



REPUBLIC OF KENYA



**Advocates & 2 others v Equity Bank (Kenya) Limited (Commercial Civil Case E659 of 2021)
[2022] KEHC 269 (KLR) (Commercial and Tax) (31 March 2022) (Judgment)**

Neutral citation: [2022] KEHC 269 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL CASE E659 OF 2021**

DAS MAJANJA, J

MARCH 31, 2022

BETWEEN

JOSEPH MAKUMI T/A J MAKUMI & COMPANY

ADVOCATES 1ST APPLICANT

**CHARLES NDEGWA T/A NDEGWA & NDEGWA ADVOCATES 2ND
APPLICANT**

MK MWANGI & COMPANY ADVOCATES 3RD APPLICANT

AND

EQUITY BANK (KENYA) LIMITED RESPONDENT

JUDGMENT

1. The Applicants (“the Advocates”) act for the administrators of the Estate of one Jonah Thumbi Karimi (“the Vendor”) where they represented them in selling Land Title Number Ruiru Town/70 (“the Suit Property”) to Elijah Mburu Mbugu (“the Purchaser”) for the purchase price of KES 65,000,000.00 as evidenced by the Agreement for Sale dated 20th November 2020 (“the Agreement”).
2. The Purchaser sought financial assistance from the Respondent (“the Bank”) to aid in the payment of the balance of the purchase price of KES 58,500,000.00 and which assistance the Bank acceded to. As such, the Bank issued an undertaking dated 26th November 2020 (“the Undertaking”) to the Advocates that it will pay the aforesaid sum to the Advocates upon them releasing the original Title and Transfer documents to the Bank’s advocates and within 14 days of registration of the Transfer together with its charge.
3. On 30th June 2021, the Advocates filed the Originating Summons made, inter alia, under Order 37 Rule 3 of the Civil Procedure Rules claiming that the Bank has reneged on the Undertaking by failing



to pay the balance of the purchase price within the 14 days of the Registration of the Transfer. The application is supported by the affidavits of the 1st Applicant Advocate sworn on 30th June 2021 and 2nd September 2021 respectively and is opposed by the Bank through the replying affidavit of its Senior Manager Legal Services, Roy Akubu, sworn on 16th August 2021. The parties have also filed written submissions in support of their respective positions.

The Application

4. As stated, the Advocates accuse the Bank of renegeing on the Undertaking by not remitting the balance of the purchase price as promised despite written demand and perfection of the securities. The Advocates state they released the Title documents and the Transfer of the Suit Property to the Bank's advocates, who on 4th May 2021 caused the same to be registered at the Ruiru Lands Registry on the basis of the Undertaking provided to them. The Advocates now seek for declaratory orders that the Bank is bound by the terms of the Undertaking and that the court orders the Bank to pay and remit to the Advocates KES. 58,500,000.00 plus interest at a commercial rate of 14% from 19th May 2021 or in the alternative Court rates, immediately and in any event not later than 7 days from the date of this application.

The Bank's Reply

5. The Bank opposes the application and states that the Purchaser paid stamp duty on 28th January 2021 and that as the Bank's advocates were waiting for the title documents, the Vendor went back to Court as there was an issue touching on the lease which culminated in orders dated 30th April 2021 being issued by the High Court in Kiambu High Court Succession Cause No. 104 of 2017 In the Matter of the Estate of Jonah Thumbi (Deceased). The Bank thus accuses the Vendor of delaying the registration process as the same was halted waiting finalization of the court case.
6. In any case, the Bank avers that it paid the Advocates KES. 58,500,000.00 on 1st July 2021 at exactly 11:17 am as acknowledged by the 1st Advocate through the email dated 14th July 2021 whereas the Bank was served with this application on 5th July, 2021. The Bank therefore submits that the prayer that the Bank remit to them KES. 58,500,000.00 is overtaken by events and cannot be granted by the Court.
7. The Bank further advances the position that there is no clause in the Agreement for payment of interest upon late payment of the principal sum. It contends that even if there was, the Bank would not be bound by it since there is no privity of contract between the Vendor and the Bank. The Bank avers that the Vendor would be the right person to claim such interest and who is party to this suit and would ordinarily be paid by the Purchaser who is equally not a party to this suit.
8. The Bank states that the Undertaking did not create an express obligation on it to pay interest for delayed completion. Further that this obligation was on the Purchaser and that in any event, the funds belonged to the Vendor and not their Advocates. It adds that in the absence of the express authority of the Vendor to sue for the interest the Advocates lack the locus standi to sue the Bank. The Bank therefore concludes that the suit against it does not disclose any reasonable cause of action and should be dismissed.

Analysis and Determination

9. From the pleadings, depositions and submissions, the main issues for determination are whether the Bank is bound the terms of the Undertaking and if so, whether it should pay the Advocates KES. 58,500,000.00 together with interest thereon as claimed.
10. *Black's Law Dictionary (11th Ed.)* defines an undertaking as "a promise, engagement, or stipulation". It states that an "undertaking" is frequently used in a special sense of a promise given in the course of



legal proceedings by a party or his counsel, generally as a condition to obtain some concession from the Court or opposing party. In *Family Bank Limited v Tabitha Wothaya & 2 others ML HCCC No. 314 of 2016(OS) [2019] eKLR* the court held that a non-advocate who issues an undertaking in the course of a legal transaction is bound by the terms of that undertaking just like an advocate would, unless there is a vitiating factor that the court is bound to consider.

11. Therefore, the Bank, having issued an irrevocable and unconditionally undertaking to the Advocates to make payment of the balance of the purchase price within 14 days from the date of registration of the Transfer and securities in the Bank's favour, then it was bound by the terms of the Undertaking to do exactly that. That the registration of the Transfer and securities was done on 4th May 2021 has not been disputed, meaning the Bank had until and at least 19th May 2021 to remit payment. This payment was done more than 30 days later, in clear breach of the Undertaking. I find that the reason that there was a delay in registration does not arise as the Bank did not pay the sum within 14 days even after registration was done. The Bank nevertheless remitted the balance the KES 58,500,000.00 in accordance with the Undertaking. In the circumstances no purpose will be served by granting the declaration.
12. The only remaining issue is whether the Bank should pay interest on this amount for the days it remained unpaid as from 19th May 2021 when the Bank ought to have made payment. I have gone through the Undertaking and I agree with the Bank that it does not contain any clause imposing payment of interest on the Bank for failure to remit KES. 58,500,000.00. Since the Undertaking governs the relationship between the Advocates and the Bank, I find and hold that there is no basis to award the interest sought by the Advocates.

Disposition

13. The Originating Summons lacks merit. On the issue of costs, I depart from the general principle that costs follow the event, as the Bank delayed in remitting payment.
14. The Originating Summons dated 30th June 2021 is dismissed but with no order as to costs.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH 2022.

A. MABEYA

JUDGE

Court Assistant: Mr M. Onyango

Mr Makumi instructed by J. Makumi and Company Advocates for the Applicants.

Mr Mbaje instructed by Igeria Ngugi Advocates for the Respondent.

