



REPUBLIC OF KENYA



Nyaga & another v Kencom Co-operative Savings & Credit Society Limited & another (Civil Case 648 of 2015) [2024] KEHC 14718 (KLR) (Commercial and Tax) (15 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14718 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 648 OF 2015
FG MUGAMBI, J
NOVEMBER 15, 2024

BETWEEN

GEORGE NTHIGA NYAGA 1ST PLAINTIFF
BEATRICE GATWIRI MUGAMBI 2ND PLAINTIFF

AND

KENCOM CO-OPERATIVE SAVINGS & CREDIT SOCIETY
LIMITED 1ST DEFENDANT
PETER MUTUA 2ND DEFENDANT

JUDGMENT

Background and Introduction

1. Through an amended plaint dated 29th May 2018, the plaintiffs seek judgment against the defendants jointly and severally for:
 - a. Kshs. 10,300,000/-;
 - b. Interest at court rates from 28th October 2011 until payment;
 - c. Costs.
2. The plaintiffs' case is that the 1st defendant, a Co-operative Society, was the registered proprietor of a property described in the plaint as the Kiambu property. The 1st defendant subdivided the property and offered the sub-plots for sale. The 1st plaintiff was allocated plots 8 and 9 while the 2nd plaintiff was allocated plot 10.



3. The 1st plaintiff paid Kshs. 10,000,000/- in full and final payment of Plot 8 and a deposit of Kshs. 3,000,000/- for plot 9. The 2nd plaintiff paid a deposit of Kshs. 3,000,000/- for Plot 10. The 2nd defendant, the 1st defendant's then General Secretary, acknowledged receipt through a letter dated 28th October 2011, on behalf of the 1st defendant's Chairperson.
4. On 7th June 2013, the 1st defendant decided not to proceed with the sale of the plots and instead chose to establish a controlled development. It therefore offered to refund all monies paid by the plaintiffs. As at 6th July 2015, the 1st defendant had refunded Kshs. 5,700,000/- to the 1st plaintiff leaving Kshs. 7,300,000/-. No refund was made to the 2nd plaintiff. The plaintiffs' therefore claim Kshs. 10,300,000/- from the defendants.
5. The 1st defendant filed a statement of defence dated 22nd February 2016 in which it denied ownership of the Kiambu property, of offering the sub plots for sale to the plaintiffs or receiving any money from the plaintiffs citing lack of a written agreement and proof of payment.
6. Following mediation, the parties' advocates recorded a consent dated 31st January 2018 in the following terms:
 - i. That Judgment be entered for the Plaintiff against the Defendant for the sum of Kenya shillings Four Million Three Hundred Thousand (Kshs. 4,300,000/=).
 - ii. That the Defendant has paid Kenya shillings Four Hundred and Thirty Thousand (Kshs. 430,000/=) out the above thus the balance is Kenya shillings Three Million Eight Hundred and Seventy Thousand (Kshs. 3,870,000/=) which sum the Defendant shall settle in monthly instalments of Kenya shillings Four Hundred and Thirty Thousand (ksh.430,000/=) from 31st January, 2018 until payment in full.
 - iii. That in the event of default on payment of any single instalment, the outstanding balance become due and execution to issue.
 - iv. That the outstanding issue of Kenya shillings Six Million (ksh.6,000,000/=) plus interest be argued at the main hearing of the suit.
 - v. That cost be agreed or taxed.
 - vi. That parties herein be and hereby at liberty to apply.
7. After judgment was entered for the agreed sum of Kshs. 4,300,000/-, the plaintiffs sought summary judgment for the balance of Kshs. 6,000,000/-. However, through a Ruling dated 28th February 2020, the Court held that the case proceeds for trial on the issue whether the sum of Kshs. 6,000,000/- was paid on account of the 2nd defendant.

The Evidence:

8. When the matter came up for mention on 15th May 2024 to schedule a hearing date, the 2nd defendant was present in person, but the 1st defendant was notably absent. The Court took note of the 1st defendant's continued absence, and consequently scheduled the matter for trial on 16th July 2024.
9. On the hearing date, neither the 1st nor the 2nd defendant appeared in court, despite having been duly served with a hearing notice. The plaintiffs provided an Affidavit of Service dated 16th May 2024, confirming that the defendants had been formally notified of the trial date. In light of the defendants' failure to attend and the verified service of notice, the Court proceeded with the hearing in their absence.



10. The 1st plaintiff, George Nthiga Nyaga testified as PW1. He adopted his witness statement dated 18th December 2015, similar to the plaint, as his evidence. He also produced the plaintiffs' principal and further list and bundle of documents dated 18th December 2015 and as plaintiffs' exhibits 1, 2, 3 and 4.
11. Mr. Nyaga confirmed that the 1st defendant had partially settled the outstanding amount by paying Kshs. 4,300,000/= in ten installments, as previously agreed. He further stated that the remaining balance of Kshs. 6,000,000/= was contingent upon the plaintiffs providing evidence of this payment. He relied on the plaintiffs' exhibit 4 to prove that the money was paid to the defendants advocates on 2nd November 2011.
12. Mr. Nyaga prayed for entry of judgment against the defendants for the principle of Kshs. 6,000,000/- together with interest thereon, interest on the sum of Kshs. 4,300,000/- and costs of the suit.

