



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

**Civil Suit 1209 of 2002**

**MUTHITHI INVESTMENTS COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**HOUSING FINANCE COMPANY (K) LIMITED.....DEFENDANT**

**J U D G M E N T**

The Plaintiff and the Defendant entered into an arrangement in which the Defendant was to avail funds for purposes of mortgages to prospective purchasers of houses the Plaintiff was constructing in a scheme known as Jacaranda Estate. The initial agreement was entered into on or about 29<sup>th</sup> August, 1998 in which the Defendant agreed to set aside kshs.711,740,000/- which was to be used to facilitate individual staff of KRA to purchase the said Plaintiff's housing units. The Plaintiff was on its part to pay a commitment fee calculated at 3.5% of the amount availed by the Defendant. The parties later renegotiated the terms and on 14<sup>th</sup> May, 1999, the Defendant agreed to set aside and avail funds to the tune of Kshs.350 million. The Defendant also agreed to allow the Plaintiff to pay the commitment fee which was worked out as Kshs. 12 million, by four monthly installments. The Plaintiff paid three installments, a total of Kshs. 9 million.

The Plaintiff's contention was that the Defendant failed to perform the commitment agreed upon between the parties and has sued for a refund of the commitment fee it paid.

The Defendant has admitted that a commitment fee of Kshs. 9 million was paid by the Plaintiff and has counterclaimed for the balance in the sum of Kshs.3 million. The Defendant denies failing to make the financial commitment available as agreed with the Plaintiff and denies that it failed to perform its part of the obligation.

Each party called one witness. The Plaintiff called John Kaigua Kigochi the Plaintiff Company's Administration Manager. The Defendant called Joseph Kamau Kania the Legal Services Manager of the Defendant. I have considered the evidence adduced by both witnesses.

The advocates filed their submissions which they later highlighted in court. I have considered the same.

Even though the parties filed a statement of Agreed Issues, the issues for determination have been narrowed down considerably. The issues agreed upon by both parties were filed in court on 11<sup>th</sup> June, 2003 and are as follows:

1. Did the plaintiff apply to the Defendant for financial commitment in respect of its development scheme?
2. If the answer to (1) is yes, did the plaintiff agree to a commitment fee of 3.5% of the amount applied for?
3. Did the plaintiff pay to the defendant part of the commitment fees?
4. Did the defendant negotiate, approve and make available funds for the plaintiff's purchasers who qualified for such advances?
5. If (4) is in the affirmative, was the defendant's action, the consideration for the commitment fee?
6. What were the terms of commitment in regard to the commitment fees paid to the defendant by the plaintiff?
7. Is the defendant entitled to the balance of the agreed commitment fee as pleaded in the counter-claim?
8. Is the plaintiff entitled to the orders sought?
9. Who should bear the costs of this suit?

Issues 1, 2 and 3 are not in dispute. There is no dispute that the Plaintiff applied to the Defendant for financial commitment in respect of its development scheme. More specifically the Plaintiff initially applied to have the Defendant avail finances to the tune of Kshs. 711,740,000/- in April 1998. That figure was later reduced by the Plaintiff to Kshs.350,000,000/- in May 1999. On the other hand, the Plaintiff bound itself to pay a commitment fee of 3.5% of sums availed by the Defendant which worked out to Kshs.12 million. The Plaintiff paid Kshs. 9 million towards the commitment fee by three installments. The Agreement entered into by these two parties was legally binding and lawful.

The fourth issue is whether the Defendant did negotiate, approve and make available funds for the Plaintiff's purchasers. This issue proved to be contentious one. The Plaintiff's contention was that the Defendant failed to meet its commitment to avail the funds. The Defendant on its part maintained that it was ready and willing to avail finances to individual purchasers who qualified for the mortgages to purchase the Plaintiff's housing units. None of the two parties placed any evidence before the court to show why the project failed and who was responsible. The two parties are however in agreement that no loans were advanced for purposes of the mortgage for purchase of the Plaintiff's housing units.

There seems to have been some complexity which arose because, while the Financing Commitment Arrangement was between the Plaintiff and the Defendant companies, the prospective buyers were employees of Kenya Revenue Authority.

