had a loan with the Bank of KShs.6 million charged in favour of consolidated Bank of Kenya Limited. PW1 Krishna Kumar Shivilal Lakhani

agreed to buy the plot. PW1 and the defendants proceeded to draw a sale agreement dated 28<sup>th</sup> June 2007 which PW1 produced as exhibit P1. It was witnessed by party's two witnesses Dr. Gadhi and Dorothy Karimi. Both the plaintiff and the defendants signed the agreement. The plaintiff issued cheque for KSh.2,000,000/= on 29.6.2007 and produced Bank slip P exhibit P2 and thereafter paid to the defendants KShs.500,000 in cash in the presence of Dorothy Karimi at Equity Bank Limited but the defendants did not acknowledge receipt of KSh.500,000/= in writing.

4. It was term of the sale agreement that the vendors were the registered owners of suit plot Block II/36, Meru Town and the purchase price was KSh.6,000,000/= which amount was to be paid in full to the consolidated Bank of Kenya Limited, Maua Branch, which had currently charged the property. That transfer process was to be effected at the Consolidated Bank concurrently at the time of clearing of the debt (outstanding loan). That the party in breach of the terms of the contract as per exhibit P1 was to pay KSh.500,000/= to the innocent party, same being penalty for breach of the agreement plus costs and interests.

5. PW1 set out to find out how much was owed by the defendants as the defendants had told PW1 they had taken a loan of KSh.6 Million, however on enquiry with the Bank, PW1 found that from the Bank Manager the outstanding loan was KSh.16 million. He proceeded to carry out search with Lands Office and confirmed the property was charged at KSh. 16 Million and produced of search P exhibit 3. PW1 called the 2<sup>nd</sup> defendant who did not pick his call forcing him to proceed to his shop at Maua Town but did not find him. PW1 got worried on discovering that he had been cheated and decided not to go on with the deal. PW1 asked for the refund of his money but defendants did not pay him though they promised to do so. PW1 testified that he had heard the property had by then been sold to a third party and urged the defendants by selling the property to a third party had breached the contract. He further urged the defendants were in breach of the contract as they lied to him on the amount of loan taken from the bank. PW1 urged if he had paid the agreed KSh.6 million he would not have gotten the transfer as the amount owned in form of loan was more than what the agreement had stated. He denied having breached the contract stating he had enough money to honour the contract.

6. On the defendants counterclaim for KSh.4,961,831/66, PW1 denied the same urging that it is far fetched as he had not personally taken the loan and that he does not owe the defendants anything as he did not deal with their bank. He added that he cautioned the property rightly to protect his interest of 2.5 million as the caution was ordered by court. The plaintiff prayed for refund of KSh.2.5 million plus KSh.500,000/= for breach of contract with costs and interest.

7. During cross-examination PW1 testified that P exhibit 1 meant he was supposed to pay KSh.8,000,000 to the bank but he paid KSh.2,000,000/= to the bank and KSh.500,000/= cash to the defendants as per agreement dated 3<sup>rd</sup> December 2007 as per paragraph 7 which reveals payment of KSh.500,000/= by cheque. He also testified the charge in certificate of search dated 22.12.2006 shows the loan was KSh.16 million and that at the time of the agreement he was not told the outstanding loan however the defendants had told him if he paid KSh.6,000,000 they would be able to effect the transfer. During re-examination and there being no objections to the production of the agreement dated 3<sup>rd</sup> December 2007, PW1 produced the same as plaintiff P exhibit 4. He testified the defendants admitted to him that they had taken a loan of KSh.16 million and that the date he was supposed to pay the amount to the bank was not set out in sale agreement.

