



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL CASE NO.1031 OF 2002 (OS)**

**DAVID OMBISI.....APPLICANT**

**VERSUS**

**JOSEPH WAMBUGU NJERI.....RESPONDENTS**

**JUDGMENT**

This suit was commenced by way of an Originating Summons dated 13th June, 2002.

At the start of the trial, following the plaintiff's application, the court directed that the suit should proceed as if the same had been commenced by way of a plaint. This direction was made pursuant to the provisions of Order 36 rule 10.

However, before I proceed to analyse the evidence before the court, I think it prudent to first set out in brief resume, the history of this matter. The Originating Summons was filed on 19th June, 2002. It is supported by the affidavit of the Plaintiff, sworn on 13th June, 2002.

The record shows that the Plaintiff filed an application on 8th August, 2002, seeking leave to serve the Defendant by way of substituted service. On 22nd October, 2002, Githinji J (as he then was) granted leave to the Plaintiff to serve the Defendant either by an advertisement in a local daily newspaper or alternatively through his postal address.

The Plaintiff opted to effect service through advertisement in the "East African Standard" newspaper dated 30th October, 2002. I have therefore satisfied myself that the Defendant was properly served with the Originating Summons. However, he did not enter appearance nor file any documents in response to the originating summons.

Subsequently, the Plaintiff sought and obtained Directions from this court, on how to proceed with the trial. Following the said Directions, the case was set down for trial before me.

During his testimony, the Plaintiff testified that he had entered into a contract with the Defendant, whereat the Defendant would sell to him a vehicle, at an agreed purchase price of Ksh.400,000/=. Pursuant to the terms of the contract the Plaintiff was to pay a deposit of Ksh.250,000/=. He was then to take possession of the vehicle, whilst the Defendant would retain the log book until such time as the balance of the purchase price had been paid over to the Defendant.

The Plaintiff produced in evidence, a withdrawal slip for Ksh.250,000/=. He says that the sum was paid to the Defendant, but the defendant failed to honour his part of the bargain. Apparently, the Defendant started playing a "hide and seek" game with the Plaintiff, whereupon the Plaintiff lodged an official

complaint with the police.

It is clear to the court that the action of lodging the official complaint compelled the Defendant to take more seriously the concerns raised by the Plaintiff. He therefore paid Ksh.80,000/= to the Plaintiff and also signed an agreement (P.Exhibit 3) promising to pay the balance.

By the same agreement, (P Exhibit 3), the Defendant offered security in the form of the title deed to his land, Title No.Muguga/Kahuho/1272. He further said that he would pay the balance by 31st March, 2001, failing which the Defendant was entitled to sell the security, so as to recover the balance still outstanding.

The Defendant did not pay the balance of Ksh.170,000/= by 31st March, 2001 as had been agreed. Indeed he did not pay the balance or any part of it, at all.

In the meantime, the Plaintiff has, in his custody, the original Title Deed for the land which was offered as security. He had also taken the precaution of registering a caution against the said title, so as to secure it against further dealings. However, as the title remains in the name of the plaintiff, it is still unavailable to the plaintiff for sale, with a view to recovering the debt owed to him. It is for that reason that the Plaintiff has come to this court, seeking orders that will empower him to give effect to the terms of the agreement dated 1st February, 2001.

Having given due consideration to the evidence adduced before this court, I am satisfied that the Defendant did give the suit property as security to the Plaintiff. The Defendant also surrendered the Title Deed of the said property to the Plaintiff. Furthermore, by his express words, the Defendant stipulated that if he did not pay the debt due to the Plaintiff.

“Mr. Ombisi will have the right and obligation to sell the said land to recover the unpaid amount”.

In Civil Appeal No.227 of 1999 John Njoroge Michuki V. Kenya Shell Limited, the Court of Appeal expressed itself as follows;

“As regards contracts between persons not under a disability or at arms length, the courts of law should maintain the performance of contracts according to the intention of the parties and should not overrule any clearly expressed intention on the basis that the judges know the business of the parties better than the parties themselves”.

In the same judgment, the court went on to say that;

“Whatever the document, it must receive a construction according to the plain meaning of the words and sentences contained therein; for interpreters of any document have to deal with the written expression of the of the writer’s intention, and courts of law have to carry into effect what the writer has written and not what it may be surmised, on whatever probable grounds, that he intended to have written. What a man has said ought to be acted upon unless it is clearly proved that he meant something different from what he said”.

I therefore find that by the words in the agreement dated 1st February, 2001 the Defendant intended to and did confer upon the plaintiff beneficial interest in the suit property. In consequence thereof, the Defendant is deemed to be holding the property in trust for the Plaintiff.

Following the Defendant’s failure to pay the debt, the Plaintiff has become entitled to have the land transferred to him, so that he can give effect to the terms of the agreement dated 1st February, 2001.

In order to have the land transferred to the Plaintiff, the Defendant is hereby directed to execute and deliver to the plaintiff, an appropriate Transfer of the suit property, Title Number Muguga/Kahuho/1272, Kiambu. The transfer should be executed and delivered by the Defendant to the Plaintiff within 30 days of service of the Decree. But should the Defendant fail to execute and/or deliver the Transfer to the Plaintiff within the period stipulated herein, the Registrar of this Honourable Court should execute the

requisite Transfer.

In conclusion, judgment is granted in favour of the Plaintiff in terms of prayers 1, 2, 3 and 4 of the Originating Summons dated 13th June, 2002. The costs of the suit are awarded to the Plaintiff

DATED at Nairobi this 1st day of March, 2004.

**FRED A. OCHIENG**

**Ag. JUDGE**