The letter from KRA to HFCK dated 16<sup>th</sup> December 1998 signed for the Commissioner General provided as follows:

**"PURCHASE OF JACARANDA ESTATE**

**OFF OUTER RING ROAD NAIROBI**

***The Kenya Revenue Authority has received an offer for the purchase of 233 No Houses at the above estate for their staff from Muthithi Investments Company Limited.***

***The Kenya Revenue Authority, however, as a matter of policy, intends to increasingly move away from staff housing and instead encourage staff to own their houses. Towards this goal the authority has***

***encouraged staff to interest themselves in the loan arrangements in HFCK. I am informed, however, that for various reasons well over 300 applicants are awaiting processing at KRA and HFCK. The basic problem appears to be that all applicants are handled singly.***

***In view of the existing arrangements between KRA and HFCK, find ways and means to fund the purchase of the above estate as a whole for transfer to interested staff at KRA.***

***L.M. Wendo***

**For: COMMISSIONER GENERAL”**

The letter speaks for itself. It is apparent that KRA’s involvement in the matter was not sought and or clarified before the Plaintiff approached the Defendant company to avail the funds for purchase of the former’s houses by KRA staff. It is also apparent from this letter that KRA declined to involve itself with the project and instead chose to encourage its staff who were interested to purchase the houses to go it on their own at individual level.

HFCK replied to KRA by a latter dated 17<sup>th</sup> December, 1998, paragraph 3, 4 and 5 of that letter stated as follows:

***“It has also been noted that KRA is encouraging its staff to own their own houses and therefore to interest themselves in the loan arrangements with HFCK. You have also indicated that for various reasons well over 300 applicants are waiting processing at KRA and HFCK. From our records there does not seem to be any application received from your staff on the above Estate awaiting processing and it would be advisable for your staff handling this matter to get in-touch with our Lending Manager to sort out details.***

***The recently signed agreement between KRA and HFCK was intended to assist the Authority help its staff acquire their own houses on fairly reduced rate of mortgage interest using the back-up funds at a rate mutually agreed between KRA and HFCK. In all cases the applicants would have to apply individually so as to satisfy the lending conditions.***

***However the last paragraph of your letter is that you wish HFCK to make advance deposit payments to the developer on behalf of your staff and then recover it from the loan proceeds when the loan has been processed and documents registered. You should then authorize the Banking Manager to remit such payment from your existing investment/deposit accounts. It would however be important to indicate the details of the staff for who the deposit is being paid besides ensuring that such staff do apply for the loan. Through the same arrangement the developer should authorize the Lending Manager to deduct from the loan proceeds the amount of the deposit so paid in advance by KRA and refund the same to the authority.”***

These paragraphs speak for themselves. Each individual staff member was to apply and satisfy the lending conditions individually.

There is no evidence adduced by either party to shed light on the question why the project failed and I am unable in the circumstances to determine that point. I however find that the burden lies with the Plaintiff to show why the project failed. Despite lack of evidence on that point, I do find that no evidence was adduced to controvert the Defendant’s evidence that the funds it set aside then were still available if required.

Issue five deals with the question what was to be the consideration for the commitment fee. This issue will be dealt with together with issue No. six which is; what were the terms for the commitment in regard to the commitment fees paid to the Defendant by the Plaintiff.

The Plaintiff’s evidence seemed to be circuitous. John’s (PW1) initial evidence was that the Plaintiff was seeking finances for Development of the Housing Scheme. Later on in his evidence in-Chief, he testified

that the Plaintiff sought finances both for the Development of the Project and for facilitation of mortgages to prospective purchasers. The Defendants letter to the Plaintiff dated 29<sup>th</sup> April 1998 is however clear that what the parties finally negotiated was commitment of finances to be availed as mortgages to individual qualified purchasers.

The terms of the commitment for each of the parties are set out in the Defendant's letter to the Plaintiff dated 29<sup>th</sup> April, 1998 which is set out in full hereunder.

*"The Director*

*Muthithi Investments Co. Ltd.,*

*P. O. Box 18755,*

*NAIROBI*

*Attention: Mr. Maina*

*Dear Sir,*

*RE: PROPOSED JACARANDA COURT*

*Further to your letter dated 15<sup>th</sup> April, 1998 I am happy to inform you that the appraisal exercise has now been completed except for the shopping complex which requires more clarification. In principle this company is in a position to provide a commitment as analyzed below:*

House Mortgage	Mortgage units	maximum loan <u>Commitment</u>	No. of	Maximum <u>Type</u>	<u>Valuation</u> at 80% of
	Shs.	Shs.	Shs.		
Type A	3,700,000	2,960,000	89		263,440,000
Type A1	3,700,000	2,960,000	42		124,320,000
Type B	3,700,000	2,960,000	48		142,080,000
Type C	4,000,000	3,200,000	54		172,800,000
Nursery					
School	13,000,000	9,100,000(70%)	1		<u>9,100,000</u>

**Maximum Possible Commitment (Excluding 9 shops) 711,740,000**

*As indicated above HFCK is in a position to provide a total commitment of Shs.711,740,000.00 to be available to qualified individual purchasers subject to the following conditions:*

*(a)Houses to be constructed according to approved plans and specifications.*

*(b)Each unit to have a separate title to be charged in favour of this Company to secure the loan.*

