



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 82 OF 2014**

**CHARLES METO.....PLAINTIFF**

**VERSUS**

**AMOS KOSGEY.....1<sup>ST</sup> DEFENDANT**

**DAVID MUGUN.....2<sup>ND</sup> DEFENDANT**

**COLLINS SAINNA.....3<sup>RD</sup> DEFENDANT**

**CAD HOLDINGS LIMITED.....4<sup>TH</sup> DEFENDANT**

**RULING NO. 2**

1. The plaintiff's application is for the striking out of the Defence. The plaintiff says that the Defence on record is scandalous, vexatious or otherwise an abuse of the process of the court.
2. The second limb of the application is for summary judgement to be granted in favour of the plaintiff, in respect to the liquidated claim of U.S \$ 152,480.52, on its equivalent in Kenya Shillings.
3. It is the plaintiff's case that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants; (**AMOS KOSGEY: DAVID MUGUN and COLLINS SAINNA**) invited him to jointly participate with them in a project for the development of **HOLIDAY HOMES ON PLOT No. KILIFI/MTWAPA/729**.
4. The plaintiff's understanding was that each the 3 defendants, (*named above*) would hold 25% shares in **CAD HOLDINGS LIMITED**. The plaintiff was to hold the final 25% shares in that company.
5. **CAD HOLDINGS LIMITED** (*the 4<sup>th</sup> defendant*) was, in the understanding of the plaintiff, supposed to be the Special Purpose Vehicle for use in the development of the Holiday Homes.
6. **CAD HOLDINGS LIMITED** (*the Company*) opened a bank account at **FINA BANK LIMITED**.
7. The plaintiff, (*Charles*) remitted US \$ 152, 480.52 into the Company's bank account. The remittances were made in 2010 and 2011.
8. According to Charles, he visited Kenya in the year 2012, and found out that the land upon which the Holiday Homes was supposed to be constructed, had never been purchased.

9. Charles also says that Amos, David and Collins had not raised their respective portions of the money which was to be utilized to develop the Holiday Homes.
10. Furthermore, the money which Charles had paid into the company account, had been withdrawn. Therefore, Charles concluded that Amos, David and Collins had defrauded him. They had, allegedly, led him to believe that the company had identified a viable investment opportunity, and that they had met their respective equity shareholding in the company.
11. It later turned out that the other 3 shareholders had neither paid their respective funds, nor had the company purchased the land upon which the Holiday Homes were to be developed.
12. The plaintiff decided to bring this suit, with a view to recovering the money which he paid towards the project.
13. Miss Olando, the learned advocate for the plaintiff, submitted that the Defence on record did not give rise to any triable issues. That submission is premised upon the defendants' admission that they received the money which the plaintiff remitted.
14. The defendants are also said to have admitted that money was to be invested, had failed to take-off.
15. As the sums remitted by Charles were of a liquidated amount, which the defendants are said to have admitted receiving, the plaintiff feels that the Defence on record did not raise any *bona fide* defence or any arguable issue.
16. In answer to the application, Mr. Drammey, the learned advocate for the defendants, submitted that the only admission in this case was that money was received from the plaintiff (*Charles*).
17. However, the defendants categorically denied that the company was incorporated as a Special Purpose Vehicle.
18. As far as the defendants were concerned, the company was an ordinary limited liability company.
19. Secondly, although the land which was due to have been purchased had not yet been acquired, the defendants submitted that that could not extinguish the plaintiff's obligation to purchase 25% of the shares in the company.
20. According to the defendants, there were triable issues which arose from the Defence.
21. The defendants asserted that there was an alternative property in Kilifi, which was available for investment.
22. However, the plaintiff countered that assertion by emphasizing that there was no proof that any such alternative property was available.
23. I find that the parties do not agree on the question as to whether or not there was alternative land, located at Kilifi, which was available for the company to invest in. But that is not the central factor in this case.
24. To my mind, the central factor relates to the bona fides or lack thereof, of the defendants. The plaintiff has accused the defendants of fraud, falsehoods and misrepresentation.
25. But the defendants have insisted that at all material times, they all acted with honesty. They said that Charles personally attended numerous meetings at which the parties explored other options for investment.
26. The defendants added that Charles actually signed documents relating to the alternative investments

which the company was pursuing.

27. In the circumstances, if the defendants were to provide evidence to prove the involvement of Charles in those other negotiations, it is possible that the claims of the alleged fraud may not be sustainable. In other words, the defence was arguable.

28. The plaintiff paid money into the account of the Company.

29. Whereas Amos, David and Collins were all shareholders in the Company, the question that arises is with regard to their alleged personal liability for money paid to the company.

30. The shareholders stated that the plaintiff was originally offered only 5% of the shares. They said that it is the plaintiff who insisted on owning 25% of the shares, so as to bring him to the same level of the other 3 defendants.

31. If the defendants were to demonstrate that that contention was factually accurate, there might arise the question as to whether or not there was an elaborate scheme of falsehood and misrepresentation by the defendants.

32. In the Witness Statement of Collins Sainna, it was said that the Company did execute a Sale Agreement in relation to **KILIFI/MTWAPA/749**, and that the plaintiff was present when the company paid the deposit to the vendor.

33. According to the defendants, the sale transaction collapsed because the property was sold to **BEN GITONGA MUIRURI**.

34. I understand that to mean that the Company had had every intention of buying the land in Mtwapa. That would suggest that the defendants had genuine intentions to purchase the said land.

35. Another question that arises from the Defence relates to issue regarding the relationship between the plaintiff and his co-share-holders. Can the plaintiff sustain the claim against his co-shareholders in respect to money which the plaintiff had paid into the company's account?

36. The claim by the plaintiff is in relation to money which he gave out to the company. He had given out the money for the purposes of buying shares in the company.

37. If the plaintiff was allocated shares in the company, as asserted by the defendants, the question that follows is about whether or not the plaintiff can demand a refund of the money he used to buy the shares.

38. I appreciate the fact that the plaintiff feels cheated. He has not benefited which he used to purchase shares in the company.

39. He feels that even worse after realizing that his co-shareholders may not have put down their respective funds into the purchase of their own shares.

40. But such a feeling may be insufficient to prove fraud, falsehood or misrepresentation, which the plaintiff has attributed to the defendants.

41. The plaintiff's claim is not limited to the liquidated claim. He also claims General Damages and also Interest at "*Commercial rates?*".

42. It is possible, in principle to separate the liquidated claim from the balance of the claim.

43. However, the grant of an order to strike out the defence in respect to the liquidated amount, would not, of itself, translate into summary judgement for both the liquidated amount and also of the interest at commercial rates.

44. A person laying claim to interest at commercial rates needs to lead evidence to prove the rates which were applicable during the period in issue.

45. Finally, the plaintiff has failed to demonstrate how the defence on record was scandalous, vexatious or otherwise an abuse of the process of the court.

46. In the result, I find no basis in law or in fact, to warrant the striking out of the Defence. Therefore, the application dated 9<sup>th</sup> April 2015 is dismissed with costs to the defendants.

**DATED, SIGNED and DELIVERED at NAIROBI this 24<sup>th</sup> day of March 2016.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of:**

..... for the Plaintiff

..... for the Defendants

Collins Odhiambo – Court clerk