



REPUBLIC OF KENYA



**Mwaura & 13 others v Dinara Developers Limited & another (Commercial Case E033 of 2021) [2025] KEHC 5883 (KLR) (Commercial and Tax) (8 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 5883 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E033 OF 2021**

**AA VISRAM, J**

**MAY 8, 2025**

**BETWEEN**

**ROSELINE NYAMBURA MWAURA ..... 1<sup>ST</sup> PLAINTIFF**  
**SUSAN MWIHAKI ..... 2<sup>ND</sup> PLAINTIFF**  
**NANCY WANJIRU NGATIA ..... 3<sup>RD</sup> PLAINTIFF**  
**FRANCIS MBURE ..... 4<sup>TH</sup> PLAINTIFF**  
**JAIRUS OLOO ..... 5<sup>TH</sup> PLAINTIFF**  
**JACINTA WAMUYU MURIITHI ..... 6<sup>TH</sup> PLAINTIFF**  
**FLORENCE MWIHAKI MUCHHIRI ..... 7<sup>TH</sup> PLAINTIFF**  
**NANCY WAWIRA KABUGA ..... 8<sup>TH</sup> PLAINTIFF**  
**THOMAS NJIRU NGAI ..... 9<sup>TH</sup> PLAINTIFF**  
**EVERLYNE WANJIRU KAMAU ..... 10<sup>TH</sup> PLAINTIFF**  
**ROSELINE NYAMBURA ..... 11<sup>TH</sup> PLAINTIFF**  
**MARGARET SIRIMA ..... 12<sup>TH</sup> PLAINTIFF**  
**JULIUS KIPTOON ..... 13<sup>TH</sup> PLAINTIFF**  
**VINCENT MUNIALO WEKESA ..... 14<sup>TH</sup> PLAINTIFF**

**AND**

**DINARA DEVELOPERS LIMITED ..... 1<sup>ST</sup> DEFENDANT**  
**ANDREW MUHIU KAMAU ..... 2<sup>ND</sup> DEFENDANT**



## RULING

1. I have considered the Notice of Motion Application dated 13<sup>th</sup> September, 2023, together with the affidavit sworn in support of even date, the replying affidavit sworn in opposition to the same on 22<sup>nd</sup> February, 2024, the submissions of the parties and the applicable law.
2. The Applicant seeks orders of this Court to enter summary judgment for the Plaintiff/Applicants against the Defendant/Respondents jointly and severally for the sum of Kenya Shillings Nineteen Million Eight Hundred and Seventy-Five Thousand Only (Kshs. 19, 875, 000/-).
3. In a nutshell, the Plaintiffs filed this suit vide a plaint dated 11<sup>th</sup> January, 2021, praying for judgment against the Defendants for Kshs. 19,875,000.00/-, general damages for breach of contract, interest on the amount, and the cost of the suit.
4. Subsequently, on 3<sup>rd</sup> May, 2021, the Plaintiffs made a request for judgment before this Honourable Court and an interlocutory judgment dated 19<sup>th</sup> May, 2021, was entered for the Plaintiffs against the Defendants.
5. Consequently, upon the 2<sup>nd</sup> Defendant learning of the interlocutory judgment against him, he made an application dated 13<sup>th</sup> October, 2021, seeking for inter alia orders that this Honourable Court do issue stay of the execution of the interlocutory judgment and the resultant decree and/or all other consequential orders thereto.
6. On 22<sup>nd</sup> October, 2021, the court made orders for the status quo of the suit to be maintained. Thereafter, the 2<sup>nd</sup> Defendant filed his defence dated 31<sup>st</sup> July, 2023, precipitating the present Application.
7. The Applicant submitted that the said defence does not raise any triable issues capable of being heard in trial, and accordingly, summary judgment should be entered forthwith. The Applicant argued that the evidence will show that despite receiving payments from the Applicants, the Defendants in breach of the agreement for sale, failed to develop and construct the houses as agreed, or at all, and had never commenced construction.
8. The Applicant submitted that the 2<sup>nd</sup> Defendant, as director of the 1<sup>st</sup> Defendant, entered into a settlement agreement with the Plaintiffs dated 11<sup>th</sup> June, 2020 (“the Settlement Agreement”) undertaking to pay the sum of Kshs. 19, 575,000/- within a fixed period of time, which time has since expired, and the Respondent has failed to make payment as agreed. Evidence of the same is annexed at exhibit DM 4 to the Applicants supporting affidavit.
9. In opposition to the Application, the 2<sup>nd</sup> Defendant submitted, in summary, that the 1<sup>st</sup> Defendant was no longer a director of the 1<sup>st</sup> Defendant. Further, that the 1<sup>st</sup> Defendant had indemnified the 2<sup>nd</sup> Defendant from any liability.
10. Further, the Respondent submitted that Order 36 applies only to situations where a defence has not been filed.
11. The applicable law is found at Order 36 of the *Civil Procedure Rules* which provides that: -
  - In all suits where a Plaintiff seeks judgment for—
    - (a) a liquidated demand with or without interest; or



