



REPUBLIC OF KENYA

ELC CASE NO. 160 OF 2014 (OS)

WILSON MIRANGI WACUKA.....PLAINTIFF

VERSUS

PETER MATHENGE GITONGA (Practicing as

MATHENGE GITONGA & CO ADVOCATES.....DEFENDANT

JUDGMENT

1. The dispute in this suit relates to an alleged land sale contract between the plaintiff and the defendant. On 20/5/2014, the plaintiff took out an originating summons dated 15/4/2014 under **Orders 37 and 52 of the Civil Procedure Rules**, seeking a determination of the following verbatim questions:

- 1. Whether the completion period for the undertaking is due.***
- 2. Whether the plaintiff is entitled to specific performance of the undertaking.***
- 3. Whether the plaintiff is entitled to damages for non-performance.***
- 4. Whether the plaintiff is entitled to costs.***

2. The plaintiff subsequently amended the originating summons on 13/10/2015 and the amended originating summons was filed on 23/10/2015. Through the amended originating summons, the plaintiff sought the court's determination on the following verbatim questions:

- 2. Whether the plaintiff is entitled to specific performance of the undertaking by the defendant as vendor and as an advocate in his professional capacity***
- 3. Whether the plaintiff is entitled to a refund of Kshs. 930,000 by the defendant within 14 days being sums deposited with the defendant, and interest accruing at 27% per annum from 12th July 2013 until payment in full, including damages for non-performance.***
- 4. Whether the plaintiff should be at liberty to enforce the said order against the defendant by the attachment of his moveable and immovable assets in Kenya and or arrest and committal to civil jail of the defendant until such a time that the sums of Kshs. 930,000 and interest accrued shall have been paid.***
- 5. Whether the plaintiff is at liberty to apply for such further or other orders and or directions as the honourable court may deem fit and just to grant.***
- 6. Whether the plaintiff is entitled to costs.***

3. On 16/3/2017, parties mutually agreed to dispose the originating summons through affidavit evidence, an agreement that was accepted by the court. The court subsequently directed the parties to file written submissions on the originating summons.

4. On 1/3/2021, Mr Mandala, counsel for the plaintiff, orally submitted to the court from the Bar that the defendant had "returned the 10% deposit" and that the only outstanding questions in the originating summons related to costs and interest. He stated from the Bar, in the absence of counsel for the defendant, that the refund was made on 20/6/2019. He added that the plaintiff had abandoned "prayers 1, 2 and 4". He invited the court to render a determination on the two questions relating to interest and costs of this suit. Consequently, this judgment will be confined to determining only two questions: (i) Whether the plaintiff is entitled to interest at 27% p.a from 12/7/2013 until payment in full; and (ii) Whether the plaintiff is entitled to costs of this suit against the defendant.

5. The plaintiff filed brief written submissions dated 23/7/2019. On interest, counsel for the plaintiff submitted that the interest rate of 27%

per annum was the “current commercial interest rate as sought by the plaintiff, which was the trade usage and custom norm within the banking industry during the pendency of this suit”. Counsel urged the court to be guided by the provisions in **Section 26** of the **Civil Procedure Act** and the decision in **Feroz Nuralji Hirji v Housing Finance Company of Kenya Ltd & Another [2015] eKLR**. Counsel urged the court to award the plaintiff compound interest. On costs, counsel submitted that costs follow the event, hence the same should be awarded to the plaintiff. The defendant did not file written submissions.

6. I have considered the originating summons together with the defendant’s response thereto. I have also considered the plaintiff’s brief written submissions, the relevant legal framework, and the relevant jurisprudence. The plaintiff having abandoned all the other questions except the two questions relating to interest and costs of this suit, the following are the two remaining questions that fall for disposal in this originating summons: (i) Whether the plaintiff is entitled to interest at 27% p.a from 12/7/2013 until the date of payment in full; and (ii) Whether the plaintiff is entitled to costs of this suit. I will make brief sequential pronouncements on the two questions in the above order.