Analysis and Determination

13. I have carefully considered the pleadings, the evidence, the submissions and authorities presented.
14. The plaintiffs submitted three letters of acknowledgment pertaining to payments for Plots 8, 9, and 10. These payments, totaling Kshs. 16,000,000/= comprise of Kshs. 10,000,000/=: Kshs. 3,000,000/=: and Kshs. 3,000,000/= respectively. The payments are as documented in the amended plaint, specifically in paragraphs 7 and 8. According to paragraph 11 of the plaint, Kshs. 5,700,000/= of these funds had already been refunded by the defendants. An additional Kshs. 4,300,000/= was addressed through the consent judgment which PW1 confirmed payment, leaving a remaining balance of Kshs. 6,000,000/= still not refunded.
15. In order to prove that this amount was indeed paid to the defendants as part of the purchase price for the plots, the plaintiffs submitted a KCB Application for Funds Transfer form dated 2nd November 2011. The form documents a transfer of Kshs. 6,000,000/=. The transfer was initiated by Totalsure Insurance Agency, with the beneficiary listed as Makhandia & Makhandia Company Advocates, designated for the purchase of Kiambu Plots 9 and 10.
16. Although the plaintiffs have not provided an explanation for their relationship with Totalsure Insurance Agency, it is clear from the evidence that Kshs. 6,000,000/= was transferred to the defendants' advocates via RTGS, indicating that this amount was intended for the transaction.
17. The defendants did not appear in court to test the veracity of the evidence that was produced by the plaintiffs. In the circumstances, I note further that the defendants had acknowledged in writing that Kshs. 16,000,000/= had been paid by the plaintiffs. The acknowledgement letters are signed by the 2nd defendants. In the absence of any contrary evidence from the defendants either disputing the Kshs. 6,000,000/= payment or demonstrating that this amount was refunded to the plaintiffs, I find that the plaintiffs have established their case to the required standard of proof.
18. Regarding the claim for interest on the Kshs. 4,300,000/=: I note that the consent which was adopted as a judgment of this Court was deliberately silent on this issue. The terms of the consent judgment were negotiated and clearly articulated, with the parties expressly providing for payment of costs and even including a default clause to address any failure to pay the agreed amount. However, they chose to omit any provision for interest on the Kshs. 4,300,000/=: which is an indication of a mutual decision not to pursue interest as part of the settlement.



19. This omission is significant, in my view, as it reflects a conscious compromise reached by the parties, who crafted the terms to resolve their dispute in a manner satisfactory to both sides. In the case of *Kasmir Wesonga Ongoma & Another V Ismael Otoicho Wanga*, (1987) KLR 159, the court held that:

“... the purpose of a consent judgment is for the parties to inform the court that they have composed all their differences in a manner suitable to themselves without asking the court to make any further decision. The principle is that the parties know best how to conduct their own affairs and that by entering into a consent judgment they have entered into a contractual agreement to resolve their differences to their satisfaction.”

20. This principle underscores that a consent judgment is, in essence, a binding contract between the parties, reflecting the full scope of their negotiated terms. By omitting interest, the parties demonstrated their intent to settle without imposing additional financial obligations beyond the principal amount and costs. The court is therefore bound to respect the integrity of their agreement. Given the clear and deliberate structure of the consent judgment, I am disinclined to interfere by adding terms that the parties themselves chose to exclude.

21. That said, I recognize that interest serves to compensate a successful party for the loss of use of the principal sum. In order for interest to be awarded, there must be a clear justification, typically arising from a wrongful act or delay attributable to the defendant. The Court of Appeal in *Highway Furniture Mart Limited V Permanent Secretary Office of the President & Another*, [2006] eKLR, highlighted this principle, noting:

“The justification for an award of interest on the principal sum is, generally speaking, to compensate a plaintiff for the deprivation of any money, or specific goods through the wrong act of a defendant. In *Later V Mbiyu* [1965] EA 592, the forerunner of this Court said at page 593 paragraph e:

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”.

(See also the Uganda case of *Lwanga V Centenary Rural Development Bank*, [1999] 1 EA 175).”

22. Having determined that the plaintiffs have successfully proved their claim for the outstanding Kshs. 6,000,000/=, I find it appropriate to award interest on this amount alone. This award is justified to compensate the plaintiffs for the deprivation of these funds due to the defendants’ failure to pay the balance.

Disposition

23. Accordingly, judgment is entered for the plaintiffs against the 1st and 2nd defendants jointly and severally for:

- i. Kshs. 6,000,000/= together with interest thereon at court rates from the date of judgment until payment in full.
- ii. Costs of the suit.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 15TH DAY OF NOVEMBER 2024.



F. MUGAMBI
JUDGE

