



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Environmental & Land Case 351 of 2009**

JAMES ONYANGORE ONYANGO .....PLAINTIFF

V E R S U S

AGGREY TAIKOSH AZELWA .....DEFENDANT

**R U L I N G**

The Plaintiff was the registered owner of land known as ELDORET MUNICIPALITY BLOCK 21 (KINGONGO)/1696. On 14<sup>th</sup> July, 2008 he agreed (“J00-1”) to sell the same with all its developments to the Defendant at KShs. 2.9 million. The Defendant did not have the money. It was agreed that he was going to raise the same by way of a loan from Standard Chartered Bank. To be able to get the loan he required security. The parties agreed that the Plaintiff transfers the title documents to the property to the Defendant who would charge the same to obtain the KShs. 2.9 million loan to pay as the purchase price. In the meantime, the Defendant gave the Plaintiff a postdated cheque (“J00-2”) for KShs. 2.9 million. The Plaintiff honoured his part of the bargain and this enabled the Defendant to eventually get a loan of KShs. 2.8 million from the bank (“J00-3”). The Defendant paid to the Plaintiff KShs. 900,000/= towards the purchase price leaving a balance of Kshs. 2,000,000/= which is now being sought together with interest and costs.

The Defendant’s defence is that the parties subsequently agreed to rescind the sale agreement. He states that it was further agreed that the Plaintiff would refund the KShs. 900,000/= and then have the loan repaid and the property transferred back to him. The Defendant subsequently denied that he owed the Plaintiff the said KShs. 2 million, or at all.

The Plaintiff has applied under **Order 35 rules 1, 2, 5, 8 and 9** of the **Civil Procedure Rules** and **section 3A** of the **Civil Procedure Rules** for summary judgment on basis that the defence raises no triable issue and is a mere denial. The application was opposed by the Defendant who made reference to the alleged subsequent arrangement between the parties to rescind the agreement, have the Plaintiff refund the KShs. 900,000/= and for the property to be retransferred.

There was no reply to the defence or further affidavit by the Plaintiff to deny the Defendant’s reference to this subsequent agreement as stated in the defence.

The procedure for summary judgment is a drastic one as its effect is to deny the Defendant the opportunity to have his case determined by a proper trial where there has been discovery and the oral evidence has been subjected to cross-examination. (See **INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION –VS- DABER ENTERPRISES LTD, Civil Appeal No. 41 of 2000; [2001] IEA 75**). The Plaintiff must show therefore that his case is plain and obvious, and that the defence raises no single triable issue.

The parties are in agreement about the sale agreement entered into on 14<sup>th</sup> July, 2008 together with all its terms. The Plaintiff states he performed his part of the bargain but that the Defendant did not. The Defendant says that he did not perform his part because the agreement was subsequently mutually rescinded. Whether or not the agreement was rescinded would certainly be a triable issue and that is enough to send this dispute to trial.

The consequence is that the application for summary judgment is dismissed with costs.

**DATED AND DELIVERED AT NAIROBI**

**THIS 30<sup>TH</sup> DAY OF APRIL 2010**

**A. O. MUCHELULE**

**J U D G E**