



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. E340 OF 2019

SPIRE BANK LIMITED.....APPLICANT/CHARGE

VERSUS

JAMES CHURCHIL OTIENO.....1ST RESPONDENT

GEORGE SAMWEL AYANY OKOTH.....2ND RESPONDENT

RULING

BACKGROUND

1. The 2nd respondent herein approached the applicant for a loan facility of Kshs 7,500,000/= to enable him purchase the 1st respondent's property known as LR No. 13511/17.

2. The applicant then accepted to finance the 2nd respondent after which a sale agreement was executed by the parties and the applicant agreed to disburse the sum of Kshs 7,500,000/= to the 2nd respondent in fulfillment of its contractual obligations with the 1st respondent pursuant to their sale agreement on condition that security in the form of a charge in favour of the applicant was simultaneously created with the transfer of the property in favour of the 2nd respondent.

3. The process of transfer and issuance of the charge however took longer than expected as the original title documents were not readily available thus prompting the 1st respondent to obtain a provisional title. On confirmation of the availability of the duplicate title, the applicant's counsel made a professional undertaking dated 11th February 2019 in the following terms:

4.1. That within fourteen (14) days of our receipt from the Lands Registry of the duly registered transfer and the Bank's Charge, we shall cause our client to pay to you the balance of the purchase price.

4.2. That if the balance of the purchase price is not paid within forty – five (45) days of our receipt of the documents from your offices, we shall upon demand return the same to you in the same condition in which they were on leaving your offices.

4. Upon receiving the completion documents, the 2nd respondent's advocates finalized the registration of the Transfer and charge and then called upon the applicants and pay the balance of the purchase price.

5. The applicant was however unable to release the balance of the purchase price citing the expiry of the initial appraisal conducted on the 2nd respondent due to the long time it took from credit approval to the registration of the Transfer and Charge. The applicant attributed this delay to the time it took for the 1st respondent to avail the original title documents.

6. The 1st respondent threatened to file enforcement suit to have the purchase price released. It is at this point that the applicant invoked the terms of the professional undertaking so that the parties can be restored to their positions before the registration of the title and charge by filing the Originating Summons dated 6th August 2019 wherein the applicant sought the following orders:

1. Spent

2. That an order does issue directing the Registrar of Titles to cancel the transfer registered on 25th June 2019 over ALL THAT piece of land known as Land Reference Number 13511/127 in favour of GEORGE SAMWEL AYANY OKOTH, the 2nd respondent.

3. That an order does issue directing the Registrar of Titles to cancel the transfer registered on 25th June 2019 over ALL THAT piece of land known as Land Reference Number 13511/127 in favour of the applicant.

4. That consequently the Registrar of Titles be ordered by this Honourable court to reinstate the interest previously held by JAMES CHURCHIL OTIENO the 1st respondent, as proprietor of ALL THAT piece of land known as Land Reference Number 13511/127.

5. Such other necessary directions as this Honourable court may be pleased to grant in the circumstances of the case.

6. Costs of these proceedings.

7. There be liberty to apply.

7. The respondents opposed the originating summons through their respective replying affidavits wherein they stated, inter alia, that the suit has been filed in bad faith with the intention of frustrating them in enforcing the professional undertaking.

8. The 1st respondent contends that if the court grants the orders sought, then the applicant/bank and its advocates should be ordered to refund/pay them the costs of the suit, legal costs and damages on account of misrepresentation.

9. On his parts, the 2nd respondent claims for the payment of all the expenses already incurred in the transaction in terms of the stamp duty, valuation fees, legal fees and registration fees.

10. At the hearing of the Originating Summons, parties agreed, by consent that the same be allowed in terms of prayers 2, 3,4 and 7 thereof. The parties then agreed to address the court on the issue of costs and legal fees.

11. **Miss Lwila**, learned counsel for the applicant submitted that the remedies sought in the replying affidavits are not remedies profiled in the professional undertaking that was the subject of the originating summons.

12. According to the applicant the originating summons was precipitated by the inaction by the respondent in failing to avail the title documents on time thereby leading to the expiry of the 2nd respondent's appraisal.

13. **Mr. Cherongis**, learned counsel for the respondent submitted that the 1st respondent paid legal fees to the advocate, transfer was effected yet the purchase price was not released by the applicant. Counsel argued that in the circumstances of the case the 1st respondent is entitled to a refund of the legal fees and costs.

14. **Mr. Okello**, learned counsel for the 2nd respondent also sought the costs incurred by the 2nd respondent in the transaction.

15. The main issue for determination is whether the respondents herein are entitled to the costs/legal fees incurred in the transaction. It is not in dispute that the originating summons was precipitated by the professional undertaking which provided that the balance of the purchase price was to be paid by the applicant within 14 days of receipt of the duly registered transfer and the Bank's Charge. It further provided that in the event the purchase price is not paid within 45 days, the title documents would be returned in the same condition in which they were when they left the respondents advocates offices. The professional undertaking was however silent on the issue of the costs that would have been incurred by the parties in the event that the purchase price was not paid within the agreed period.

16. I note that by entering into consent to allow the Originating Summons, the parties herein basically agreed to compromise the substantive prayers sought in the originating summons. In the replying affidavits and submissions, the respondents alluded to their claim for costs and legal fees incurred in the sale transaction. The respondents have attached copies of receipts, cheques and invoices to support their claims.

17. The general rule as to costs is provided for in section 27 of the **Civil Procedure Act** which provides as follows:

Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

18. In the case of **Supermarine Handling Services Ltd v Kenya Revenue Authority Civil Appeal No. 85 of 2006** the Court of Appeal expressed itself thus:

“Costs of any action or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the

Court of Appeal will not interfere with his discretion in that instance...Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where the reasons are given if it considers that those reasons do not constitute "good reason" within the meaning of the rule...In the instant case the learned Judge gave no reasons whatsoever for his decision to deprive the successful plaintiff of its costs and yet it was not shown that the defendant had been guilty of some misconduct which led to litigation. In the court's view the learned Judge's order was wrong and for the foregoing reasons, the plaintiff's appeal succeeds as to the award of interest and costs on the principal sum awarded".

19. In *Devram Manji Daltani v Danda* [1949] 16 EACA 35 it was held that a successful litigant can only be deprived of his costs where his conduct has led to litigation, which might have been averted.

20. In the present case, I note that the agreement between the parties was frustrated by the delay on the part of the 1st respondent in availing the original title documents. Strictly speaking and guided by the dictum in the above cited cases, I find that it cannot be said that the applicant's conduct led to the litigation which may have been averted as the applicant was also a victim of the delay. In the same vein, I note that none of the parties can be said to have been a successful litigant before this court as the import of the consent order was to take the parties back to their original positions before they entered into the loan facility agreement.

21. My further finding is that the parties herein having agreed on the substantive prayers in the originating summons ought to have at the same time also agreed on the subject of costs or legal fees incurred in the transaction. In the circumstances of this case, this court is unable to find that any of the parties is liable to the other for costs and the order that commends itself to me is the order that each party is to bear its/his own costs.

Dated, signed and delivered via skype at Nairobi this 29th day of April 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Miss Luila & Luseno for the applicant

No appearance for respondent

C/A & DR – Hon. Tanui