

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO 547 OF 2011

1. **BENSON MUTURA KANGARA**
2. **MARY NJUGUINI**

(t/a PINKSONTE ENTERPRISES).....PLAINTIFFS

VERSUS

BOARD OF GOVERNORS,

ST MARY'S SCHOOL.....DEFENDANT

RULING AND JUDGMENT

1. The Plaintiffs paid to the Defendant the sum of KShs 3,300,000/00 upon representation from a third party, one **Urbanus Mbevi Mutinda (Mutinda)**, that they would receive from the Defendant a written offer to purchase the Defendant's trees. When it turned out that no contract with the Defendant was forthcoming, the Plaintiffs demanded a refund of their money from the Defendant and subsequently sued for the same.
2. The Defendant has in its statement of defence admitted receiving the KShs 3,300,000/00 from the Plaintiffs. It has further pleaded that when it received the money it had already entered into a contract with another person called **John Duncan Mbichi (Mbichi)** for purchase of the same trees; that it alerted Mbichi of the receipt of the money and that he (Mbichi) represented to it that the Plaintiffs were his financiers in the transaction and had paid the money on his behalf; that there was no contract at all between the Defendant and the Plaintiffs; and that the Plaintiffs have no sustainable claim against the Defendant for the refund of the said sum of KShs 3,300,000/00.
3. I have tried all angles to understand the Defendant's position, but I cannot for the life of me find any justification for the Defendant keeping the Plaintiffs' money! The Defendant has not pleaded that Mbichi had informed it before-hand that the Plaintiffs would pay on his behalf the KShs 3,300,000/00. It was the Defendant who informed him that there was some payment! A financing agreement subsequently produced to the Defendant by Mbichi is **between Mbichi and the same Mutinda who apparently misrepresented to the Plaintiffs in the first place! It is not between Mbichi and the Plaintiffs.**
4. After receiving the payment from the wrong party, why did the Defendant not refund it immediately? Was Mbichi's mere say-so backed by a financing agreement that did not concern the Plaintiffs sufficient proof in the eyes of the Defendant that there existed a financing contract between the Plaintiffs and Mbichi in respect of the KShs 3,300,000/00?
5. A worse case of injustice I have not yet come across! The Plaintiffs were apparently deceived by Mutinda into paying to the Defendant KShs 3,300,000/00 in the expectation that a contract for the purchase of the Defendant's trees would follow. The Defendant admits receiving the money, but it turns out that it had already entered into a contract with another person (Mbichi) for him to purchase the trees. So, why would the Defendant not refund to the Plaintiffs their money? Is Mbichi's mere claim to the Defendant that the Plaintiffs paid the money on his behalf sufficient to deny the Plaintiffs a refund of their money? Certainly not!

6. To allow the Defendant to keep money obviously paid to it upon misrepresentation by Mutinda who appears to have been working in cahoots with Mbichi, and to allow Mbichi to contentedly watch - no doubt with a smirk on his face – as innocent persons pay his obligations, is to allow an intolerable injustice to be perpetrated against the Plaintiffs.

7. The admission here by the Defendant is plain and obvious. It received money from the Plaintiffs that was not due to it from them. The decent thing to do would have been to refund it to them immediately. The Defendant's subsequent suit against Mbichi in which it acknowledges receipt from him "through his financiers" of the KShs 3,300,000/00 is its own problem with Mbichi. It does not, and should not, concern the Plaintiffs.

8. After considering the written submissions filed on behalf of the parties, and in the particular circumstances of this case, I will allow the Plaintiffs' application by **notice of motion dated 23rd March 2012**. I will enter judgment for them against the Defendant on admission plus costs and interest at court rates from the date of filing suit until payment in full. The Plaintiffs will also have the costs of the application. Those will be the orders of the court.

DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF OCTOBER 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 18TH DAY OF OCTOBER 2013