



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL CASE NO. 71 OF 1997**

**ALFRED N. O. MICHIRA ..... PLAINTIFF**

**VERSUS**

**GESIMA POWER MILLS LTD. .... DEFENDANT**

**JUDGMENT**

The plaintiff has instituted this suit to recover the total sum of Shs.5,090,000/= which he claims is due to him from the defendant pursuant to the terms and conditions of an agreement entered into between the two parties which said agreement the plaintiff alleges was breached by the defendant. The claim is denied by the defendant.

The agreement in question is dated 21.8.1996 and is in writing. Although it was supposedly witnessed by advocates, it appears to have been 'home-made' and contains several contradictory clauses framed in unusual terms. It is for the sale of a piece of land known as L.R. No. 209/4194/16 situate at Nairobi measuring 0.1607 of an acre owned by the defendant. The agreed price was Shs.10,000,000/= which according to clause 3 thereof was to be paid as follows:-

***i) Kshs.1,000,000/= (ONE MILLION SHILLINGS ONLY) being ten (10%) per cent of the purchase price shall be paid by the purchaser upon the vendor executing this agreement by Cheque No. 196780 K.C.B. KISII Dated 21 st August, 1996.***

***ii) Part of the balance of the Purchase price namely Kshs.2,000, 000/= (Read Kshs TWO MILLION SHILLINGS ONLY) shall be paid to the Vendor within seven (7) days of the Vendor delivering the parcel of Land in vacant possession to the purchaser.***

***iii) Kshs.7,000,000/= (READ SEVEN MILLION SHILLINGS ONLY) shall be paid upon the Vendor complying with condition No. 6 herein."***

A careful reading of the sale agreement reveals that after providing that payment of the sum of Shs.2,000,000/=, the balance of the purchase price would be made within 7 days of **'delivery of the parcel of land in vacant possession of the property to the purchaser'** the same agreement goes on, in clause 6, to recognise the presence on the property of existing tenants (it refers to them as 'occupation') and clearly indicates that the transfer of the property would be made subject to those tenancies upon which event the balance of the purchase price would then be paid to the vendor (Clause 7).

My interpretation of the two clauses is that while clause 3(ii) makes provisions for payment of Shs.2,000,000/= to the vendor by the purchaser upon delivery of the subject property in vacant possession, clause 6 thereof read together with clause 7 imply that what clause 3(ii) provides cannot be done; the property would have to be delivered subject to the existing (apparently protected) tenancies.

With that kind of vague and under agreement, it was not surprising that immediately upon the signing of the agreement and payment of the initial deposit of Shs.1 million, misunderstandings promptly arose between the parties and the transactions came to a dead end.

The evidence tendered on behalf of the parties particularly that by Stanley Mayieka (DW1), a director of the defendant's company clearly brings out the lack of mutual understanding between the contradicting parties. He stated:-

***“After payment of the Shs.1 million deposit, the balance being Shs.9 million was to be paid within 90 days. The plaintiff did not however pay the money within the agreed period. He kept on saying (that) he would pay (and) that he was looking for a loan. He also wanted the tenants in the premises to vacate.”***

According to DW1 further evidence, the defendant did not agree with the plaintiff's stance. It accordingly informed him that the sale was not subject to a loan. And regarding the removal of the tenants, the defendant's position as explained by DW1 was that the tenants would be removed only upon full payment of the purchase price. Further, although the agreement provided for payment of Shs.2 million within 7 days of delivery by the defendant of vacant possession to the purchaser, DW1 stated that the defendant was only prepared to deliver vacant possession of the property if it received confirmation from a lawyer that the balance of the purchase price had been paid. There was of course no reference in the agreement to any payment through a lawyer but the fact that DW1 who appeared to be a sincere and truthful witness (as indeed the plaintiff also was) honestly believed that under the terms of the agreement, the defendant was not obliged to give possession of the premises at all, leave alone a vacant one, to the plaintiff unless and until the purchase price was paid, shows how far apart the two parties were in their understanding and interpretation of their respective obligations under the agreement.

DW1's further evidence was that by the time the period of 90 days within which the plaintiff was required to pay the balance of the purchase expired on 20.11.96, not a single cent had been paid and the property was subsequently sold to another party for a similar amount i.e. 10,000,000/=.

On his part, the plaintiff did not seem to adhere to the terms of the agreement either. He testified that after payment of the initial deposit of Shs.1 million, the balance was to be paid upon execution of the transfer. That evidence is clearly not in accordance with the clauses 3(ii), 6 and 7 of the agreement entered into between the parties. Although the plaintiff claims that the delay in performing the contract was occasioned by the defendant, consequence upon which he claims to have written to the defendant notifying it of its default, that alleged notice was written long after the time reserved for the completion of the transaction had expired. Furthermore, there is no evidence that the plaintiff was at any time prior to that alleged notice ready and willing to perform his part of the contract. The conduct of the plaintiff therefore gives credence to DW1's evidence that the plaintiff may not have been in a position to pay the balance of the purchase price within the time specified in the agreement.

My view of this matter based on the evidence as briefly summarised above, is that neither of the two parties to the agreement was at any time in a position to perform its part of the agreement. Accordingly given the vague, uncertain and contradictory nature of the agreement, it is clear that there was no meeting of the minds of the contracting parties. The agreement between them is clearly void and incapable of enforcement. Consequently, the clause providing for the payment of Shs.4 million by either of the parties who breached the contract upon which this suit is founded is not enforceable against either party. Furthermore, there is in my view no adequate or satisfactory evidence that either party was in breach of the agreement.

It is acknowledged by both parties that the plaintiff paid Shs.1 million as a deposit of the purchase price. It is also accepted by both parties that the sum has now been refunded. However, prior to the refund the defendant kept the money for sometime. It had been paid in respect of a consideration which has now wholly failed. Both parties are in business and obviously the plaintiff must have sustained some financial loss on account of the sum of Shs.1 million having been kept by the defendant even after it had sold the property to a third party. By the same token, the defendant must have acquired some financial gain by

keeping the plaintiff's money pursuant to this unenforceable contract. Consequently in order to return the parties to the respective positions they were in prior to the payment of the sum of Shs.1 million, the defendant must refund to the plaintiff not only the sum of Shs.1 million (which it is agreed has been done) but also pay interest to the plaintiff on the said sum at commercial rates because that is the rate the plaintiff must have been paying to his bankers from the date of receipt of the money by the plaintiff till the date the refund was effected.

In the event apart from payment of interest on the deposit as aforesaid, the plaintiff's claim against the defendant fails and is dismissed. However, in view of the outcome of the matter, each party will bear his/its own costs of the suit.

**Dated at Nairobi this 17th day of May, 2001.**

**T. MBALUTO**

**JUDGE**