



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO. 156 OF 2018**

**DOMITIEN NDAYIZEYE.....PLAINTIFF**

**=VERSUS=**

**KENCOM SACCO SOCIETY LIMITED.....DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Defendant herein drew and/or generated a Letter of Offer dated **the 21<sup>st</sup> of August 2015**, whereby same offered to sell to and/or in favor of the Plaintiff, **Unit No. 13**, situate **on L.R. NO. 12825/141**, in Runda Estate, within the City of Nairobi for a cost of Kenya Shillings 33,000,000 Only.

2. Pursuant to the Letter of Offer, the Plaintiff herein proceeded to and indeed accepted the Offer and in this regard the Plaintiff paid to and in favor of the Defendant the sum of Kenya Shillings 7,000,000, which payment constituted the stakeholder sum or Deposit, in respect of the purchase of the suit Property.

3. Nevertheless, on or about the **16th of February 2016**, the Plaintiff wrote to and in favor of the Defendant and intimated to the Defendant that same (read the Plaintiff), was not keen to proceed with the transaction. In this regard, the Plaintiff expressed his desire to invoke the Provisions of Clause 7 of the Letter of Offer which provided as hereunder;

*“Should the Purchaser either;*

*a.) Cancel/withdraw from this reservation, or*

*b.) Default in making payments as and when due and whether or not the Sale Agreement will have been executed, then the Vendor shall reserve the right to treat this offer as cancelled and the Purchaser shall forfeit 10% of the Deposit as administrative costs and the rest of the Deposit monies shall be refunded to the Purchaser within 7 days thereof.”*

4. Despite the letter by the Plaintiff, whereby same signaled his desire to withdraw from the transaction, which letter was duly acknowledged by the Defendant, the Defendant refunded the sum of Kenya Shillings 2,000,000 Only on the 23<sup>rd</sup> of September 2016, but thereafter failed and/or neglected to Refund the balance of the Deposit amounting to Kenya Shillings 5,000,000 Only.

5. On the other hand, after the Plaintiff had intimated his desire to withdraw from the transaction, the Defendant intimated her position and indeed conceded that same would arrange and refund the stakeholder sum. For clarity, the concession to refund the stakehold sum was communicated vide letter dated 19<sup>th</sup> August 2016.

6. Be that as it may, it appears that the Defendant reneged on the promise to refund the stakeholder sum and indeed same was not refunded, on or before the 15<sup>th</sup> of September 2016, as promised or at all. Consequently, the Plaintiff herein was constrained to and indeed lodged the instant suit on **the 4<sup>th</sup> of April 2018**.

7. Upon the filing of the suit, the parties later on engaged each other and thereafter, it is common ground that the Defendant herein, ultimately obliged and paid the outstanding balance of the Refund, which same had previously covenanted to do.

8. Owing to the fact that the monies at the foot of the suit herein was eventually refunded, the only issues that remain outstanding and thus due for determination are two-fold, namely;

*I. Interests payable to the Plaintiff*

## *II. Costs of the Suit.*

### **SUBMISSIONS BY THE PARTIES**

9. The subject matter herein came up before the Honourable Court on **26<sup>th</sup> of April 2021**, when the parties addressed the Court and indeed confirmed that the Deposit, which was the basis of the suit, had been refunded and that the only issues pending were the issues of Interest and Costs.

10. Pursuant to the foregoing, the Honourable Court proceeded to and directed that the issues of Interests and Costs, be canvassed by way of Written Submissions. In this regard, the Plaintiff filed his Written Submissions on the 10<sup>th</sup> of May 2021, whereas the Defendant filed her Written Submissions on the 3<sup>rd</sup> of June 2021. For clarity, the two sets of Written Submissions are on record.

### **ISSUES FOR DETERMINATION**

11. Having reviewed the Pleadings filed by both parties as well as examining the terms of the Letter of Offer dated the **21<sup>st</sup> of August 2015** and upon considering the Written Submissions filed, I come to the conclusion that the Honourable Court is only required to render itself on the two issues as hereunder;

*I. Whether the Plaintiff is entitled to Interest and if so, the duration of computation*

*II. Whether the Plaintiff should be paid Costs of the suit.*

### **ANALYSIS AND DETERMINATION**

#### **ISSUE NUMBER ONE**

##### ***Whether the Plaintiff is entitled to Interest and if so, the duration of computation***

12. It is common ground that the Defendant herein generated a Letter of Offer to and in favor of the Plaintiff, which Letter of Offer was duly accepted by the Plaintiff. Besides, the Plaintiff proceeded to and indeed made payment in the sum of Kenya Shillings 7,000,000, which constituted the Deposit agreed upon between the Parties.