8. PW2 Dorothy Karimi Mutiga testified that she witnessed the sale agreement over the suit plot Block II/36 Meru Town between the plaintiff and the defendants when the defendants stated they owed Bank a loan of KShs.6,000,000/= and they wanted some money to offset the loan. That the plaintiff paid KSh.2.5 million (through a cheque of 2,000,000/=) and cash Kshs.500,000 at Equity Bank. That after payment of KSh.2.5 million the defendants disappeared and failed to respond to PW1's telephone calls, that search at the Lands Registry revealed the property had a charge of 16,000,000/=. PW2 also talked to the consolidated Bank of Kenya Limited, Manager, who confirmed to her the transfer could not be effected without paying the outstanding loan. That after 4 to 6 months the defendants sold the property to a third party and offered to refund plaintiff's money but to date they has not done so. During cross-examination of PW2 she testified that when she enquired with the bank she was told the loan was over KSh.10

million. She also testified, the defendant told them he had gotten a higher bidder for the property.

9. The defendants evidence through DW1 Cyprian Kubai Ingingo is that on 28<sup>th</sup> June 2010 he entered into an agreement with the plaintiff to sell a property which he owned jointly with the 1<sup>st</sup> defendant being Block II/36 Meru Town, at an agreed purchase price of KShs.8 million. He stated the agreement is the one produced by the plaintiff as P exhibit 1. He testified there was agreement which had no time limit within which the money was to be paid to the bank. He testified the purpose of selling the property was to clear the debt with the bank as it had been charged with the Consolidated Bank of Kenya Limited for KSh.16 million. He further stated the date of charge was as per plaintiff P exhibit 3, thus 22.12.2006 and that as of the time of the agreement the loan balance was KSh. 8 million. He testified the bank was ready to effect transfer upon payment of KSh.8,000,000 by the plaintiff but the plaintiff paid only 2.5 million and told the 2<sup>nd</sup> defendant he did not have the balance required and needed time to borrow money from Equity Bank. That after a month he told the 2<sup>nd</sup> defendant that Equity Bank had declined to advance him a loan due to his advanced age promising to seek funds from his son who was at America who later declined to give the plaintiff the money. The 2<sup>nd</sup> defendant asked the plaintiff to let him sell the property to a third party but instead of giving him an answer he cautioned the property frustrating the 2<sup>nd</sup> defendant's plan to sell the property to a third party. That the loan was meanwhile accumulating interest. The 2<sup>nd</sup> defendant then proceeded to the bank and after discussion the bank was joined as an interested party. The inhibition was subsequently removed, the bank and the 2<sup>nd</sup> defendant were allowed to sell the property. The 2<sup>nd</sup> defendant got a buyer who paid the money to the bank. The title was then released to the new buyer and the property transferred to the new buyer. That the loan was accruing interest from the time the caution was lodged till the time the property was discharged after the loan was cleared. DW1 testified he was supposed to pay interest on the amount outstanding of KShs.5.5 after payment of KShs.2.5 million by the plaintiff in terms of the agreement. He urged the interest from June 2006 to June 2009 was tabulated to be 4,961,831/66 by the Consolidated Bank of Kenya Limited. DW1 produced D exhibit 1 in support of the tabulated amount.

10. DW1 urged that the plaintiff breached the contract and he should pay the penalty of KSh.500,000/= plus costs and interest and other expenses. He urged the plaintiff was in breach of the contract as he was supposed to pay the purchase price of KShs. 8 million at once but managed to pay only KSh.2.5 million. DW1 testified that he is not entitled to refund the purchase price of KShs.2.5 million and further testified that he is entitled to KShs.500,000/= for breach of contract, accrued interest of KSh.4,961,831 and other costs. He prayed for costs of the suit as well.

