



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 22 OF 2017**

**PHILOMENA MENEZES..... 1<sup>ST</sup> PLAINTIFF**

**MALCON MENEZES.....2<sup>ND</sup> PLAINTIFF**

**MITCHELL MENEZES.....3<sup>RD</sup> PLAINTIFF**

*(As Trustees of Shady Garden Academy)*

**VERSUS**

**JARAMOGI OGINGA ODINGA UNIVERSITY**

**OF SCIENCE & TECHNOLOGY.....DEFENDANT**

**RULING**

The matter before me is about Interest which the Plaintiffs are claiming from the Defendant.

1. It is common ground that the Plaintiffs sold the property **L.R. NO. KISUMU/MUNICIPALITY BLOCK 11/10**, to the Defendant.
2. The agreed purchase price was stated, by the Plaintiffs, to be  
Kshs 174,000,000 **PLUS VAT**, if **VAT** became payable.
3. The Defendant paid to the Plaintiffs the sum of Kshs 174,000,000/= in February 2017.
4. Thereafter, in June 2017 The Kenya Revenue Authority wrote to the Plaintiffs demanding payment of Kshs 27,840,000/= on account of **VAT** payable on the transaction.
5. The Plaintiffs informed the Defendant about the demand for payment of **VAT**, because the Plaintiffs held the view that it was a term of the contract between the two parties.
6. Notwithstanding the Plaintiffs' request, that the Defendant should pay the **VAT** to the Kenya Revenue Authority, the Defendant failed to do so.
7. In those circumstances, the Plaintiffs remitted payment to the Kenya Revenue Authority on 29<sup>th</sup> June 2017.
8. As the Plaintiffs believed that it was the Defendant that was under the legal duty to pay the **VAT**, the Plaintiffs later filed this suit, with a view to recovering the money which they had paid to **KRA**.
9. On 18<sup>th</sup> April 2018 the parties recorded a consent in the following terms;

***“1. ORDER BY CONSENT that Judgment be and is hereby entered for the Plaintiffs against the defendant in the sum of Kshs 27,850,000/=.***

***2. The defendant be at liberty to settle the decretal sum by monthly instalment of Kshs 1,000,000/= with effect***

**from the 15<sup>th</sup> August 2018 and thereafter on the 15<sup>th</sup> day of each succeeding month until payment in full.**

**3. The defendant shall bear the costs of the suit to be agreed upon, failing which the same shall be taxed.**

**4. Mention on 7<sup>th</sup> May, 2018 to enable the parties agree on the issue of interest.”**

10. When the matter was mentioned on 7<sup>th</sup> May 2018, the parties informed the court that they were still holding negotiations.

11. After several months the parties informed the court that they had been unable to reach a settlement on the issue of interest. It is at that stage that the parties decided to ask the court to make a determination on the issue.

12. The parties agreed to file written submissions, and a time-table was laid down for that purpose.

13. The Plaintiffs filed their submissions, however the defendant did not file any submissions.

14. The Agreement for Sale which is the subject matter of this Ruling is dated 2<sup>nd</sup> December 2016.

15. **Clause 1.1 (1)** reads as follows;

**“Interest Rate” means 10% per annum rate.”**

16. In this case the parties have agreed that the **VAT** which the Plaintiffs had paid to **KRA**, ought to be paid by the defendant, back to the Plaintiffs.

17. In effect, that constitutes an acknowledgment by the defendant, that it ought to have paid the **VAT** when **KRA** demanded payment.

18. As the defendant failed to pay the **VAT**, the Plaintiffs made the payment, so as to mitigate the losses which could otherwise have befallen them.

19. By paying out money which should have been paid by the defendant, the Plaintiffs were out of pocket, to their detriment.

20. If the Plaintiffs were not compelled to pay the money due on account of **VAT**, the said money could have been put to some beneficial use by the Plaintiffs.

21. The defendant’s failure to pay the **VAT** had the effect of depriving the Plaintiffs the use of the money which the Plaintiffs paid out on behalf of the defendant.

22. In the result I hold that the Plaintiffs are entitled to compensation, and that the appropriate and equitable manner of calculating the said compensation is by reference to the terms of the contract. Accordingly, I now award Interest on the principal decretal sum, at 10% per annum, with effect from 29<sup>th</sup> June 2017 until the defendant pays the decretal sum in full.

23. The Plaintiffs are also awarded the costs of the “*application*” that has led to this determination on the issue of Interest.

**DATED, SIGNED and DELIVERED at KISUMU this 7<sup>th</sup> day of March 2019.**

**FRED A. OCHIENG**

**JUDGE**