13. However, as fate would have it, the Plaintiff indicated that same was not able to proceed with the transaction and in this regard, the Plaintiff wrote to the Defendant a letter dated **16<sup>th</sup> February 2016**, whereby same invoked Clause 7 of the Letter of Offer, which essentially allowed the Plaintiff to withdraw and/or cancel the acceptance before execution of the Sale Agreement.

14. It is common ground that the Plaintiff's letter of Termination and/or withdrawing from the transaction was duly received and acknowledged by the Defendant. For clarity, the Defendant wrote back and confirmed her willingness to refund the Deposit. Besides, the Defendant made various promises which are well documented, including a promise to refund the money on or before **the 19<sup>th</sup> of April 2016**.

15. Suffice it to say, that the monies were never refunded and the Defendant kept shifting goalposts and thereafter the Plaintiff was constrained to file the subject Suit. For clarity, it is the filing of this suit that coerced and/or jolted the Defendant into action.

16. Having been aware that same was obliged to refund the Deposit within 7 days of the termination or withdrawal from the transaction and having failed to comply with the terms of Clause 7, which *ipso facto* constituted a breach, it is my finding and holding that the Plaintiff is entitled to Interest on the Deposit, which was withheld and/or delayed, as a result of the intransigence on the part of the Defendant.

17. Having found and held that the Plaintiff is entitled to Interest, the next issue that arises is the duration for which the Interest ought to be paid and/or computed. In this regard, the Provisions of **Section 26 of the Civil Procedure Act, Chapter 21 Laws of Kenya**, become relevant.

18. Before proceeding to address myself on the duration for which Interest ought to be paid to the Plaintiff, it is appropriate to reproduce the Provisions of Section 26, which states;

*“(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.*

*(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.”*

19. From the Provisions aforesaid, it is imperative to note that same provides for and/or captures two [2] scenarios, in respect of which Interest is payable and the two scenarios are as hereunder;

a) *The period from the date the suit is filed to the date when the Court gives Judgment.*

b) *The period from the date of Judgment to the date of payment of the sum adjudged due or such earlier date as the Court may fix and/or direct.*

20. As concerns the subject matter, it is common ground that the Principal sum, comprising of the Deposit has since been paid and/or refunded. In this regard, the issue of Interest ex post the delivery of Judgment does not arise.

21. Suffice it to say, the Court would thus be concerned with the issue of Interest from the date of filing of the Suit to, either date of Judgment or date of payment of the Principal sum. In this regard, it is my finding that the Plaintiff is entitled to Interest at Court rates from the date of filing of the suit, owing to the fact that the Plaintiff had been denied and/or deprived of the monies at the foot of the instant case, as a result of the wrongful conduct and/or behavior of the Defendant.

22. To fortify the foregoing holding, I beg to adopt and reiterate the position that was taken by the Court in the decision in the case of **Prem Lata vs Peter Musa Mbiyu (1965) EA at Page 592**, where the Court of Appeal held as hereunder;

*“In both these cases, the successful party was deprived of the use of goods or money by reason of the wrongful act on the part of the defendant, and in such a case it is clearly right that the party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest.”*

23. It is also worthy to state that the position adopted by the Court of Appeal in the **Prem Lata case (supra)** was reiterated and applied five years later in the decision in the case of **Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited (1970) EA 469** which was to the same effect in the following words:

*“The principle that emerges is that where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing suit. Where, however, damages have to be assessed by the Court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of the judgment.”*

24. I must say that the principle that was demarcated in the two cases, holds sway to date and therefore a party who has been denied and/or deprived of monies that are lawfully due unto him/her, is entitled to Interest. In any event, the payment of Interest acts as a cushion against the inflationary tendencies, which if not taken into account, will thus negate and / or diminish the purchasing power of the money in question over a period of time.

25. Other than the two aspects that I have discussed above, there is also the issue as to whether Interest is payable during the period obtaining prior to the filing of the suit and more particularly, where the claim is liquidated in nature. In this regard, I must also point out that the provisions of Section 26 does not provide such a remedy for same.

26. Nevertheless, it suffices to note that Interest can still be decreed to be payable for the duration between the time of accrual of the cause of action (read time when money ought to have been paid), up to and including the date of filing of the suit. However, the payment of Interest in this regard is a matter of substantive law and thus same is only claimable in certain instances.