*(c) Access Road and Estate Roads to be made to the approved standard.*

**(d) An indication of the total commitment required.**

**(e) An indication of when the loans are expected to be disbursed for individual purchasers on completion of houses and registration of security documents.**

**(f) A commitment fee calculated at 3.5% of the amount of commitment required to be paid up-front within 30 days from the date of this letter.**

**(g) A Hand-over Certificate jointly signed by the buyer and the developer to be submitted before the loan proceeds are disbursed for each unit.**

**Please sign the duplicate copy of this letter and return it together with your cheque for payment of commitment fee on or before 30<sup>th</sup> May, 1998.**

**Yours faithfully,**

**J.K. Njenga**

**Chief Manager Advances.”**

Under those terms, what was the Defendant’s consideration for the commitment? In evidence, Joseph (DW1) while admitting that the above letter was silent as to the purpose of the commitment fee, testified that the Defendant’s consideration was to make available the funds required in sum of Ksh.350 million. Joseph tried to justify the reason the commitment fee was required by the Defendant by stating that it was used to cover costs incurred, valuations carried out, technical resources and marketing. It is my view however that how the Defendant was to utilize the commitment fees paid to it by the Plaintiff is irrelevant. The important issue is that the parties agreed to the payment of the fee and are bound by those terms than was the Defendant’s consideration to same.

Mr. Henia for the Plaintiff submitted that there was a total failure of consideration on the grounds that the Plaintiff did not enjoy the benefit of any part of what he bargained for. Mr. Henia submitted that the failure of consideration has to be judged from the payer’s point of view. Counsel urged that consideration in this case was not the promise but the performance of the promise.

Mr. Gachuhi on his part relied on a text **Asset and Project Finance: Law and Precedents Release 8 paragraph B1-170** on Fees and Expenses thus:

**“A lender will usually charge a ‘front-end fee’ to cover its costs of negotiating and approving the transaction. Some lenders are happy to have details of fees payable included in the Loan Agreement; others will prefer fees to be dealt with in a separate, confidential document which will not be disclosed to, for example, potential sub-participants in the Loan.**

**Commitment Commission will generally only be paid where a significant period is likely to elapse between the Lender’ ‘committing’ to make funds available (which will have an effect on the Lender’s own ability to earn funds elsewhere because it has contracted to make those funds available to the Borrower pursuant to the Loan Agreement.”**

Counsel also placed reliance on the English Case of **William v. Roffey Bros & Nichollis (Contractors) Limited [1991] 1QB 1** where it was held:

**“Where a party to a contract promised to make an additional payment in return for the other party’s promise to perform his existing contractual obligations and as a result secured a benefit or avoided a detriment, the advantage secured by the promise to make the additional payment was capable of constituting consideration therefore, provided that it was not secured by economic duress or fraud...”**

I have considered the submissions by both counsel on this issue. **Blacks Law Dictionary Sixth Edition**

defines commitment fee as an amount paid to the lender by a borrower for loan commitment in addition to interest especially in real estate transactions.

According to the **Hand book of Financial Growth by Kenneth H. Marks, Larry E Robbins and Gonzalo Fernandez**, commitment fees are generally payable when the lender issues a commitment letter which is at which point the proceeds are factored into the lenders loan base, and consequently reduce the amount of loans that could otherwise be originated by the latter. That is the reason why the consideration by the party committing the funds is complete the moment it issues a letter confirming such commitment.

From the terms of the Agreement as set out in the letter of 29<sup>th</sup> April 1998, the commitment fees was payable upfront. In fact from the said letter, the total commitment fee was expected within 30 days of the date of the said letter. From the tenor of the letter I would say that it was very clear that the Defendant's consideration was in its commitment to set aside and make available finances for individual purchasers of the Plaintiff's housing units.

The English case cited by Mr. Gachuhi, **William v Roffey Bros**, supra, is persuasive. It clearly states that consideration was constituted by the advantage secured by the promise to make additional payment. In the instant case the Defendant's consideration was its promise to make finances available to facilitate prospective purchasers of the Plaintiff's housing units. The burden lay with the Plaintiff to show that no funds were availed as promised. That burden was not discharged.

The Plaintiff's obligation on the other hand was to pay the commitment fee in order to secure the Defendant's commitment to make available the sums it requested. The Plaintiff did not fully meet its obligation as it failed to pay the total commitment sum of Kshs.12 million. It paid only Kshs. 9 million. I do find that the Plaintiff failed to meet its part of the bargain as it did not fully meet its commitment. Consequently the Agreement between the two parties was frustrated or breached by the Plaintiff. Having breached the terms of the contract, it does not matter whether or not the Defendant availed the sums required. Further, I find that in any event the Plaintiff did not adduce evidence to show that the Defendants frustrated the Agreement. The evidence adduced supports a finding that on the basis of the Plaintiff's failure to pay the entire commitment fee, it was the party that frustrated the Agreement.

