



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Case 2132 of 2000**

**1. ANASTASIA WAMBUI NDUNGU**

**2. MOSES MUTHIORA KIBUE .....PLAINTIFFS**

**V E R S U S**

**JAMES MUTUA .....DEFENDANT**

**R U L I N G**

On 15<sup>th</sup> October 2008 the following consent order was entered herein:-

**“ORDER: By consent:-**

- 1. Relief No (a) in the amended plaint dated 9<sup>th</sup> August 2002 be and is hereby marked withdrawn, the issue of costs therein to be argued later and decided by the court.**
- 2. Judgment be and is hereby entered for the Plaintiff against the Defendant in the sum of KShs 200,000/00, the same being a refund of the purchase price paid. Costs on the same and interest to be argued later and decided by the court.**
- 3. Arguments on costs and interest on 18/11/2008.**
- 4. ....”**

Arguments were eventually made by written submissions, which I have carefully considered, together with the cases cited. Both costs and interest are at the discretion of the court. See **sections 26 and 27 of the Civil Procedure Act, Cap 21.**

I will first deal with the issue of costs. The Plaintiffs sought in this suit the main relief of specific performance. In the alternative they sought refund of the purchase price of KShs 200,000/00. A litigant is entitled to plead in the alternative.

It was pointed out quite early to the Plaintiffs by the Defendant that they could not succeed on the claim for specific performance for want of land control consent. Eventually the Plaintiffs conceded that point, hence the consent order of 15<sup>th</sup> October 2008. I therefore deem that the Defendant succeeded on the claim for specific performance, notwithstanding that the same was withdrawn.

It also appears that the Defendant had offered, quite early, to refund the purchase price of KShs 200,000/00 and deposited the same in court for that purpose. But the parties could not sooner enter an appropriate consent for want of agreement regarding costs and interest. I reiterate that the Plaintiffs were entitled to seek in the alternative a refund of the purchase price. They have eventually obtained judgement for that refund. I consider that they have succeeded on the alternative claim.

Though costs are at the discretion of the court, the proviso to section 27(1) of Cap 21 aforesaid decrees that costs shall follow the event unless the court or judge shall for good reason otherwise order. The events here are that the Defendant has succeeded on the main claim while the Plaintiffs have succeeded on the alternative claim. So, the Defendant would be entitled to costs on the main claim while the

Plaintiffs would be entitled to costs on the alternative claim. Those costs would in all probability cancel each other out. So, in exercise of my discretion I order that the parties bear their own costs of the suit.

Regarding interest on the award of Kshs.200,000/00, I am persuaded by the statement of Law, JA in the case of **Nyakinyua Kang'ei Farmers co. Ltd. vs Kariuki Gathecha Resources Ltd (No.2) [1984] KLR at page 117**, to the effect that the refund of KShs 200,000/00 sought in the alternative claim did not become payable as a debt until the main claim of specific performance was withdrawn on 15<sup>th</sup> October 2008. Interest should therefore be awarded from that date. I hereby order that there shall be interest at court rates upon the KShs 200,000/00 awarded from the date of judgement (15<sup>th</sup> October 2008) till payment in full. As already ordered, the parties shall bear their own costs of the suit. Those shall be the orders of the court.

**DATED AT NAIROBI THIS 17<sup>TH</sup> DAY OF DECEMBER, 2008.**

**H. P. G. WAWERU**

**JUDGE**

**DELIVERED THIS 19<sup>TH</sup> DAY OF DECEMBER, 2008**