



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 591 OF 2008**

**JOSEPHINE KAMENE J. MUSOLA..... PLAINTIFF**

**VERSUS**

**DEPOSIT PROTECTION FUND BOARD**

**TRUST BANK IN LIQUIDATION.....1<sup>ST</sup> DEFENDANT**

**RAPHAEL KABUGU WARUI .....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application before the court is a Notice of Motion dated 18th February 2015 filed in court by the 1st Defendant. The application seeks the following orders:-

1. ***That CMCCC No. 7347 of 2002 be marked as settled in light of the Judgment in HCCC No. 591 of 2008 delivered on 19th December 2014.***
2. ***That the costs of this application be provided for.***

2. The application is premised on the grounds set out therein and is supported by affidavit off **Micah L. Nabori** sworn on **18th February 2015**.

3. In brief, the Applicant's case is that in the year 1995 the Plaintiff charged their property **NAIROBI/BLOCK 75/706** ('the suit property') on which stands a residential house to Trust Bank (now In liquidation) to secure advances to the sum of Kshs. 750,000/= to one Kevin Malinga. The Plaintiff was the guarantor of the aforementioned borrower (Kevin Malinga). The borrower defaulted in servicing the loan advanced to him necessitating the bank's action to recoup the amount advanced by sale of the suit property by way of public auction. It is this action that prompted the 2<sup>nd</sup> Defendant, then the Plaintiff in CMCC NO 7347 OF 2002 to file a plaint dated 18<sup>th</sup> September 2002 when the chargor refused to vacate the premises legally acquired by him. The 2<sup>nd</sup> Defendant further stated that he had an interest in the suit property as leasehold owner having been declared the highest bidder at a public auction held on 15<sup>th</sup> August, 2001 where the 1<sup>st</sup> Defendant was exercising its statutory power of sale. That HCCC 591 of 2008 was a suit filed herein by the Plaintiff as the chargor seeking to set aside the sale of the suit property. The matter proceeded for hearing and judgment was delivered on 19<sup>th</sup> December 2014 dismissing the Plaintiff's suit and judgment entered in favour of the 2<sup>nd</sup> Defendant's counterclaim for vacant possession. A careful perusal of the judgment shows that the court decided all the issues raised by the parties. In view of the foregoing paragraphs, it is clear that both suits raise substantially the same

matters and therefore the decision of the High court has settled the same issues in CMCC NO 7347 OF 2002.

4. That the issues in both cases are substantially the same. In the judgment delivered on 19<sup>th</sup> December 2014 after full trial in this suit, the Court made a decision which determines the rights of all the parties. The principles of *stare decisis* and *res judicata* apply in the instant case as the decision of the higher court binds that of the lower court and further it will be an effort in vain to continue prosecuting an action that has similar issues to be adjudicated upon once a judgment is in place determining the matter finally. It is in the interest of justice that the matter be marked as settled.

5. The application is not entirely opposed. In her replying affidavit, dated 10th April 2015 the Respondent does not appear to address the main prayers herein that is, that CMCC no. 7347 of 2002 be marked as settled pursuant to the judgment in HCCC No. 591 of 2008 delivered on 19th December 2014. It is clear that the Respondent does not object to this prayer.

6. However, the Respondent trains her eyes on the second issue raised by the Applicant herein. That issue is in regard to Kshs.400,000/= which was the surplus of a sale of the Respondents property. This surplus was due to the Respondent, but was kept by the Applicant. Now the Applicant proposes To pay out this surplus without interest, and this sir the bone of contention.

7. On this issue, the Applicant submitted that it is ready and willing to refund the surplus of the sale proceeds without interest to the Plaintiff herein for the following reasons:-

- a. The 1<sup>st</sup> Defendant was placed under statutory management on 17th September, 1998 and later in liquidation on 15<sup>th</sup> August, 2001, the same date as the auction.
- b. The subject property was sold through public auction on the same date i.e. 15<sup>th</sup> August, 2001 and 25% of the proceeds amounting to Kshs.400,000/= was paid. The balance of Kshs. 1,200,000 was later received on 30<sup>th</sup> November, 2002.
- c. The issue of interest does not arise as the 1<sup>st</sup> Defendant had been placed under liquidation as at the date of the auction and had ceased normal banking operations.