11. During cross-examination DW1 confirmed P exhibit 1 and 4 were the copies of the sale agreement between the plaintiff and DW1. He admitted that according to P exhibit 1, the consideration was KShs. 6 million, however the loan balance was KSh. 8 Million urging if the plaintiff had paid KSh. 6 million, the bank would have released the title deed of the suit premises to him as he had an arrangement with the bank. An affidavit of Eratus Wanjohi dated 4<sup>th</sup> June 2009 under paragraph 4, DW1 testified it indicated the outstanding loan as of 28<sup>th</sup> June 2007 was KSh.16 million as P exhibit 3 of 22.12.2006. DW1 admitted he had taken a loan of KSh.16 million. He stated the title deed was released to the 2<sup>nd</sup> purchaser when he paid KSh. 8 million. He testified that he did not have any document to support his assertion nor any agreement with the 2<sup>nd</sup> purchaser. He agreed that the agreement of 28<sup>th</sup> June 2007, has a penalty clause but nothing on the interest. In the first agreement DW1 stated as he had received KSh.2 million they put the purchase price at KSh.6 million but in the agreement of 2<sup>nd</sup> December 2007, they put the actual purchase price of KSh. 8 million out of which he had received KSh.2 million on 28<sup>th</sup> June 2007 and that the purchase price was KSh. 6 million. That they had not put the limited period within which the amount was to be paid. DW1 testified he pleaded with the plaintiff to remove the caution and when he refused to do so he offered him a lorry but he also refused. He further testified that he could not recall when he entered into an agreement with the 2<sup>nd</sup> purchaser. He agreed that the plaintiff was a purchaser and was not under any obligation to pay the defendants loan. DW1 agreed he owes the plaintiff KShs. 2.5 million but not KShs.500,000/= as the plaintiff breached the contract. He also testified that P exhibit 1 was not on the letter head of the Consolidated Bank of Kenya Limited but is confirmed by the Bank Manager of the Bank. DW1 testified he can pay the plaintiff KSh. 2.5 million if he pay him KSh.500,000/= for

breach of the contract with interest and costs. On re-examination DW1 admitted he owes the plaintiff KShs.2.5 million however the plaintiff owes the defendant KSh 500,000/= accrued interest of 4.961.831/66 plus costs and interest.

12. I have very carefully considered the pleadings, evidence by the plaintiff and his witness as well as evidence by the 2<sup>nd</sup> defendant and written submission on behalf of the plaintiff dated 3<sup>rd</sup> June 2015, by M/s. Mwangi E.G. Learned Counsel for the Plaintiff and submissions on behalf of the defendants dated 25<sup>th</sup> June 2015 by M/s. Kiautha Arithi and Company Advocates for the defendants. In my considered view the issues arising thereto for determination by the Court can be summarized as follows:

***(a) Did the plaintiff and the defendant enter into a sale agreement over Suit Plot No. Block II/36 Meru Town, and if so, what were the terms of the agreement?***

***(b) Whether the terms of the sale agreement over Suit plot Block II/36 Meru Tow, were breached and if so by which party between the plaintiff and the defendants?***

***(c) What relief is the innocent party entitled to?***

13. Did the plaintiff and the defendants enter into a sale agreement over suit plot No. **Block II/36 Meru Town** and if so what were the terms of the agreement? The pleadings by both the plaintiff and the defendant as well as the oral evidence reveal that on 28<sup>th</sup> June 2007, the plaintiff and the defendants entered into an agreement for sale of Suit plot No. **Block II/36 Meru Town**, for a consideration of KShs.6 million as per plaintiff's P exhibit 1 which sum was payable in full to M/s. Consolidated Bank of Kenya Limited, Maua Branch as the property had been charged in the Bank's favour. The parties as per their evidence subsequently drew another agreement dated 3<sup>rd</sup> December 2007 rescinding the earlier agreement of 28<sup>th</sup> June 2007. That both agreements were duly executed by the plaintiff and the defendants in presence of their witnesses. Both parties agree the existence of the aforesaid agreements. I therefore find and hold that both the plaintiff and the defendants entered into valid sale agreement of Suit Plot No. **Block II/36 Meru Town**.

