



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT NAIROBI**  
**MILIMIMANI LAW COURTS**  
**ELC NUMBER 434 OF 2014**

**DR. PRAKASH HEDA. ....PLAINTIFF/APPLICANT**

**=VERSUS=**

**JANE WANJA MIRITI ALIAS**

**JAYNE WANJA MIRITI.....DEFENDANT/RESPONDENT**

**RULING**

The matter coming up for determination is the Notice of Motion dated **19<sup>th</sup> June, 2014** brought under **Order 36 Rule 1(1) (2) of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act**, and all other enabling provisions of the law. The application herein is brought by the Plaintiff/Applicant, **Dr. Prakash Heda** against the Defendant/Respondent and has sought for the following orders:

- 1. That this Honourable court be pleased to enter judgment in favour of the Plaintiff/Applicant against the Defendant/Respondent for the liquidated sum of Ksh.2,500,000/- together with costs and interest as prayed for in the Plaint.***
- 2. That the costs of this application be borne by the Defendant/ Respondent.***

The application is premised on the grounds stated on the face of the application and on the affidavit of **Dr. Prakash Heda**. The grounds in support of the application are: -

- a) That it is not in dispute that the Plaintiff/Applicant and the Defendant/Respondent entered into an agreement of sale on 9<sup>th</sup> September, 2013 whereby the Plaintiff/Applicant agreed to purchase and the Defendant/Respondent agreed to sell property, LR.No.3734 /1101 for Ksh.50,000,000/- (Kenya Shillings Fifty Million Only).***
- b) That it is not disputed that the said parcel of land was at the time encumbered or charged to the Bank of Africa. It was in actual fact a term of the agreement for sale under clause 3(b) which stated that:***

**“... the purchaser will pay the remainder of the purchase price to the Bank of Africa who currently hold a charge over the said property to offset the vendor’s liabilities with the Bank...”**

**c) That the Defendant/Respondent admits entering into such an agreement for sale at paragraph 3 of her Defence.**

**d) That the Defendant/Respondent by accepting the deposit of Ksh.2, 500,000/= paid by the Plaintiff/Applicant and by constantly reassuring the Plaintiff/Applicant that the Defendant/Respondent was resolving the issue sought outstanding balance owed to the Bank of Africa; the Defendant/Respondent in essence recognized her indebtedness to the Plaintiff/Applicant and cannot turn around to claim that the same was not paid by the Plaintiff/Applicant.**

**e) That as per the agreement of sale, the Defendant/Respondent was duty bound to advise the Plaintiff/Applicant on the outstanding balance which would then enable the Plaintiff/Applicant transfer the amounts which would clear the loan and automatically have the discharge of charge and the original title documents released to the Plaintiff/Applicant.**

**f) That the Defendant/Respondent represented to the Plaintiff/Applicant on several occasions that she was waiting for the Bank of Africa to avail the relevant documentations and resolving the issues regarding the outstanding loan to enable completion of the Agreement for Sale.**

**g) That the Plaintiff/Applicant did indeed perform his part of the bargain, which the Defendant/Respondent acknowledged; and it was in fact the Defendant/Respondent who failed to meet the stipulation of the agreement and defaulted in the same and this Honourable court cannot award default on the part of the Defendant/Respondent.**

**h) That the Defendant/Respondent has refused/neglected/failed to pay the Plaintiff/Applicant his refund of the deposit of Ksh.2,500,000/- even after a completion notice was served upon the Defendant/ Respondent’s Advocates.**

**i) That the Defendant/Respondent’s defence is merely evasive of the issues raised in the Plaint and does not afford the Defendant/ Respondent any reasonable defence.**

**j) That the Defendant/Respondent’s defence is vexatious, frivolous and a futile attempt to embarrass the fair trial of this suit thereby denying the Plaintiff/Applicant his rights to a refund of his deposit under the Agreement for sale.**

In his supporting affidavit, the Applicant **Dr. Prakash Heda** averred that on or about the **9<sup>th</sup> September 2013**, he entered into an agreement with the Defendant/Respondent herein for the purchase of **L.R. No. 3734/1101** Nairobi for the purchase price of **Ksh.50,000,000/-**. Further that he paid the Defendant/Respondent the sum of **Ksh.2,500,000/-** as per the agreement of sale dated **9<sup>th</sup> September, 2013** as deposit before the execution of the agreement a gesture of commitment to purchase the property. He also averred that he was aware at the time of execution of the agreement, for sale that the suit property had been charged to the Bank of Africa and this fact was part of the term of the agreement for sale. It was her further averments that since the completion date for the agreement for sale was ninety (**90**) **days** from the date of the agreement i.e. **9<sup>th</sup> December 2013**, all parties were aware of the said date and represented to each other that as at the date, each party would have met his/her obligations as per the agreement.

