



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**Environmental & Land Case 385 of 2011**

**LUCY CHEPKEMOI KEROR .....PLAINTIFF**

**-VERSUS-**

**SARMA ENTERPRISES LTD..... 1<sup>ST</sup> DEFENDANT**

**STEKA COMMERCIAL AGENCIES.....2<sup>nd</sup> DEFENDANT**

**RULING**

Lucy Chepkemoi Keror the Plaintiff/Applicant has filed a Notice of Motion dated 25/10/2011 against SARMA ENTERPRISES LTD 1<sup>ST</sup> Defendant and STEKA COMMERCIAL AGENCIES 2<sup>nd</sup> Defendant and is seeking the following orders.

1. That Judgment be entered for the Plaintiff/Applicant against the Defendants/Respondents in the sum of Kshs.900,000/- together with interest thereon at 18% calculated on a monthly basis from the 30<sup>th</sup> day of January 2007 until payment in full.
2. Costs for the suit be awarded to the Plaintiff/Applicant.
3. Cost of this application be awarded to the Plaintiff/Applicant.

The application is based on the following grounds:-

- a) The Defendant/Respondent received the sum of Kshs. 900,000/- from the plaintiff/Applicant on account of the sale of plots No: 15,16,17 and 18 of L.R. NO:12715/49 SYOKIMAU which plots were subsequently sold and transferred to third parties.
- b) The Defendant/Respondent have expressly admitted receipt of the said sum of Kshs. 900,000/- on account of an agreement which cannot be completed.
- c) The Defendants/Respondents do not have any defence to the alternative prayer in the plaint.
- d) The Defendant/Respondents having acknowledged receipt of the said sum of Kshs. 900,000/- and having further confirmed that the suit properties have already been registered in favour of third parties, it would be an abuse of the process of this court to allow them leave to defend the suit herein.

The application is brought under section 3A of the Civil Procedure Act Cap 22 of Kenya and Order 36 Rule 1,2 and 3 of the Civil Procedure Rules and is supported by the affidavit of Lucy Chepkemoi Keror filed on the 10<sup>th</sup> of November 2011.

The applicant states as follows in brief; in January 2007 the Respondents offered for sale various plots which were to be subdivided from L. R. No. 12715/49 Syokimau; that the Respondents agreed to sell to her 4 plots being plot Nos. 15, 16, 17, and 18 each measuring 50 x100 at a purchase price of Kshs. 250,000/- each; that pursuant to the said agreement she paid a total of Kshs. 900,000/- to the 2<sup>nd</sup> Respondent; that it was mutually agreed and understood that she would pay the balance of the purchase price of Kshs. 100,000/- together with payment for transfer and stamp duty upon completion of the subdivision and delivery of the completion documents; that between November 2007 and mid 2009 she made several visits to the offices of both Respondents to ascertain whether the completion documents were ready, but it became clear that both defendants were not ready to complete the agreement and consequently her lawyers wrote a demand letter annexure LCK2. Subsequently she verified and confirmed that the two plots were transferred and registered in the name of 3<sup>rd</sup> parties as stated in paragraph 6 of the replying affidavit of **Sarah Mbeti Karingi** sworn on the 19<sup>th</sup> day of August 2011; that the 2<sup>nd</sup> Respondent has also expressly admitted receiving a total sum of kshs. 900,000/= from her. She also seeks interest of 18% per annum from the 23<sup>rd</sup> of January 2007 and states that the refund of her payment cannot amount to sufficient compensation for her loss as the said properties are now selling at Ksh.1.3 million per plot.

Sarah Mbeti Karingi the Director of the 1<sup>st</sup> Defendant/Respondent filed a replying affidavit dated 17<sup>th</sup> November 2011. She states in her affidavit the 1<sup>st</sup> defendant had contracted the 2<sup>nd</sup> Defendant to source buyers for the plots mentioned in the pleadings by the plaintiff; that the said 2<sup>nd</sup> Defendant had no power or authority to engage in the sale of the said properties and it was erroneous and lack of diligence on the part of the plaintiff to enter into a sale agreement with the 2<sup>nd</sup> defendant; that the 1<sup>st</sup> Defendant did not receive any money from the Plaintiff and did not enter into any sale with the said Plaintiff; that the plaintiff without the knowledge of the 1<sup>st</sup> defendant executed a sale agreement with the 2<sup>nd</sup> Defendant and paid money which amount the 1<sup>st</sup> Defendant is not only unaware but did not receive apart from a Kenya Shillings One Hundred Thousand (Kshs.100,000/-) belatedly deposited in the 1<sup>st</sup> Defendant's account by the 2<sup>nd</sup> Defendant when approached and questioned about the allegations raised by the Plaintiff. The 1<sup>st</sup> Defendant is ready and willing to return the said Kenya Shillings One Hundred Thousand (Kshs. 100,000/-), that the 1<sup>st</sup> Defendant was at all material time a stranger to the transaction entered between the plaintiff and the 2<sup>nd</sup> Defendant whose agreement does not bind it; that unaware of any transaction over its property, the 1<sup>st</sup> Defendant disposed its properties to other 3<sup>rd</sup> parties to whom title deeds were issued by the land registry; that the plaintiff's pleadings do not explain why the plaintiff avoided to make a sale agreement with the 1<sup>st</sup> Defendant whereas it was the registered owner of the properties the Plaintiff intended to purchase; that if any money was paid to the 2<sup>nd</sup> defendant by the Plaintiff as alleged, then the plaintiff should have claimed the same from the 2<sup>nd</sup> Defendant without involving the 1<sup>st</sup> Defendant as there was no privity of contract between the 1<sup>st</sup> Defendant and the Plaintiff.

