



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

**AT NAIROBI**

**CIVIL SUIT NO. 620 OF 2009**

ABDIRAHMAN YUSSUF ABDI ..... PLAINTIFF/APPLICANT  
VERSUS  
GEORGE NJOROGE KARIUKI .....DEFENDANT/RESPONDENT

**RULING**

The plaintiff and the defendant entered into a sale agreement in respect of a parcel of land known as LR. No. 2/121 situate in Kilimani area, Nairobi. The said agreement was executed on 16<sup>th</sup> September, 2009 and the agreed purchase price for the said parcel of land was Kshs. 53,000,000/=. The plaintiff on execution of the said agreement and provision of the completion documents paid 50% of the said purchase price amounting to Kshs. 26,500,000/=. It was agreed that the balance of the purchase price of Kshs. 26,500,000/= was to be paid by the plaintiff to the defendant's advocate Messrs A.S. Kuloba and Wangila Advocates upon a successful registration of the transfer in the name of the purchaser and would then be released to the defendant.

The advocates for the plaintiff Messrs Adera & Company Advocates received the completion documents on or about 17<sup>th</sup> September, 2009. The appropriate procedures for the preparation of transfer and registration thereof were undertaken, including the assessment of duty payable amounting to Ksh. 2,120,010/= which was duly paid by the plaintiff to facilitate registration.

Just before the transfer was registered, evidence pointing to fraud in this transaction came to light and it was subsequently discovered that the defendant had misrepresented facts regarding his ownership of the said property and had thereby defrauded the plaintiff of the sum of Kshs. 26,500,000/=. On realizing this, the plaintiff through his advocates demanded a refund of the said sum of Kshs. 26,500,000/= from the defendant. On failure to receive this sum the plaintiff filed this suit for the following orders.

1. A declaration that the agreement for sale between the plaintiff and the defendant over the suit property in land reference No. 2/121 Kilimani, Nairobi and dated 16<sup>th</sup> September, 2009 is invalid, null and void *ab initio* for fraudulent misrepresentation on the of the defendant.
2. The declaration that the defendant is legally obligated to refund to the plaintiff the sum of Kshs. 26,500,000/= being 50% deposit of the purchase price paid by the plaintiff to the defendant and released to/received by the defendant on 24<sup>th</sup> September, 2009 or thereabout.
3. Kshs. 26,500,000/= being refund aforesaid.
4. General and aggravated damages for fraudulent misrepresentation.
5. Costs.
6. Interest on 3 and 4 above at courts rates from 24<sup>th</sup> September, 2009 until payment in full.
7. Any other/further relief as this court may deem just in the circumstances.

Upon service of the summons to enter appearance and file defence, the defendant filed a defence in which he denied all the allegations in the plaint and, in particular that he was not the registered owner of the suit property. He also denied that he ever received the sum of Kshs. 26,500,000/= from his advocates.

There is now before me an application by way of Notice of Motion under Orders XII Rule 6; VI Rule 13 (1), (b) (c) and (d); XXXV Rule 1(1) (b) of the Civil Procedure Rules, Sections 3,3A, 63(e) and 94 of the Civil Procedure Act for the following orders,

1. That a judgment on admissions be entered for the plaintiff/applicant against the defendant/respondent for the sum of Kshs. 26,500,000/=.
2. Further and or in the alternative and without prejudice to prayer 1 above that the defendant's/respondent's statement of defence dated 15<sup>th</sup> February, 2010 be struck out in toto and this honourable court be pleased to enter summary judgment against the defendant/respondent and in favour of the plaintiff/applicant in terms of prayers 1,2,3,5 and 6 on the plaint dated/filed on 3<sup>rd</sup> December, 2009, pending a determination of prayers 4 and 7 thereof.
3. That the plaintiff/applicant be granted leave and liberty to forthwith execute the ensuing preliminary decree herein pending the actual determination of costs or any prayers on the plaint.
4. That the costs of and relating to this application and suit be to the plaintiff/applicant.

