



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO.108 OF 2008

FREDRICK TUHOTO MAITERI.....1ST PLAINTIFF

BENSON KARIMI MWIHURI2ND PLAINTIFF

VERSUS

JOSHUA KIMANI KUNGU.....DEFENDANT

JUDGMENT

The plaintiffs, Fredrick Tuhoto Maiteri and Benson Karimi Mwihuri instituted this suit against Joshua Kimani Kungu (the defendant) claiming that the latter received Kshs.326,480/= being the purchase price for 2¼ acres portion of parcel of land known as NYANDARUA/NJAMBINI/4397 (the suit property) and the defendant has refused, failed and/or neglected to transfer the suit property to the them.

The plaintiffs pray in the main suit for specific performance of the contract or in the alternative a refund of the purchase price at the current price per acre; general damages for breach of contract; costs of the suit and interest.

The defendant filed a defence raising the following grounds:

- a) that the suit is incompetent and amounts to an abuse of the court process;
- b) that the suit discloses no reasonable cause of action;
- c) that the suit is *res judicata*;
- d) that there was no valid sale agreement;
- e) that there was no consent of the land control board;
- f) that the sum of Kshs.326,480/= is not even enough to buy ¼ of an acre at Njambini township;
- g) that the defendant has all along been ready and willing to refund the entire Kshs.326,480/= to the plaintiffs who have adamantly refused;
- h) that the defendant is ready to deposit the sum in question in court

On 19th July, 2010, parties recorded a consent to the effect that the defendant makes a refund to the

plaintiffs and thereafter the parties to file written submission on the amount of refund to be made for the court to make a determination.

For the defendant, it has been submitted that in view of the matters deposed in the defence, i.e. the land control board consent was not obtained; that the suit was statute barred by limitation; that the defendant has all along offered to refund the purchased price, it was unreasonable to demand what the plaintiffs have proposed, namely Kshs.2,250,000 based on the going market rate for a parcel of land of the same size at Njambini.. Instead the defendant has, on his part proposed to refund the purchase price at court interest rate (of 12%) from the date of judgment to date of refund in full.

I have considered the submissions and the single authority cited by counsel for the defendant. While it is common ground that the defendant has had the purchase price without transferring the suit property to the plaintiffs from 1995, (note that the defendant has raised a defence of limitation based on this dated) parties have decided to compromise this dispute and the court has been called upon to determine the single issue raised in a just and fair manner. The single issue is, in the circumstances of the averments and pleadings, herein what are the plaintiffs entitled to? The plaintiffs have deposed that the current market value of land in the area where the suit property is located is Kshs.1m per acre. That translates to Kshs.2,250,000/= for the 2¼ acres, hence their proposal. The defendant on the other hand has based his proposal on the interest and has suggested, as explained earlier, a refund of the entire purchase price subject to an interest at court rate (12%) per annum.

To begin with, it must be noted that the plaintiffs themselves had made an alternative prayer in the suit for a refund of the purchase price. That prayer was not premised on the refund of the purchase price on the market value.

Secondly, the plaintiffs have not demonstrated the basis of Kshs.1m per acre for a parcel of land in the area. On the other hand, the defendant's proposal of a refund of the purchase price is in accordance with plaintiffs' own prayer. The outstanding issue is the interest rate.

As was stated in the case of **Highway Furniture Mart Limited Vs. The Permanent Secretary Office of the President and Attorney General**, Civil Appeal No.52/2005:

“.....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.”

See also **Later** Vs. **Mbiyu** (1965) EA 592. See also **Section 26** of the **Civil Procedure Act**.

Taking into consideration all the relevant factors, it is hereby ordered that the interest on the admitted principal sum of Kshs.326,480/= shall be paid by the defendant to the plaintiffs at the court rate of fourteen per centum (14 %) per annum from the date of filing this suit to the date full payment is made.

Costs of the suit is also awarded to the plaintiffs.

Dated, Delivered and Signed at Nakuru this 16th day of February, 2011.

**W. OUKO
JUDGE**