7. The plaintiff moved the court on the restrictive framework of an originating summons under **Order 52 rules 4 and 10** and **Order 37 rules 1 and 3** of the **Civil Procedure Rules**. For a start, the framework in **Order 52 rules 4 and 10** of the **Civil Procedure Rules** relates to proceedings taken under the **Advocates Act** and applies to a scenario where the relationship of advocate and client exists or has previously existed. In those circumstances, a client would be entitled to take out an originating summons, inviting the court to order the advocate to deliver accounts and documents relating to the relevant brief.

8. There is no evidence that there was a client and advocate relationship between the parties to this suit. Indeed, paragraph 3 of the plaintiff’s supporting affidavit indicates that the plaintiff was represented by a different advocate. It reads thus:

“3. That on the 13th July 2013 through my then advocates, I forwarded Khs 930,000/- being the 10% deposit to the defendant as the Vendor by SWIFT transfer. Annexed hereto and marked WM1 is a copy of the said payment.”

9. Secondly, the questions which were itemized in the amended originating summons are not any of the matters contemplated under **Order 52 rules 4 and 10** of the **Civil Procedure Rules**. To this extent, I do not think the questions placed before the court can be properly answered on the platform of an originating summons taken out under **Order 52 rules 4 and 10** of the **Civil Procedure Rules**.

10. Besides **Order 52 rules 4 and 10** of the **Civil Procedure Rules**, the amended originating summons was also anchored on **Order 37 rules 1 and 3** of the **Civil Procedure Rules**. The plaintiff did not address the court on the relevance of any of **Order 37 rule 1**. On my part, I have not found the relevance of **Order 37 rule 1** of the **Civil Procedure Rules** to this originating summons. Secondly, **Order 37 rules 3** would be relevant if only the plaintiff placed before court documentary evidence of an uncontested contract of sale between the parties to this originating summons. No documentary evidence of contract of sale was annexed to the amended originating summons. Secondly, the sale agreement annexed to the initial originating summons related to a contract between **Peter Gachenga Kimuhu** (as **Vendor**) and the plaintiff herein (as **Purchaser**). It is inconceivable that this exhibited agreement for sale which relates to a different vendor would be of any meaningful assistance in answering the questions framed in the amended originating summons.

11. Without saying much, in the absence of evidence of the duly executed agreement for sale of land, the court has no basis upon which to answer questions in an originating summons under **Order 37 rule 3** of the **Civil Procedure Rules**. Consequently, it follows that no award can be made in relation to interest under **Order 37 rule 3** of the **Civil Procedure Rules** without evidence of the contract upon which the question relating to interest is anchored. This is not to say that the plaintiff’s claim for interest was baseless *ab initio*. Far from that, this is purely because of the platform through which the plaintiff chose to seek redress and the plaintiff’s failure to place before court relevant documentary evidence of the land sale contract and the basis for interest at 27% p.a.

12. Lastly on the issue of interest, no evidential material was placed before court to support the plea that the court awards interest at 27% p.a. In the absence of evidence of land sale contract and supporting evidence on the plea for interest at 27% p.a, my finding on the first question is in the negative.

13. The second question relates to costs of this suit. Key questions in the originating summons were abandoned without going to trial. They were unilaterally abandoned by the plaintiff. While abandoning them, counsel for the plaintiff stated from the Bar that he was abandoning them because “the defendant returned the 10% deposit.” No evidence was placed before the court to indicate the circumstances under which the money was returned, and the exact date when the money was returned.

14. While justifying a finding in favour of the plaintiff on the question relating to costs, counsel submitted that “costs follow the event”. This submission, in my view, cannot apply in the circumstances of this case because at this point, there is no judgment in favour of either party to this suit. It was the duty of the plaintiff to place relevant evidence before the court to justify an answer in his favour. Without the court knowing the date when the payment was made; the circumstances under which the payment was made; and given that the plaintiff unilaterally abandoned the principal questions in the originating summons, I find no proper basis for making a finding in favour of the plaintiff on the question of costs.

15. Because the defendant did not submit on the originating summons, there will be award of cost in relation to the originating summons.

16. In the end, my answers to the questions put before the court for determination are all in the negative. Parties shall bear their respective costs of this originating summons.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF JUNE 2021.

B M EBOSO

JUDGE

In the Presence of: -

Ms Nyaga holding brief for Mr Mandala for the Plaintiff

Court Assistant: June Nafula