



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL AND TAX DIVISION**

**CIVIL CASE NO. 189 OF 2010**

**BENSON MBUVI**

**KATHENGE.....PLAINTIFF**

**VERSUS**

**NELSON MUTAI T/A KANDE MUTAI MUDIZI & CO  
ADVOCATES.....DEFENDANT**

**RULING**

**1** The originating summons dated 18<sup>th</sup> March, 2010 is taken out under the provisions of **Order 36 Rule 1(d)** and **3** among other provisions of the law. The applicant is seeking for an order that the respondent be ordered to pay a sum of Kshs. 2,950,000 which was the balance of the deposit in respect of sale of LR No 209/8275/20 a transaction between the applicant and George Kiprotich. This application is based on the grounds that on 11<sup>th</sup> September, 2008, the applicant entered into a sale agreement with one George Kiprotich for the sale of the suit premises. The applicant was represented by the firm of Anthony M. Mulekyo & Co Advocates while the vendor was represented by the firm of Kandie Mutai & Co Advocates.

**2** The property was to cost a sum of Ksh. 6.5 million out of which the applicant deposited a sum of Kshs. 3,250,000/= as deposit, and the balance was to be paid upon completion. However, the title which had purportedly been issued to the vendor was cancelled by the registrar of titles. Thus the vendor had no capacity to sell the property. The applicant demanded the refund of the deposit which was paid to the vendors advocates but only a sum of Kshs. 300,000/= was refunded on 2<sup>nd</sup> December, 2008.

**3** The applicant filed the present originating summons, seeking for an order that the deposit which was paid be paid to court by the respondents. It was submitted by counsel for the applicant that the deposit was paid as stake holder according to the law society conditions and terms of sale. The advocate was not supposed to release the deposit to the vendor before completion. The respondents in breach of the agreement released the sums to the vendor without consultation, knowledge or consent of

the applicant or his advocate. That was a breach of trust and sum paid as deposit should be refunded.

4 This application was opposed; the respondent relied on the replying affidavit by Nelson Mutahi sworn on 5<sup>th</sup> July, 2010. It is contended that the deposit was to be used to pay for the rates and rents and to subsequently obtain the relevant transfer documents. The respondent conducted a search and confirmed the suit property was indeed registered in favour of George Kiprotich he therefore claimed a sum of Kshs. 284,104 to clear the rates and land rent which owed on the property. The respondent used the sum of 2.5 million to pay the vendor so as to obtain the title. It was later discovered that the title was cancelled by the Registrar thus the transaction was frustrated and the respondent refunded a sum of Kshs. 300,000 which he had retained for his legal fees.

5 This application is brought under the provisions of **Order 36 Rule 1 (b)** which provides that: **“...The payment into court of any money in the hands of the executors, administrators or trustees”**

It is common ground that the respondent acted for the vendor and in that capacity he received the deposit of Ksh. 3,250,000 under clause 2.1 of the sale agreement the sale agreement provided that:

**“The sale and purchase of the property is subject to the LSK Conditions which shall be deemed incorporated herein in extensor save in so far as LSK Conditions are not inconsistent with the provisions of this Agreement or are varied or excluded by the terms of this Agreement.”**

The respondent contends that under clause 4.1 he was at liberty to apply the deposit to obtain the title documents and that is how he paid the vendor a sum of Ksh. 2.5 million. That clause is coached in the following words:-

**“The purchaser shall upon execution of this Agreement pay to the Vendor’s advocate the sum of Kenya Shillings Three million two hundred and fifty thousand )Ksh. 3,250.000/-). The vendor is at liberty to apply the said sum towards rates and the rents and to subsequently obtaining the relevant transfer documents.”**

6. My own reading and interpretation of the above clause does not lead to the conclusion that the respondent was given liberty to pay the vendor the entire purchase price before the completion of the transaction. What is even more curious is that the respondent an advocate of the High Court to boot did not even notify or seek the applicant’s advocates consent before releasing a sum of Kshs. 2.5 million which was held as deposit. This agreement was also subject to the Law Society terms and conditions of sale which require a deposit towards a sale of land be held by an advocate a stake holder. If the deposit is to be released before completion, the vendor’s advocate can only do so with the express consent of the purchaser’s advocate.

7. The respondent is also economical with information of how the title documents were held by one Mr. Ken. No documentation is attached to support that allegation. I find the deposit was paid to the respondents who were to hold it and the only expenses they were authorized to incur were the rates and rents. Accordingly I grant the order that the respondent do deposit a sum of Kshs. 2.9 million in court within 15 days. Failure to do so, judgment is entered for the applicant in the said sum with costs and interest.

RULING READ AND SIGNED THIS 22<sup>ND</sup> DAY OF OCTOBER, 2010

**MARTHA KOOME**  
**JUDGE**