It was his contention that his advocates, **Messrs Lumumba & Lumumba Advocates**, on several occasions wrote to the Defendant’s/Respondent’s advocates requesting for a copy of the title and the amount(s) of the Loan balance outstanding to enable him make arrangements to settle the amounts. He also contended that his advocates did not receive any response from the Defendant/Respondent’s advocates until the **17<sup>th</sup> of September, 2013** vide their letter stating that they would revert with the documents requested i.e. the

title and outstanding loan balance amount. The Applicant deposed further that his advocates repeatedly requested the Defendant/Respondent to update them on the progress of the transaction particularly on the issues between her and the Bank of Africa but he received no response. He also deposed that as the completion date approached, the Defendant/Respondent through her advocates represented to his advocates that she was in a position to complete the transaction on or before the completion date.

Further that acting on the information represented by the Defendant/ Respondent's advocates that she was able to complete the transaction his advocates responded by requesting for the title documents and the outstanding loan balance. The deponent further averred that he has been advised by his advocates that the Defendant/Respondent has not performed her part of the agreement and that he was therefore entitled to a refund of his deposit of **Ksh.2,500,000/-**. He also alleged that the Defendant/Respondent's actions despite being issued with a Notice/Demand has failed/ neglected/ and/or refused to pay a refund of this deposit.

The Respondent though served with the instant Notice of Motion did not file a Replying Affidavit in opposition to this Notice of Motion. The court directed that the same to be canvassed by way of written submission. The Law Firm of **Lumumba & Lumumba advocates** for the Plaintiff/Applicant filed their written submissions on **22<sup>nd</sup> March, 2016** and relied on various decided cases. Among the cases relied on is the case of **Diamond Trust Bank (K) Ltd Vs Martin Ngombo & 8 Others (2005), HCCC No. 43 of 2004** where the court held that: -

***“this summary procedure is intended to give a quick remedy to the plaintiff which is being delayed in realizing his claim against the Defendant by what is generally described as sham defence. The jurisprudence that parties through the above cases is that a mere denial on general traverse is not sufficient defence and that a defence that has no merit is for striking out”***

The Applicant urged the court to allow his application. This court has now carefully considered the instant application which is brought under **Order 36 Rule 1(1) (2) of the Civil Procedure Rules and sections 1A, 1B and 3A of the Civil Procedure Act , Order 36 Rule 1(1) (2) of the Civil Procedure Rules** provide that: -

***“in all suits where the plaintiff seeks judgment for a liquidated demand with or without interest on 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 on for recovery of the land and rent on mesne profits.”***

Further the Applicant has anchored his application under Sections **1A** and **1B** of the Civil Procedure Act which deals with the overriding objective of the Act and which is to facilitate the *Just, expeditious, proportionate, and affordable* resolution of civil disputes and that the court has the duty to ensure that it furthers the overriding objective in the way it handles the matter before it. The court is further granted inherent power by **Section 3A** to make such orders that may be necessary for the ends of justice to be met and also to prevent abuse of the process of court.