The grounds upon which orders are sought are that,

- i) The defendant/respondent falsified/forged a land title deed for the suit property in LR NO. 2/121 Nairobi in his name and duped the innocent plaintiff/applicant into purchasing the suit property from him (defendant).
- ii) The actual and registered owner of the property is M/s Tusk Construction Limited who holds the original and bona fide title document to the property and who has not attempted to sell the same to the applicant or at all.
- iii) The applicant had paid to the respondent the sum of Kshs. 26,500,000/= as deposit on account of the now fake transaction but which sum the respondent has since failed, refused and or neglected to return to the applicant following the failure of consideration and termination/nullity of the suit sale transaction and despite his advocate's letter of 14<sup>th</sup> October, 2009 conceding liability to refund the deposit money.
- iv) The respondent is facing a related criminal case being Kibera CM/CRI/C.No. 4963 of 2009 alongside other criminal court cases on fraud arising from similar fraudulent uttering of various land titles.
- v) The defendant's statement of defence dated 15<sup>th</sup> February, 2010 and filed herein on 24<sup>th</sup> February, 2010 is frivolous, a sham, amounts to a mere denial or is largely an admission of the claim herein, is an oppressive delaying tactic and is otherwise an abuse/mockery of the process of the court. The application is further supported by two affidavits of Abdirahman Yusuf Abdi and Lawrence Kiogora Muga respectively both sworn on 31<sup>st</sup> May, 2010. The defendant filed a replying affidavit sworn on 1<sup>st</sup> December, 2010 in which he opposed the plaintiff's application.

Before the said application was heard the original file went missing but was reconstructed following an order by the Deputy Registrar. As at that time the parties had already filed their written submissions to address the said application.

On my part I have gone through the entire record, starting with the pleadings, the application and the affidavits annexed thereto. It is clear that the parties herein have fallen out as a result of the alleged fraud on the part of the defendant. There is no evidence that even if the parties had not fallen out this transaction would have gone through because of the affidavits sworn by the applicant and the Personnel And Administration Manager of M/s. Tusk Construction Limited, the true owners of the Land in question. The Original title documents are still held by the said registered proprietor, that is, M/s Tusk Construction Limited.

The authenticity of the said title documents has not been disputed by the defendant. The charging of the defendant in a criminal court on matters related to this document is prima facie evidence of the falsity of

the said documents, even bearing in mind that the case has not been concluded and that he has not been convicted.

When the plaintiff had realized that the documents held by the defendant were forgeries, his advocates demanded the refund of the money paid as deposit. This was done by a letter dated 6<sup>th</sup> October, 2009 to the defendant's advocate in the following terms,

**“ we refer to your letter dated 18<sup>th</sup> September, 2009 on the above matter and to the meeting at our Chambers on 5<sup>th</sup> October, 2009 attended by your Mr. A.S. Kuloba; our client and our Mrs. Adera when we informed yourselves that it had come to our notice that the documents you had tendered to us on 16<sup>th</sup> September, 2009 for the purpose of registering the transfer would appear to have been forgeries.**

**It was agreed at the meeting that you urgently verify the matter; take the necessary action and arrange to refund to our client the deposit paid by him to yourselves on 15<sup>th</sup> September, 2009”.**

The said sum of money was paid through the defendant's advocates by a bankers cheque No. 071653 dated 15<sup>th</sup> September, 2009 and forwarded by a letter dated 17<sup>th</sup> September, 2009. On 18<sup>th</sup> September, 2009 Messrs A.S Kuloba & Wangila Advocates wrote to the plaintiff's advocate Messrs Adera & Company Advocates confirming receipt of the said sum of money. Upon demand of the money by the plaintiff's advocates, the advocates for the defendant wrote to the plaintiff's advocates on 14<sup>th</sup> October, 2009. Part of that letter reads as follows,