(b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the Defendant has appeared but not filed a defence the Plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits. (Emphasis mine)

12. Reading the above section at first glance, the wording of Order 36 seems to bar summary judgment after a defence is filed. However, in my view, this is not always the case. Our courts have held severally that once a defence is filed, a court will still consider an application for summary judgment in the event that the defence does not disclose any triable issues.
13. In such a scenario, if this Court finds that the defence is a sham, evasive, or raises no bona fide issue, it may still enter summary judgment despite the defence being on record.
14. I am guided by the decision of the court of appeal *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* [2015] KECA 846 (KLR) where the court stated as follows in relation to a triable issue:-

“Before the grant of summary judgment, the court must satisfy itself that there are no triable issues raised by the Defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner.

What then is a defence that raises no bona fide triable issue? A bona fide triable issue is any matter raised by the Defendant that would require further interrogation by the court during a full trial. The Black’s Law Dictionary defines the term “triable” as, “subject or liable to judicial examination and trial”. It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.”

15. In *Gupta v Continental Builders Ltd* [1976-80] 1 KLR 809, the court, dealing with an appeal from an award granted on a motion for summary judgment, and in considering the weight to be granted to the Defendant’s defence, Madan JA stated that:-

“If a Defendant is able to raise a prima facie triable issue he is entitled in law to unconditional leave to defend. On the other hand, if no prima facie triable issue is put forward to the claim of the Plaintiff, it is the duty of the Court forthwith to enter summary judgment for it is as much against natural justice to shut out without proper cause a litigant from defending himself as it is to keep a Plaintiff out of his dues in a proper case. Prima facie triable issues ought to be allowed to go to trial, just as a sham or bogus defence ought to be rejected peremptorily.”

16. I further note that in such an application, the burden rests with the Respondent to show that it has brought before this Court, a triable issue. I therefore turn my attention to the pleadings and the evidence on the Court record. At exhibits DM 2 to DM 4 are copies of the various payments made by the Applicants to the 1<sup>st</sup> Defendant for the construction of various houses.
17. This has not been denied by the Defendants, save to say, that the 2<sup>nd</sup> Defendant at paragraph 4 of his defence has pleaded that the particulars of the separate sale agreements have not been provided. I take note that to date, the 1<sup>st</sup> Defendant has never filed a defence, and the 2<sup>nd</sup> Defendant’s defence is the only defence on the Court record.