14. What were the terms of the sale agreement? The terms of the sale agreement are clearly spelled in the agreement dated 3<sup>rd</sup> December, 2007 drawn on behalf of the parties by J. S. Riunga & Co. Accountant and Auditors, P. O. Box 568 – 60200, Meru. The agreement was not drawn by a lawyer but by a layman. The consideration is given as KShs.8 million, which amount was payable in full to M/s Consolidated Bank of Kenya Limited, Maua Branch, who had by then charged the property. The transfer process was to be effected at the Consolidated Bank concurrently at the time of clearing the debt. The agreement stipulated that any party in breach of the terms and condition stated thereto would pay KSh.500,000/= penalty to the innocent party for breach of the agreement plus costs and other expense. The agreement acknowledged that the plaintiff had paid KSh2,000,000/= vide cheque No. 007991, at ABC Bank Meru Branch on 29<sup>th</sup> June 2007 and another payment of KSh.500,000/= through cheque No.000032 at Equity Bank Meru.

15. PW1 and PW2 confirmed execution of the agreement in presence of the defendants and their witnesses. DW1 confirmed execution of the agreement. He further confirmed receipt of KShs.2.5 million from the plaintiff. Plaintiff testified he paid Kh.2.5 million to the defendants and his evidence was corroborated by PW2. I therefore find that both parties agreed on the terms of the sale agreement and payment of KShs.2.5 million to the defendants.

16. Whether terms of the sale agreement over suit plot No. Block II/35 Meru Town, were breached and if so by which party between the plaintiff and the defendant? The agreement is clear that the total consideration of KShs.8 million was to be paid in full to M/s. Consolidated Bank of Kenya Limited, Maua Branch who had by then charged Suit Plot No. Block II/36 Meru Town, for a loan in favour of the defendants. That upon clearance of the outstanding debt the M/s. Consolidated Bank of Kenya Limited was to process the transfer in favour of the plaintiff. In the aforesaid agreement the amount of loan advanced to the defendants and the outstanding loan as of 3<sup>rd</sup> December 2007 was not disclosed to the

plaintiff. The plaintiff testified that he proceeded to the Lands Registry Meru and also approached the Bank Manager, Consolidated Bank of Kenya Limited to find out the sum charged over suit plot Block II/36 Meru Town, as the defendants had not disclosed the actual outstanding loan. The Plaintiff produced P exhibit 3 which shows that as of 22.12.2006 under Part C under Encumbrances Section, that a charge in favour of Consolidated Bank of Kenya Limited for KShs.16,000,000/= was noted. PW1 and PW2 approached the Bank Manager of Consolidated Bank of Kenya Ltd who specifically confirmed of the existing loan of Kshs.16,000,000/=. The 2<sup>nd</sup> defendant in cross-examination admitted of having taken a loan of KShs.16,000,000/= and that as of the time of charging of the property the same was in joint names of the defendants and as of the time of drawing the agreement they were aware of the existing charge and loan advanced to them. The defendants did not in their evidence produce any evidence from the bank to show the outstanding loan with the bank as by 3<sup>rd</sup> December 2007, or that of such time it had been reduced to KShs.8 million. The defendants deliberately failed to disclose material facts pertaining to performance of the contract and further deliberately implied by misrepresentation the plaintiff that by paying KShs.8 million to the Consolidated Bank of Kenya Limited the property would be transferred to him notwithstanding the loan was above KShs.8 million. There was no evidence produced from the bank confirming such undertaking would be honoured nor was the bank a party to the agreement of 3<sup>rd</sup> December 2007? nor was it involved in any way. PW1 and PW2 testified the Bank Manager was emphatically clear that transfer would only be effected upon payment of the full loan. The trite law is that a charged property cannot be sold and transferred without the loan being cleared. The plaintiff was in view of the above prudent to have checked the outstanding loan before parting with all his money. The defendants non-disclosure of material facts as regards the outstanding loan and misrepresentation that the outstanding loans was KSh. 8 million frustrated the plaintiff's effort to pay full consideration. The defendants assertion that the plaintiff failed to pay the balance of purchase price as he had no money is not supported by any evidence nor did the defendants produce any evidence demanding that the plaintiff pays the amount nor did they produce any undertaking to the effect that upon payment of KSh. 8 million the property would have been transferred to the plaintiff. I find that it is the defendants who breached the contract, by non-disclosure of material facts and misrepresentation to the plaintiff of the outstanding loan.

