



**Kabiru v Gakuyo Real Estate Limited (Civil Case E031 of 2021)
[2023] KEHC 18846 (KLR) (20 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18846 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL CASE E031 OF 2021
PM MULWA, J
JUNE 20, 2023**

BETWEEN

GODFREY NGUGI KABIRU PLAINTIFF

AND

GAKUYO REAL ESTATE LIMITED DEFENDANT

JUDGMENT

1. The plaintiff filed a suit against the defendant by a plaint dated 22nd November 2021 seeking a refund of his cumulative investments of Kshs. 22,200,000/= plus the monthly interest of the cumulative monthly investment, general damages for breach of the investment agreement, costs of the suit and interest.
2. The plaintiff's case is that he entered into an investment agreement with the defendant on 4th September 2014, whereby on diverse dates between 6th September 2014 to 21st August 2017, the plaintiff deposited into the defendant's accounts sums totalling Kshs. 22,200,000/=, held into two accounts. One account of Kshs. 12,000,000/= attracts a monthly interest of 3%, while the other of Kshs. 10,200,000/= attracts 2% interest monthly. Cumulatively, both accounts fetch a monthly income of Kshs. 564,000/= which defendant deposited into the plaintiff's account for some time but has since stopped. The plaintiff claims interest for forty- three (43) months.
3. That despite the plaintiff writing to defendant to terminate the investment agreement and a refund of the monies deposited the same has elicited no response. According to plaintiff, the amount due and owing is Kshs. 46,452,200/= .
4. The defendant was served with the plaint and summons to enter an appearance on 15th December 2021. It entered appearance through the firm of Nyamweya Mamboleo by a memorandum of appearance dated 24th December 2021. On 16th March 2022, the plaintiff sought to have the interlocutory judgment entered and the same was allowed on 19th October 2022.



5. Subsequently, the defendant filed an application to set aside the ex-parte judgment through the firm of Chui Karera Advocates. When the said application came up for hearing, the defendant and its counsel failed to attend court prompting the court to dismiss the application. The defendant filed a second application seeking to set aside the orders of the court. The second application was compromised by the consent of parties on 19th October 2022 and the defendant given 21 days to file a defence, list of documents and a defence statement.
6. When the matter came up for hearing on 14th February 2023, the defendant had not complied with any of the consent orders and on application by the plaintiff's counsel, the court issued directions that the suit proceeds as an undefended suit as the defendant failed to file a defence despite entering an appearance.
7. Pw1 (Godfrey Ngugi Kabiru) testified on 14th February 2023 and he adopted his list of documents dated 22nd November 2022 and witness statement dated 17th May 2021 as his evidence in chief.
8. By the directions of the court the plaintiff filed submissions, in which counsel submits the agreement between the plaintiff and the defendant was reduced in writing and executed by both parties in compliance with Section 3(1) of the *Law of Contract*. He urged the court to find the evidence of the plaintiff is uncontroverted and proceed to find the defendant breached the terms of the agreement, and award the plaintiff a refund of his investment amounts.
9. The Plaintiff submits its unfair and unjust enrichment on the part of the defendant for failure to remit the monies owed to the plaintiff as and when they fell due.
10. Counsel urged the court to award the costs of the suit to the plaintiff.

Analysis and determination

11. In due consideration of the plaint, and the submissions filed, I frame the issues for determination are follows:
 - i. Whether there is a valid investment agreement?
 - ii. Whether the plaintiff deposited monies with the defendant?
 - iii. Whether the defendant was in breach of the investment agreement, and if in the affirmative, whether the plaintiff is entitled to a refund of the monies?

Whether there was a valid investment agreement.

12. The Plaintiff bears the burden of proving the existence of a contract which was binding as per Sections 107 and 109 of the *Evidence Act* which stipulate as below;
 107. Burden of proof
 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
 109. Proof of the particular fact



The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.

13. The Plaintiff has adduced a copy of the investment agreement between the himself and the defendant. The agreement though executed by both parties is not dated. The agreement provided among other clauses the terms of investment, and termination.
14. It was a term of the agreement that the defendant would utilize the money deposited by the plaintiff in land investment and in return pay interest to the plaintiff.
15. Therefore, the court has been called upon to enforce the interests of both parties in the agreement. The defendant has not denied the agreement.
16. It thus follows that there was a valid agreement between the parties which demonstrated the manner of investment and the interest the plaintiff was to earn from the investment.

Whether the plaintiff deposited money into the accounts of the defendant.

17. It is common law that the plaintiff must prove on a balance of probabilities that he deposited money with the defendant. Courts have stated that parties claiming a refund of money must prove the amount deposited before any action is taken. (See *Zainabu Ayub Mohamed & another vs. Rafiki Microfinance Ltd* [2019] eKLR)
18. The plaintiff claims he invested money with the defendant intending to attract interest. That on diverse dates between 6th September 2014 and 21st August 2017, he deposited into the defendant's accounts sums totalling Kshs. 22,200,000/=, held into two accounts one account of Kshs 12,000,000/= attracting a monthly interest of 3%, and the other account of Kshs. 10,200,000/= attracting 2% interest monthly. Cumulatively both accounts fetched a monthly income of Kshs. 564,000/=.
19. In support of his assertion the plaintiff has attached copies of receipts issued by the defendant for the monies deposited in the years 2014, 2015, and 2017 as well as a bank statement. It is evident the defendant received monies from the plaintiff and issued receipts on diverse dates.
20. I thus find that plaintiff has proved on a balance of probabilities he deposited monies with defendant.

Whether defendant was in breach of the investment agreement?

21. According to the plaintiff, the defendant honoured the payment of interest for a few months before it failed to remit interest for 43 months. The plaintiff now seeks a refund of the monies deposited. The averments of the plaintiff have not been controverted as the defendant only filed a memorandum of appearance but no defence was filed.
22. It was a clause of the agreement that defendant was to pay a 3% interest on Kshs. 12,000,000/= and a 2% monthly interest on Kshs. 10,200,000/= attracts 2% interest monthly. Cumulatively both accounts fetched a monthly income of Kshs. 564,000/=.
23. There are numerous email correspondences between the plaintiff and the defendant and some of them are the former seeking a refund of his investment.
24. Having found that plaintiff deposited the monies in the defendant's account and the defendant failed to pay the interest on the amounts invested by plaintiff, this court finds that the plaintiff is entitled to a refund of his money deposited with defendant.



25. The general principle is that the court does not award damages for breach of contract unless it is demonstrated the actions of the defendant were oppressive. In the circumstances, the plaintiff has not demonstrated to the court the loss suffered by the actions of the defendant.

26. For the above reasons this court enters judgment as follows:

- i. Judgment is entered for the Plaintiff against the Defendant for Kshs 22,200,000 with interest at court rates from the date of filing suit till payment in full.
- ii. The Plaintiff is awarded the costs of the suit.

Orders accordingly

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU ON THIS 20TH DAY OF JUNE 2023.

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P.M. MULWA

JUDGE

In the presence of:

Kinyua – court assistant

Mr.Mageto - for the plaintiff

N/A - for the defendant