**“We had asked our client to refund the 50% deposit we transferred to him upon making known to him the concerns and subsequent revelation surrounding this transaction. Our client intimated to us that he would arrange to refund the deposit as soon as possible but he has since not done so.**

**Our client has of late behaved in a suspicious manner as he has remained elusive ever since we pointed out the anomaly in the transaction and asked for a refund.**

**The undersigned has taken upon the issue by reporting the same to the Criminal Investigation department and the Police have embarked on an exercise to trace our client's whereabouts. We have so far been co-operating with the police in its investigations to try and locate our client so as to have him refund the deposit or otherwise”**

Apparently the advocates for the two parties met because on 26<sup>th</sup> October, 2009 the advocates for the defendant wrote to the plaintiff's advocates in the following terms.

**“We refer to your letters dated 21<sup>st</sup> October 2009 and the one meeting we had at your offices on the 23<sup>rd</sup> October, 2009. As soon as our client who received the deposit of the purchase price is apprehended and remits the money into our account, we undertake to refund the same to you.**

**Meanwhile we are following up on the progress by the police and their investigations and we shall inform you of any development as soon as we receive an update from them”.**

In his defence the defendant denied that he ever received any money from his then advocates which he repeated in his affidavit in reply at paragraph 8 thereof. That denial notwithstanding, and perhaps without his knowledge, the advocates dealing with this transaction had exchanged banking documents which clearly showed that the defendant's advocate Messrs A.S. Kuloba & Wangila Advocates had transferred the said sum of money to the defendant's account. These documents are annexed to a letter by Messrs A.S. Kuloba and Wangila advocates dated 3<sup>rd</sup> February, 2011, addressed to Messrs Adera & company Advocates showing that, the said advocates credited the defendants account No. 0630191617722 held at Equity Bank, Kawangware Branch, through a transfer from Commercial Bank of Africa by way of RTGS. This transaction was made on 24<sup>th</sup> September, 2009. The defendant executed an acknowledgment

on the same day where he also endorsed that, the said payment is less Kshs. 400,000/= being the lawyers' fees.

The denial by the defendant of the said receipt in his defence and replying affidavit is dishonest in view of the said documents which he has not referred to.

I find that the said sum was paid to the defendant's advocates who in turn transferred the same to the defendant's personal account and this therefore confirms that he received the said sum. The question is whether or not the plaintiff should be granted the orders sought in the present application. The undertaking to pay the said sum to the plaintiff was made by the defendant's then advocates with full authority of the defendant. They had full authority to compromise the transaction and therefore committed themselves that, the defendant shall refund the money. The defendant has not alleged that his then advocates has no authority to do so. The letters by his advocates were an admission of liability. There is no other meaning that can be attached to the said letters. Other than admission of liability it is also the commitment that the defendant shall pay the said sum. In that case therefore, and considering that the transaction has now failed, I see no defence capable of standing the test of law. I find that the plaintiff is therefore entitled to judgment on admission by the defendant through his advocates.

I believe I am right in so holding but even if I were not, the defence filed by the defendant in view of the evidence I have referred to herein above, is intended to delay the finalization of this suit, otherwise it holds no triable issues that require to go for the main trial. Having said so the same is hereby struck out in its entirety and judgment entered in favour of the plaintiff in terms of prayers No. 1,2,3,5 and 6 as prayed in the plaint dated and filed on 3<sup>rd</sup> December, 2009. Prayers No. 4 and 7 shall await a formal proof by the plaintiff.

Considering the circumstances surrounding these proceedings, I hereby grant leave to the plaintiff to execute the preliminary decree as prayed. The costs of this application and the suit shall be to the plaintiff/applicant.

Orders accordingly.

***Dated, signed and delivered at Nairobi this 19<sup>th</sup> day of July, 2011.***

**A. MBOGHOLI MSAGHA  
JUDGE**