17. What relief is the innocent party entitled to? The agreement dated 3<sup>rd</sup> December 2007 under paragraph 5 states:-

***“That any party in breach of the above terms and conditions is to pay KSh.500,000/= (five hundred thousand) to the innocent party the same being penalty for breach of the agreement plus costs and other expenses.”***

18. The plaintiff in his pleadings and evidence prayed for the refund of KShs.2.5 million being monies paid as part of the purchase price and KShs.500,000 for breach of contract all totaling to Kshs.300,000/=. The plaintiff pleaded and strictly proved payment of the said sum to the defendant. The defendants acknowledged receipt of the said amount however the 2<sup>nd</sup> defendant offered to refund KShs.2.5 million but not KShs.500,000/= for the breach of contract as according to the defendants that it was the plaintiff who breached the contract by failing to pay the full purchase price within a reasonable time. The defendants assertion is not supported by the agreement as the time of payment is silent and further more for the reasons I have stated herein above. I therefore find that the defendants were in breach of the contract. The defendants counterclaimed KShs.4,961,831/66 being accrued bank interest and KShs.500,000/= being liquidated damages for breach of contract with costs and interest and any other or such better relief that this court may deem fit/just to grant.

19. The defendants in support of their counterclaim produced D exhibit 1 being document on interest incurred from June 2006 to June 2009 tabulating interest accrued of KShs.4,961,831/66. I have very carefully perused D exhibit 1 and have noted the said document has not given particulars of the owner of the account it is dealing with nor has the bank disclosed the nature of the account. It is a document that is not on a letterhead nor does it have any information as to whether it had anything to do with the suit plot Block II/36 Meru Town. It is therefore difficulty in absence of any evidence, to say the document was over the loan taken by the defendants. The defendants did not tender evidence on the loan they had taken and how it was being serviced since the charge was registered on 22.12.2006. The defendants did not

produce similarly a copy of the charge to show as they alleged that was not an old loan of 1982. From the evidence and P exhibit 3 I am satisfied the charge was created on 22.12.2006 and the charge was between the defendants and their Bank and the plaintiff had nothing to do with the payment of the loan as he did not enter into any agreement with the bank. The Bank Manager in his affidavit dated 4.6.2009, under paragraph 4 confirmed of the registration of the legal charge following offering of financial facilities to the defendants of KShs.16 million. In the agreement of 3<sup>rd</sup> December 2007 the parties under the default clause did not provide for payment of interest in default of payment of the consideration. I therefore find that the defendants prayer for interest arising out of their loan to be paid by the plaintiff in default of payment of the consideration to be remote and far fetched and invalid. I therefore find the plaintiff is entitled to be paid KShs.500,000/= for breach of the contract in terms of the agreement dated 3<sup>rd</sup> December 2007. I further hold and find the inhibition was lawfully lodged, after the court found the plaintiff's application was meritorious and as such the plaintiff cannot be blamed for the same.

**20. The upshot is that the plaintiff's claim succeeds and the defendants counterclaim fails. I accordingly enter judgment for the plaintiff as follows:-**

- (a) Refund of purchase price of KShs.2.5 million.**
- (b) Payment of Kshs.500,000/= to the plaintiff being sum stipulated in sale agreement as penalty for breach of contract.**
- (c) Counterclaim for KShs.4,961,831/66 is dismissed with costs.**
- (d) Costs of the suit with interest to the plaintiff from the time of filing the suit till payment in full.**

**DATED AND SIGNED THIS 13TH DAY OF DECEMBER, 2016.**

**J. A. MAKAU**

**JUDGE**

**DELIVERED IN OPEN COURT AT MERU THIS 13TH DAY OF DECEMBER, 2016**

**IN THE PRESENCE OF:**

**Mwangi E. G. & Company Advocates for the Plaintiff**

**Kiautha Arithi & Co. Advocates for Defendants**

**C.A. 1. ....**

**2. ....**

**BY (F. GIKONYO)**

**JUDGE**

**ON BEHALF OF:**

**J. A. MAKAU**

**JUDGE**