27. In support of the foregoing submissions, I find guidance in the decision in the case of **Jane Wanjiku Wambu v Anthony Kigamba Hato & 3 others [2017] eKLR** in which the Court stated;

*“Third, when it comes to the period before the filing of the suit, Section 26 of the Civil Procedure Act has no application. Instead, interest prior to the date of the suit is a matter of substantive law and is only claimable where under an agreement there is stipulation for the rate of interest (contractual rate of interest) or where there is no stipulation, but interest is allowed by mercantile usage (which must be pleaded and proved) or where there is statutory right to interest or where an agreement to pay interest can be implied from the course of dealing between the parties. See Gulamhussein v French Somaliland Shipping Company Limited [1959] EA 25; Highway Furniture Mart Limited – v- The Permanent Secretary & Another EALR (2006) 2 EA 94; Mulla – The Code of Civil Procedure (16th Ed.) Vol. 1 at p. 505.”*

28. As pertains to the subject matter, the Defendant was well aware that the monies/refund was contractually due and payable within 7 days of withdrawal from and/or termination. For clarity, it is the Defendant who generated the Provisions of Clause 7 of the Letter of Offer.

29. Having generated the said Clause, it must be taken and/or otherwise implied therefrom that the Defendant was aware, that a failure to refund the Deposit within the stipulated timeline would therefore constitute breach of Contract.

30. Similarly, it becomes apparent that having failed and/or neglected to Refund the money within the stipulated timeline, the Defendant thus exposed herself to the incidence of Interest accruing from the date of Default.

31. In a nutshell, it is my finding and holding that the Defendant herein is liable to pay Interest reckoned and/or computed from the 23<sup>rd</sup> of February 2016, same being the 7<sup>th</sup> day after receipt of the Notice of Termination of the Contract.

**ISSUE NUMBER TWO**

**Whether the Plaintiff should be paid Costs of the suit.**

32. The position of the Law as pertains to payment of costs is captured and/or underscored by the provisions of **Section 27 of the Civil Procedure Act**. For clarity, it is stated that costs shall follow the event, unless for good reason the Court otherwise directs.

33. As pertains to the subject matter, it is important to recall that the Defendant herein was aware of her duty and/or obligation to make the refund within 7 days ,from the date of termination and/or withdrawal from the transaction by the Plaintiff.

34. Better still, it is imperative to note that the Provisions of Clause 7, that expressly stipulated the timeline for making of the Refund, was coined by the Defendant. Consequently, a failure by the Defendant to comply thereof should attract Costs against same .Simply put, the Defendant was pretty aware of its obligations under the transactions and hence did not require a reminder or a wake up call, or at all.

35. In support of the foregoing holding, I adopt and reiterate the decision of the Court in the case of **Margaret Ncekei Thurania vs Mary Mpinda & Another (2015)eKLR**, where the Court stated as hereunder;

*“On the issue of costs, rule 31 of the Rules of this Court enjoins us at the end of our determination to make any necessary, incidental or consequential order including orders as to costs. In **Devran Dattan versus Dawda [1949] EACA 35** it was held that the decision as to whether the successful litigant has a right to recover his costs should be left to the discretion of the judge who tried the case, a position reiterated in **James Koskei Chirchir versus Chairman Board of Governors Eldoret Polytechnic [2011] eKLR (Civil Appeal No. 211 of 2005)** when this Court ruled that notwithstanding, the provision of section 27 of Civil Procedure Act costs are generally a matter within the discretion of the court. See also the decision in the case of **Super Marine Handling Services Limited versus Kenya Revenue Authority [2010] eKLR (Civil appeal No. 85 of 2006)** for the proposition that costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order. Herein, the learned trial Judge properly exercised his discretion in awarding costs to the respondents. We find no good reason to interfere with the exercise of that discretion as the costs therein had followed the event considering that the respondents were the victorious party.*

**FINAL DISPOSITION**

36. Having considered the relevant Provisions of the Law and having taken into account various decisions that have been rendered over the years, pertaining to the twin issues of Interest and Costs, I now make the following Orders;

*I. The Plaintiff shall be and is hereby entitled to Interest at Court rates with effect from the 23<sup>rd</sup> of February 2016, until the date when the Principal sum was paid.*

*II. The Plaintiff be and is hereby awarded Costs of the Suit.*

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF OCTOBER, 2021.**

**HON. JUSTICE OGUTTU MBOYA,**

**JUDGE,**

**ENVIROMENT AND LAND COURT,**

**MILIMANI.**

In the presence of;

June Nafula Court Assistant

Ms Ouma BA For the Plaintiff/Applicant

NA For Defendant/Respondent