**Stephen Kariuki Kanyiri** the proprietor of the 2<sup>nd</sup> defendant company filed a replying affidavit sworn on 17<sup>th</sup> of November 2011.

He deponed as follows; that they were specifically commissioned by the 1<sup>st</sup> defendant to dispose off the said properties which also included other plots at a commission and but the contract was terminated by the 1<sup>st</sup> Defendant before completion of the transactions; that he is aware that the plaintiff paid a total of Ksh. 900,000/- for the four plots in instalments within a period of 12 months but all documents pertaining to the sale of the plots were handed over to the 1<sup>st</sup> Defendant when their contract was terminated; that it was a term of the agreement that the plots were to be transferred once the purchase price, Title registration fees, legal fees and transfer fees was fully paid and the plaintiff balance as at the time the 1<sup>st</sup>

Defendant terminated the contract was Kshs. 220,000 and not 100,000 as alleged by the Applicant; that the suit herein raises triable issues which can only be adjudicated once the matter is heard fully and by entering summary judgment at this juncture, the 2<sup>nd</sup> Defendant is at risk of suffering tremendous loss which might outlive this suit, that further, the interest claimed in paragraph 15 is unjustified because as far as their offices was concerned, the plots were paid for in bits within a period of 12 months beginning January 2007 to December 2007.

I have carefully read and considered the application the affidavits filed by the parties, the submissions made and the law that governs applications of this nature and find as follows, there is no dispute that the plaintiff in this case sought to buy four plots from the defendants and that she paid a sum of 900,000/- to the 2<sup>nd</sup> defendant. Receipts attached in "LSK 1" show that the 2<sup>nd</sup> defendant received the said sum. From the facts adduced in the affidavits of the defendants it is evident that the 1<sup>st</sup> and 2<sup>nd</sup> defendants had a principal agent relationship. The 1<sup>st</sup> defendant commissioned the 2<sup>nd</sup> defendant to sell the plots. The 2<sup>nd</sup> defendant did so and received a sum of 900,000/- from the plaintiff/applicant. The 1<sup>st</sup> defendant in the affidavit sworn by the director states that they only received a sum of 100,000/- from the 2<sup>nd</sup> defendant. This is not denied by the 2<sup>nd</sup> defendant. The plaintiff did not get her plots and the defendants have held the monies paid by her. I note that none of the defendants have filed any defences, but from their affidavits they admit receipts of sums from the plaintiff.

Order 36 rule 5 states that:

"if it appears that the defence set up in the affidavit by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to, or as is admitted, subject to such terms, if any, as to suspending execution, or the payment of the amount realised or any part thereof in court, the taxation of cost, or otherwise as the court thinks fit, and the defendant may be allowed to defend as to the residue of the plaintiff's claim".

In this case each defendant has admitted the sums that were paid to them in the affidavits and therefore the plaintiff is entitled to judgement for such part of her claim as is admitted.

I note that the power to grant summary judgment under order 36 should be exercised cautiously and was intended to apply only to cases where there is no reasonable doubt and the plaintiff is entitled to judgement.

The affidavits filed raise no triable issues on the amount of 900,000/- that the plaintiff is claiming. On interest the applicant claims 18% to be calculated on a monthly basis from the 30<sup>th</sup> January 2007 until payment in full. The plaintiff's counsel argument is that the plaintiff is entitled to the said interest on reasons that currently the plots are going for Ksh.1.3million and there is an upward trend of prices of property.

Section 26 of the Civil Procedure Act gives the Courts powers to award interest as correctly pointed out by counsel for the plaintiff. A party claiming an interest above court interest needs to justify the percentage being claimed. In this case I find no proper justification to claim interest of 18% calculated on a monthly basis from the 30<sup>th</sup> January 2007 until payment in full. No reasonable ground has been laid for it. I find that the plaintiff is therefore entitled to interest at court rates from the date of filling suit.

I therefore grant the orders sought in the notice of motion dated 25<sup>th</sup> October 2011 as follows:

1. I enter Judgment for the plaintiff against the 1<sup>st</sup> defendant in the sum of Ksh.100,000/- (One Hundred Thousand) together with interests as Court rates from the date the suit was filed until payment in full.
2. I enter Judgment against the 2<sup>nd</sup> defendant in the sum of Ksh.800,000/- (Eight Hundred Thousand) together with interest at court rates from the date the suit was filed until payment in full .

3. Costs of the application and the suit are awarded to the plaintiff.

**Dated and delivered this 10<sup>th</sup> Day of February 2012**

**R. OUGO**  
**JUDGE**

In the Presence of:-

Mrs Ochieng.            For the Applicant

Ms Obel                    For the Respondent

Mr. Kabiru                Court Clerk