8. In response the Plaintiff stated that the 1st Defendant sold the property for Kshs.1,600,000/= without giving her a notice in regard to the sale, and so she was not aware of the amount the property was sold at and neither did the 1st Defendant/Applicant communicate to notify her of the sale terms and proceeds. The Respondent states that the 1st Defendant/Applicant has been holding the balance of Ksh.411,000/= since the 15th August 2001 and even after it was placed under liquidation. The Respondent was never informed or called to collect the money by them and they knew very well that the money was outstanding. According to the Respondent, the 1st Defendant/Applicant was under obligation to disclose all material information to her before and after the sale and also give her a particularized statement of accounts. Even though this matter has been pending in courts since 2008 the Applicant has never bothered to make an offer to pay the money or even deposit the same in court pending hearing and determination of the suit. It is in the best interest of justice that the 1st Defendant/Applicant be ordered by this court to pay the sum of Kshs.411,000/= with interest at commercial rates from 15th August 2011 to date.

9. I have considered the application and submission of the parties on this issue. The only issue for consideration is whether or not the said sum of Kshs.411,000/= should be paid to the Respondent with interest thereon, and if so, at what percent.

10. In regard to the issue, this court is in an advantage position having heard and determined the dispute between the parties. The evidence was clear that the Plaintiff/Respondent was not aware that her property was sold for Kshs.1,600,000/=. Neither was she aware that there was a balance of Kshs.411,000/= for her. The Applicant herein or Trust Bank Limited never informed the Respondent about this money or the need to take it. The Respondent or its agents or predecessors had the obligation to disclose all material information to the Respondent, including giving particularized statement of account. It is instructive that even though this matter has been pending in court since 2008 the Applicant never bothered to give the

said money to the Respondent, or to deposit the same in court pending the finalization of the suit. That kind of action or conduct by the Applicant was not responsible. The Applicant submitted that it does not trade and therefore did not earn interest on the said Kshs.411,000/=. That may be correct. However, the Applicant's conduct was not bona fide. The Applicant should have at least shown an attempt to communicate with the Respondent telling her to take the Kshs.411,000/= or alternatively, the same could have been deposited in court. Clearly the Respondent is entitled to the said sum plus interest accruing thereon from 15th August 2001. This is because if the said money was given to the Respondent at that time, the Respondent would have put it to some good use which with time, would improve its value or what was brought by it.

11. As for the rate of interest, the court rates will suffice, since the Applicant alleges that it does not earn interest on its deposits.

12. Having said the above, and simply as a matter of interest, why is it that the Applicant does not earn interest on its deposits? Is there an institution in Kenya today who keeps money, somebody's money, without paying interest thereon? The Applicant must be one lucky such entity whether by law, or by practice, or by whatever fiat, to hold somebody's money, use the same, and not to pay interest on it. I have, however looked at the Banking Act cited by the Applicant. In particular, I have seen Sections 33 and 34 which addresses issues of interest. In these Sections, the payment of interest by a liquidator is not outlawed. Those Sections mainly restrict or limit the maximum rate of interest which can accrue on deposits and other debts payable by the institution during the period of the moratorium to the minimum rate determined by Central Bank of Kenya. There was no submission herein that the Central Bank of Kenya had issued any minimum rate of interest payable in this particular case.

13. Pursuant to the foregoing this court makes the following orders:-

1. ***That CMCC No. 7347 of 2002 be and is hereby marked as settled in light of the judgment in HCCC No. 591 of 2008 delivered on 19th December 2014.***
2. ***That the sum of Kshs.411,000/- due to the Plaintiff by the 1st Defendant be refunded to the Plaintiff with inters at court rates with effect from 15th August 2001.***
3. ***That each party shall pay own costs of this application.***

Orders accordingly.

**READ, DELIVERED AND DATED AT NAIROBI THIS 12TH DAY OF JUNE 2015**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Mr. Nzuva for the Plaintiff

Mr. Kimani holding brief for Mwangi for the Defendants

Teresia – Court Clerk