



**REPUBLIC OF KENYA**

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

**Civil Case 9 of 2000**

**JACKSON K. KIBOR:.....PLAINTIFF**

**VERSUS**

**SAMUEL K. RONO:.....DEFENDANT**

**RULING**

In his testimony, the plaintiff as PW1, tendered in evidence a Sale Agreement dated 11<sup>th</sup> January, 1991. The said document was accepted as P. Ex.No.5. In his continued testimony PW1 purported to deny that he had received from the Defendant a sum of kshs.9,000,000 towards the agreed price of Kshs.22,500,000/=. He said that while the agreement was drawn and witnessed by an Advocate, yet he actually did not receive the said sum of Kshs.9,000,000/= as stated in the Sale Agreement.

Counsel for the Defendant immediately objected to the attempt by the plaintiff from departing from the express terms of the agreement. The said counsel Mr. Machio was of course invoking the provisions of section 97 and 98 of the Evidence Act which are clear on this question. He objected to any oral agreement or statement for the purpose of contradicting, varying, adding or subtracting from the terms of the sale Agreement.

On his part counsel for the plaintiff Mr. Katwa submitted that; they were entitled to prove such oral agreement or statement since they had pleaded in the plaint and Defence to the counterclaim matters touching on illegality, fraud, and failure of consideration. That this was an exception to the provisions of section 97 and 98.

I have considered the pleadings and submissions of counsel vis-à-vis the objection taken.

In the Amended plaint, the plaintiff pleaded in paragraph 5C that the agreement was an agreed “phony agreement” to induce the AFC to believe that the Defendant as purchaser had paid part of the sale price for him to get a loan for the balance. At this stage the court does not know the legality, validity or otherwise of such an arrangement, if truly it was made. What is clear is that the plaintiff disclosed in his plaint that according to him the agreement was “*an arrangement*” between the parties so that the AFC could loan the sum of Kshs.13, 500,000/= to the Defendant.

In the plaintiffs Defence to counterclaim, the plaintiff denied that he was paid the sum of Kshs.9, 000,000/. =. He also denies that the Defendant paid the balance of the sale price to AFC. As a result whatever the situation, the court must as a matter of law and fact establish and determine when the sum of Kshs.9, 000,000/= was paid, the mode of payment and place of payment.

The Defendant claims he paid a sum of 19,037,612/= through his counterclaim. This is denied by the

plaintiff. So this is an issue for determination by the court.

Section 98 (1) provides for an exception to the general rule against introducing or admitting any oral agreement or statement to depart from the strict terms and conditions of a document.

It provides that:-

**“98. When the terms of any contract or grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 97, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in the interest for the purpose of contradicting, varying, adding to or subtracting from its terms:-**

***Provided that –***

**(i) Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, mistake in fact or law;.....”**

It is my view that if the sale Agreement was a “**phony agreement**” as suggested by the plaintiff and an instrument to dupe AFC into lending the loan of Kshs.13, 5000, 000/= or any “balance” of the purchase price then there is a likelihood that such an agreement could be invalidated as it would amount to fraud against AFC which is a public body belonging to the Kenyan tax-payer. In any case it would be against public policy to enforce such an agreement for such illegal conduct, if found to be true.

In the premises, I do hereby dismiss the objection. I do allow the plaintiff to tender any evidence of the alleged oral agreements and make such statements to prove the same. I am of the view that the exceptions set out in section 98 (1) come into play in this case.

Dated and Delivered in Eldoret this 28<sup>th</sup> day of March, 2008.

***M.K.IBRAHIM***

**JUDGE**