



IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO 1223 OF 2001

**1. DR. JOSIAH M. KINAMA
2. DR. LAWRENCE M. MUSAU.....PLAINTIFFS**

VERSUS

**1. MILKA WANZA KITUNDU
2. JOHN MUTHUI KITUNDU
3. SOLOMON NDUNDA KITUNDU.....SUBSTITUTED DEFENDANTS**

J U D G M E N T

1. The Plaintiffs sought in this suit a refund of KShs 650,000/00, the same being money paid towards purchase price in a land sale transaction with the deceased Defendant, **Solomon Kitundu Munywoki**. They also sought damages for breach of contract and interest at the rate of 34% per annum on the principal sum from 17th April 1997 to date of payment. Judgment in default of appearance was entered but was subsequently set aside upon application by the Substituted Defendants. They then filed defence in which the sale agreement between the Plaintiffs and the deceased Defendant was admitted, along with receipt of the KShs 650,000/00 towards purchase price. But it was denied that the deceased Defendant was in breach of the sale agreement.

2. When the case came up for hearing on 19th December 2011 the parties recorded consent in the following terms –

“1. Judgment be and is hereby entered for the Plaintiffs against the Defendants in the sum of KShs 650,000/00.

2. The sum of KShs 650,000/00 deposited in Court by the Defendants on 10th May 2011 shall be forthwith released to the Plaintiffs through the Advocates on record.

3. It is hereby agreed that the following are the outstanding issues for trial
–

(i) Interest on the principal sum.

(ii) Damages for breach of contract.

(iii) **Costs of the suit.**

4. ...”

3. The case on the outstanding issues was heard on 03/03/2014 and 12/05/2014. The Plaintiffs and the 3rd Defendant testified. The respective bundles of documents of the parties were admitted in evidence.

Parties then filed written submissions. The Plaintiffs’ submissions were filed on 29th May 2014 while those of the Defendants were filed on 13th June 2014. I have considered the testimonies and the documents admitted in evidence. I have also considered the submissions, including the cases cited.

Interest on the Principal Sum

4. The sale agreement is silent on the issue of interest. **Section 26 (1) of the Civil Procedure Act, Cap 21 (the Act)** provides -

“26. (1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment, or to such earlier date as the court thinks fit”

5. In the case of *Highway Furniture Mart Limited –vs- Permanent Secretary & Another [2006] 2 EA 94*, the **Court of Appeal** held, *inter alia*, that interest antecedent to the suit is only claimable where, under an agreement, there is stipulation for the rate of interest (contractual rate of interest), or where there is no stipulation interest is allowed by mercantile usage (which must be pleaded and proved), or where there is statutory right to interest, or where an agreement to pay interest can be implied from the course of dealings between the parties. The Court further stated -

“The justification for an award of interest on the principal sum is, generally speaking, to compensate a plaintiff for the deprivation of any money, or specific goods through the wrong act of a defendant. In *Later v Mbiyu [1965] EA 592*, the forerunner of this Court said at page 593, paragraph E:

“In both these cases the successful party was deprived of the use of goods or money by reason of the wrongful act on the part of the defendant, and in such a case it is clearly right that the party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest...”

In this case the building contract did not provide for payment of interest. The appellant did not prove before the trial Judge that interest before the institution of the suit was awardable in law in the circumstances of the case. We have come to the inescapable conclusion that the claim for interest at 36% for the period prior to the institution of the suit was not maintainable in law and was illegally included in the decree prepared by the appellant’s advocates.”

6. In the present case, the sale agreement did not provide for payment of the claimed interest in case of breach, and it has not been demonstrated by evidence or otherwise that such interest is payable within the parameters set out by the **Court of Appeal** in the case cited above. I will therefore award interest at court rates on the principal sum from date of filing suit (24th July 2001) to 4th April 2012 when the principal sum was released to the Plaintiffs.

Damages for Breach of Contract

7. The sale agreement did not provide for any liquidated damages. The Plaintiffs did not tender any evidence of actual loss, like lost opportunity, that they may have suffered as a result of the breach of contract by the deceased Defendant. In the case of *Firozali Noormohamed Lalji –vs- Elias Kapombe Toka & 3 Others [1981] KLR 325* it was held that parties must understand that if they bring actions for damages, it is for them to prove their damage; it is not enough for them, throw claims at Court saying, “This is what I have lost; I ask you to give me these damages”. They must prove their damages. I must therefore refuse the claim for damages.

Costs

8. Though costs are at the discretion of the court, they must follow the event unless for good cause the court otherwise orders. See **section 27(1)** of the Act. The event here is that the Plaintiffs have succeeded in their claim for refund of the principal sum but failed in their claims for special interest and damages. I will award them half of their costs of the suit.

9. There will be judgment on the outstanding issues as set out above. It is so ordered.

DATED, SIGNED AND PRONOUNCED IN OPEN COURT AT NAIROBI THIS 31ST DAY OF OCTOBER 2014

H. P. G. WAWERU

JUDGE