In determining this application, the court will be guided by the above provisions of law and the principles to be considered while deciding an application for summary Judgment. The court will also be guided by various decided cases on the issue of summary judgment. In the case of **Lion of Kenya Insurance Co. Ltd Vs Trinity Prime Investment Ltd, Civil Appeal No. 120 of 1999** the Court of Appeal held that: -

***“to succeed, the Applicant must show that the Defendant who has appeared has no defence on whatever he has or may have is merely a sham defence.”***

Further on the case the of **Trust Bank Ltd and another Vs Unvestech Bank Ltd & 3 others, Civil Appeals No. 258 and 315 of 1999**, the Court of Appeal held that: -

***“... the Civil Procedure rules empowers the court where a Plaintiff has a liquidated claim or being appropriately moved to enter summary judgment where the Defendants defence is merely a sham.”***

The Court has also considered the findings in the case of National Industrial Credit Bank Ltd Vs Raphael Obungo Okello, Nairobi (Milimani High Court, Civil Case No. 1186 of 2000 where the court held that: -

***“It is well settled that the procedure for summary judgment is to be resorted to in respect of liquidated demands only where it is plain and obvious that the Defendant is truly and justly indebted to the Plaintiff and there are no bona-fide triable issues raised by the proposed defence on defence already filed”.***

Taking into account the relevant provisions of law and the above decided cases is the Applicant deserving of the orders sought?

There is no doubt that the Plaintiff/Applicant herein entered into a sale agreement with the Defendant for purchase of **L.R. No. 3734/1101 Nairobi** which belonged to the Defendant/Respondent. As per the sale agreement attached to the Plaint, the sale agreement was made on **9<sup>th</sup> September, 2013** and the purchase price was **Ksh.50, 000,000/-**. It is evident that it was a term of the sale agreement in **clause 3(a)** that the purchaser who is the Plaintiff/Applicant was to deposit a sum of **Ksh.2,500,000/-** to be paid to the vendor or her advocate before the execution of the sale agreement. It is also evident from the annexure **DPH 1** that the Applicant did pay the sum of **Kshs.2,500,000/-** to the Defendant/Respondent who was the vendor. From the various correspondences attached to the application it is evident that the transaction collapsed. The Applicant through his advocate demanded for refund of **Ksh.2,500,000/-** vide a letter dated **6<sup>th</sup> January, 2014** and marked annexure **DPH 10**. It is evident that the Defendant did not refund the said amount as a Plaint was filed on **8<sup>th</sup> April, 2014** seeking among other orders that the Defendant be compelled to refund **Ksh.2,500,000/-** to the Plaintiff with interest.

The Defendant filed the defence dated **7<sup>th</sup> May, 2014** and denied receipt of **Ksh.2,500,000/-**. However, for **DPH1** it is evident that a sum of **Ksh.2,500,000/-** was paid to the Defendant on various dates.

The Defendant’s defence of denying receipt of the said amount of money is a mere denial meant to prolong the refund of this money to the Applicant. Since the transaction collapsed, the Defendant should have refunded the deposit paid to her as per **clause 3(a)** of the sale agreement. Though courts are very cautious when it comes to granting an order for summary judgment, it is a remedy applicable to any Plaintiff/Applicant in cases brought under order **36(1)** where the Defendant is only but on delaying action to the Plaintiff.

This was the finding in the case of National Industrial Credit Bank Ltd Vs Cornel Rasanga Amote, Nairobi (Milimani High Court, Civil Case No. 13 of 2000, where the court held that: -

***“the granting of summary judgment is a drastic remedy and should be applied in plain and obvious cases where it can be discerned that the Defendant is bent on delay or some form of mischief...”***

There is no doubt that the Plaintiff/Applicant did pay **Ksh.2,500,000/-** to the Defendant/Respondent as a deposit towards actualizing the sale agreement dated **9<sup>th</sup> September, 2013**. The said transaction collapsed and therefore the Defendant/Respondent should have refunded the purchase price as provided for in **clause No. 10** of the sale agreement.

Having now carefully considered the instant Notice of Motion dated **19<sup>th</sup> June, 2014** and the fact that the same is not opposed, the Court finds it merited and it is allowed entirely in terms of prayer **No.1** with costs to the Plaintiff/Applicant to be borne by the Defendant/Respondent.

It is so ordered.

***Dated, signed and delivered at Nairobi this 27<sup>th</sup> day of January, 2017.***

**L GACHERU**

**JUDGE**

In the presence of

Mr Kanuku for the Plaintiff/Applicant

None attendance for the Defendant/Respondent though served with Ruling Notice.

Court Clerk: Hilda

**Court:** Ruling read in open Court in the presence of the above stated advocate and absence of Advocate for the Defendant though served with Ruling Notice.

**L.GACHERU**

**JUDGE**