The seventh issue is whether the Defendant is entitled to the balance of the commitment fee and the eighth issue is whether the Plaintiff is entitled to the orders sought in the plaint. I will begin with the latter. The Plaintiff failed to meet its part of the bargain and/or breached the terms of the Agreement, by failing to pay the (total) commitment fee as required under the contract. The issue of forfeiture or penalty does not arise and the case cited by Mr. Henia **Workers Trust & Merchant BK Limited vs. Doja Investment Limited [1990] 2ALL ER 370** is distinguishable. The cited cases dealt with 25% deposits paid by a purchaser of land. Deposits in land purchase contracts are different from commitment fees for securing funds in a financial institution. Having been in breach, it cannot expect to benefit from its own omission and or failure. It is not entitled to the prayer sought. The doctrine of unjust enrichment and that of restitution suggested by Mr. Henia for the Plaintiff does not apply to the circumstances of this case. The Plaintiff was bound to pay the commitment fees as agreed between the parties and as such it cannot claim that the Defendant has unfairly enriching itself.

As to whether the Defendant is entitled to claim the balance of the commitment fee, Mr. Henia has urged that since no finance was ever provided by the Defendant it cannot claim the balance of the commitment fee. Counsel further submitted that the Defendant failed to adduce any evidence to establish the loss it suffered, and that it was not conscientious for the Defendant to retain the Kshs. 9 million already paid nor to claim the additional payment of Kshs.3 million.

Mr. Gachuhi on his part relied on the pleadings in the plaint, admissions made by the Plaintiff, the evidence adduced and the law for the proposition that the Defendant was entitled to its counterclaim.

Listening to the Plaintiff's witness John, and to submissions by Mr. Henia, it was abundantly clear to me that both of them misapprehended what a commitment fee is. The submissions that Defendant had to prove loss and that the Plaintiff did not benefit under the Agreement are all misconceptions of what the

whole Agreement between the two parties was about. I do not intend to repeat here what I have already stated. Suffice it to say that the Agreement was for the Defendant to set aside/avail finances to be used to lend to prospective purchasers to enable them buy the housing units from the Plaintiff. The Defendant's consideration was his promise to avail the funds. The Defendant has all along maintained that the funds are available even at the date this case was heard. What the Plaintiff stood to gain from it could have been payments from purchasers of the houses financed by the Defendant, if the deal went through. The Plaintiff has been evasive to disclose why the deal failed. It has however admitted that it did not pay the commitment fee as agreed and further that it has since sold off all the housing units.

The Defendant is entitled to the balance for reasons, in addition to those set out above, the Defendant met its part of the bargain by setting aside the astronomical sum of Kshs. 350million. It means the Defendant reduced its lending capacity and or loans it could avail to other customers by that figure. The act of making available the funds was a big burden on the Defendant's part. The Agreement between the parties did not say what could happen in case of breach by either side. It was silent on the issue of a refund of the commitment fee. It was also silent on what should happen if the commitment fee was not fully paid.

The Defendant is a financial institution which lends out money obtained from customers' deposits, funds sourced from without, etc. as explained by Joseph in his evidence. I would find that the balance of the commitment fee could be claimed as a breach of contract and alternatively it could be claimed as a practice in trade usage or custom. I do find that, on a balance of probabilities, the Plaintiff's case should fail and the Defendant's case should succeed. Since the Defendant did not take any action to recover its claim from the Plaintiff until it was sued four years down the line, the Defendant should not recover any interest prior to the date of filing its defence and counterclaim. There was no demand for payment issued by the Defendant to the Plaintiff and so it will not be entitled to costs of the counterclaim.

In conclusion, I enter judgment as follows:

**1. The Plaintiff's suit is dismissed in its entirety with costs to the Defendant**

**2. Judgement be and is hereby entered in the counterclaim for the Defendant against the Plaintiff in the sum of Kshs.3,000,000/- with interest from 17<sup>th</sup> January 2003 at the prevailing commercial base lending rates until payment in full.**

**Dated at Nairobi this 26<sup>th</sup> day of June, 2009.**

**LESIIT, J.**

**JUDGE**

**Read, signed and delivered, in the presence of:**

Munyororo holding brief for Mr. Henia for the Plaintiff

Mrs. Opiyo holding brief for Mr. Gachuhi for the Defendant

**Dated at Nairobi this 17<sup>th</sup> day of July, 2009.**

**LESIIT, J.**

**JUDGE**