18. Reviewing the various correspondences set out at exhibit DM 3, it is evident to me that numerous demands were made by the Applicants for a refund of the money paid to the Respondents prompting the parties to enter into the Settlement Agreement found at Exhibit DM4.
19. The Settlement Agreement is dated 13<sup>th</sup> September, 2023, and is made between the Applicants, named as the Purchasers, and the 2<sup>nd</sup> Defendant, who is named as the Developer. I emphasize, the agreement is expressly between the 2<sup>nd</sup> Defendant, in his own personal capacity as the Developer. The title page states that the purpose of the Settlement Agreement is for:-
- “claims arising from money paid pursuant agreements of sale between the purchasers and the 1<sup>st</sup> Defendant for proposed residential houses properties in title number Ruiru/ Ruiru East Block 2/4779 (Ruiru)”.
20. At page 2 of the relevant part of the Agreement states:-
- Whereas:
- B. Pursuant to the said agreements, the purchasers paid various amounts of money as more particularly set out in the schedule hereto, to Dinara Developers Ltd (total outstanding sum).
- C. The intended residential houses were not constructed and as a result thereof the purchasers have made claims for the refund of the monies paid including engaging the services of the firm of Muchoki Kangata Njenga & Company Advocates act for them in recovery of the total outstanding sum.
- D. Andrew Muhiu Kamau who at the material time of the said agreements was a director of the said Dinara Developers Limited has undertaken in the meeting held with the purchasers on 28 May, 2020 to settle in good faith the purchasers claim for the total outstanding amount together with reasonable expenses incurred in their recovery efforts, by way of monthly instalments for a period not exceeding one hundred and twenty (120) days.
21. At page 3 of the Agreement under the heading “Settlement Terms”, the names of the Applicants are listed, and the amount payable by the Developer, the 2<sup>nd</sup> Defendant herein, to each of the Applicants is similarly listed. The total amount owing by the Developer to the Applicants is expressly stipulated, and is Kshs. 19, 575,000/-.
22. Pages 4 and 5 of the Settlement Agreement are executed by the Applicants and the 2<sup>nd</sup> Defendant, and the signatures of the parties have been appended and witnessed by an Advocate, who have also duly signed the agreement.
23. Based on the terms of the Settlement Agreement as set out above, I am satisfied that the debt is admitted by the 2<sup>nd</sup> Defendant, and I am satisfied that the question of whether or not the 2<sup>nd</sup> defendant is presently a director of the 1<sup>st</sup> Defendant is immaterial.
24. The Settlement Agreement expressly states that the 2<sup>nd</sup> Defendant was a director at the material time, and in any event, he is the named party to the Agreement. Further, 2<sup>nd</sup> Defendant personally undertook to make the various payments set out in the schedule, which is the same amount the Plaintiffs are claiming pursuant to the Settlement Agreement in the Plaint.
25. Further, I am not persuaded that the issue raised in relation to the consent and indemnity between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant, is a triable issue between the Plaintiffs and the Defendants. In the event there is



any merit to the statement, that, to my mind, is a separate issue and is between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant only.

26. Finally, I am not satisfied that the issue raised at paragraph 4 of the defence relating to failure of the Plaintiff to provide particulars of the separate sale agreements is a triable issue either. Those particulars are not relevant because the sums have been expressly stipulated in the Settlement Agreement. The agreement is signed by all the parties and expressly states that the same is a legal, valid, and binding agreement.
27. Based on the reasons set out above, I am of the view that beyond mere denials, the 2<sup>nd</sup> Defendant's defence, does not demonstrate a single triable issue worthy of a full trial. Such a trial would amount to no more than a waste of judicial time and resources and this Court therefore, is of the view that such a trial ought not take place in the circumstances as described above.
28. I therefore find and hold that the Application is with merit. The orders of this Court are as follows:-
- a. Summary judgment is hereby entered for the Applicants against the Defendants jointly and severally for the sum of Kshs. 19,875,000/-
  - b. Costs are payable by the Defendants
  - c. Interest at the Commercial Court rate is payable on the sum above from the date of filing the suit until payment in full by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant.

**DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 8<sup>TH</sup> DAY OF MAY, 2025**

**ALEEM VISRAM, FCI Arb**

**JUDGE**

In the presence of;

- .....Court Assistant
- .....1<sup>st</sup> Plaintiff/Applicant
- .....2<sup>nd</sup> Plaintiff/Applicant
- .....3<sup>rd</sup> Plaintiff/Applicant
- .....4<sup>th</sup> Plaintiff/Applicant
- .....5<sup>th</sup> Plaintiff/Applicant
- .....6<sup>th</sup> Plaintiff/Applicant
- .....7<sup>th</sup> Plaintiff/Applicant
- .....8<sup>th</sup> Plaintiff/Applicant
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- .....11<sup>th</sup> Plaintiff/Applicant
- .....12<sup>th</sup> Plaintiff/Applicant
- .....13<sup>th</sup> Plaintiff/Applicant



.....14<sup>th</sup> Plaintiff/Applicant

..... 1<sup>st</sup> Defendant/Respondent

.....2<sup>nd</sup> Defendant/Respondent

