



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL CASE NO. 281 OF 2012 (O.S)**

**1.EUNICE WAIRIMU MUTURI**

**2.WASHINGTON MUCHIRI MUTURI.....PLAINTIFFS**

**VERSUS**

**BENSON K WAIRAGU T/A**

**WAIRAGU & WAIRAGU ADVOCATES.....DEFENDANT**

**R U L I N G**

**1.** The Plaintiffs brought this suit under **Order 37, Rules 1 and 3** of the **Civil Procedure Rules**, (the **Rules**) seeking one main relief -

**“That the Defendant be ordered to pay the Plaintiffs the sum of KShs 5,150,000/00 together with interest from 29<sup>th</sup> March 2012 until payment in full.”**

**2.** The Plaintiffs case as set out in the grounds for the originating summons appearing on the face thereof and the supporting affidavit was that the Plaintiffs are the legal representatives of the late **Gerald Muturi Maina** (hereinafter called the **Deceased**); that the Defendant acted for the Vendor in a land sale transaction dated 14<sup>th</sup> September 2007 in respect of L.R. No. 36/IV/14 in which the Deceased was the Purchaser; that under the sale agreement the Deceased paid to the Defendant KShs 5,150,000/00 as deposit towards the purchase price to hold the same as stakeholder; that the sale failed after the property was sold to a third party by a mortgagee; and that the Defendant thereafter refused or neglected to refund the deposit despite demand.

**3.** In his replying affidavit filed on 16<sup>th</sup> July 2012 the Defendant deponed, *inter alia* –

- i. That whereas the sale agreement stated that he was acting for the Vendor and that other advocates were acting for the Purchaser, he in fact did some substantial work for the Purchaser and was *de facto* advocate for both parties, and that in that connection he was owed legal fees of KShs 1,749,280/00 by the Deceased.
- ii. That he indeed received the deposit of KShs 5,150,000/00 from the Purchaser (Deceased) as a stakeholder.
- iii. That he was not aware of the Purchaser’s death and was all along waiting for his instructions until

he was served with process in this suit.

- iv. That indeed he had received a letter of demand dated 29<sup>th</sup> March 2010 requiring him to release the deposit to the “purported estate of (the Purchaser)” but did not comply as he was a stranger to the alleged death of the Purchaser and thus needed to carry out “the necessary enquiry to confirm the authenticity of the Plaintiffs’ claim”.
- v. That as part of that enquiry and in due diligence he, by a letter dated 4<sup>th</sup> April 2012, requested for a meeting with the Plaintiffs’ advocates to enable him “establish the truth or otherwise of the alleged death of (the Purchaser)” but that his request was turned down.
- vi. That he is ready and willing to refund the deposit of KShs 5,150,000/00 but would do so only “after sufficiently verifying that the Plaintiffs are the legally appointed administrators of the estate of Gerald Muturi Maina if at all he is now deceased” less his legal fees of KShs 1,749,280/00 owed to him by the Deceased.
- vii. That the suit was premature as he had not refused to refund the deposit and the matter could easily have been sorted out of court.

4. I cannot find on the record any supplementary affidavit filed by the Plaintiffs in answer to the replying affidavit which certainly raised issues that required a response. Instead the Plaintiffs filed notice of motion dated 18<sup>th</sup> July 2012 seeking judgment for the admitted sum of KShs 3,400,720/00 together with interests and costs. In the supporting affidavit sworn by the 2<sup>nd</sup> Plaintiff I cannot find any averment to the effect that the concerns regarding the alleged death of the Purchaser that the Defendant avers in the replying affidavit (to the originating summons) he had raised had been addressed prior to filing suit.

5. In his replying affidavit filed on 1<sup>st</sup> February 2013 in response to the application for judgment on admission the Defendant repeated the concerns that he had expressed earlier regarding the alleged death of the Purchaser. He also reiterated his willingness to refund the admitted sum less his fees, but without interest or costs, and that the suit was premature and in bad faith.

6. When the application came up for hearing on 30<sup>th</sup> January 2013 learned counsel for the Defendant stated that he wanted to see “proper authentication of the standing of the Plaintiffs”. His learned opposite replied that she would make available to him “the original sealed grant of representation”. The matter was then stood over to 7<sup>th</sup> February 2013 for mention with a view to recording at least a partial consent.

7. Indeed on 7<sup>th</sup> February 2013 the following the following order consent was recorded –

**“By consent:**

- i. **There be judgment for the Plaintiffs against the Defendant for the sum of KShs 3,400,720/00 plus costs.**
- ii. **The issue of interest to be determined by the court, and submissions on the same to be made on 26<sup>th</sup> February 2013.**
- iii. **There shall be stay of execution for 45 days from today.”**

8. The parties subsequently filed written submissions, the Plaintiffs filing theirs on 15<sup>th</sup> and the Defendant on 25<sup>th</sup> February 2013. So, this ruling concerns only the issue of interest.

9. I have considered the submissions of the parties. No cases were cited. The Plaintiffs have submitted that the Defendant should pay interest at least from the date the suit was filed as due demand and notice to file suit in default was given, to which he did not respond. The Defendant’s specific concerns regarding

the alleged death of the Purchaser raised prior to filing suit are not addressed, save to say they were “lame excuses”.

10. On his part the Defendant argues that the suit was in bad faith as he had not refused to refund the deposit (less his fees), and all he wanted was clear authentication of the alleged death of the Purchaser of which he was not aware, and the standing of the alleged administrators of his estate; that he was only acting in abundant caution; that he called for a meeting with the Plaintiffs’ advocates to clear the air which was not granted; that the money was never held in an interest-earning account; that once he was satisfied of the death of the Purchaser and the standing of the Plaintiff he readily entered into the consent for refund of KShs 3,400,720/00; and that it would be unjust to condemn him to pay interest.

11. Interest is in the discretion of the Court. **Section 26(1) of the Civil Procedure Act, Cap 21 (the Act)** states as follows –

**“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.**

12. In the present case there is no evidence that the Defendant was duly informed of the death of the Purchaser – complete with death certificate, etc. There is also no evidence that after demand was made and he raised his concerns about the alleged death of the Purchaser and the Plaintiffs’ standing, that those concerns were duly addressed and necessary and proper proof provided. Even a meeting with the Plaintiffs counsels requested by the Defendant was not granted.

13. In money matters there is nothing wrong with a counsel acting with abundant caution so that funds are not released to the wrong person or persons. There are many conmen (and con-women!) in this country. I do not see any sinister reluctance on the part of the Defendant to release the deposit that he had taken as a stake-holder. Once the necessary evidence of the death of the Purchaser and the standing of the Plaintiffs was provided he readily entered into an appropriate consent.

14. There is also no evidence that there were any instructions to hold the stake money in an interest-earning account.

15. In the circumstances I hold that it would be unjust to require the Defendant to pay interest from any date earlier than 7<sup>th</sup> February 2013 when the consent judgment was entered. I therefore direct that the Defendant shall pay interest at court rates upon the judgment sum of KShs 3,400,720/00 from the date of that judgment until payment in full. That will be the order of the court.

**DATED AND SIGNED AT NAIROBI THIS 16<sup>TH</sup> DAY OF AUGUST 2013**

**H. P. G. WAWERU**

**JUDGE**

**DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF AUGUST 2013**