



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

HCCC NO. 02 OF 2015 (ORIGINATING SUMMONS)

KALE MAINA & BUNDOTICH ADVOCATES.....PLAINTIFF

VERSUS

MUNIKAH & CO. ADVOCATESDEFENDANT

CONSOLIDATED WITH

CIVIL SUIT NO. 369 OF 2018 (ORIGINATING SUMMONS)

**KENNEDY ASINALI PRACTICING LAW IN THE NAME AND STYLE OF ASINALI &
ASSOCIATES ADVOCATESPLAINTIFF**

-VERSUS-

**AMOS C. K. KALE AND STEVE K. BUNDOTICH PRACTISING LAW IN THE NAME
AND STYLE OF KALE MAINA & BUNDOTICH ADVOCATES.....DEFENDANT**

JUDGMENT

1. This decision is in respect to two Originating Summons whose prayers are a mirror of the other and hence their consolidation.
2. In Civil Case No. 2 of 2015 Kale Maina & Bundotich Advocates (KMB Advocates) commenced proceedings against Munikah & Co. Advocates (Munikah Advocates) for the following orders:-
 - a. That the defendant do forthwith and in any event within seven (7) days from the date of the order deliver to the Plaintiff duly stamped lease instrument for Apartment Unit No.B2 erected on Land Reference No.1/308(original No.1/80/4 executed between Heri Development Limited and Heri Paradise Management Limited and Amos Kipronoh Cheptoo.
 - b. That the defendant do forthwith and in event(sic) within Seven(7) days from the date of the Order deliver to the Plaintiff the Mortgage Instrument over the aforesaid apartment.
 - c. Costs.
3. The area of controversy was considerably narrowed when the following consent was entered by the parties on 16th October 2015;
 - a. The Plaintiff shall on the date of filling of this Consent Order issue a professional undertaking to the defendant's Advocates to pay a sum of Kshs. 288,468/= or such lower sum within Seven(7) days of registration of lease instrument for L.R.No.1/308 Original Number 1/80/4 in favour of Amos Kipronoh Cheptoo.

b. That upon issuance of the Professional undertaking pursuant to clause 1 above the defendant shall deliver to the Plaintiff forthwith and in any event within seven (7) days from the date of receipt of the professional undertaking the duly stamped lease instrument for Land Reference No 1/308(original No.1/80/4) executed as between Heri Development, Heri Paradise Management Limited and Amos Kipronoh Cheptoo.

4. In Originating Summons 369 of 2018 the Plaintiff seeks the following orders:-

a. That the Respondents do forthwith and in any event within seven(7) days from the date of the Orders pay to the Applicant a principal sum of Kshs. 288,486/= together with interest thereon at the rate of 14 %per annum effective from 7 days of registration of the lease instrument for Apartment b2 erected on a piece of land known as LR No.1/308 (original 1/80/4), executed between Heri Development Limited and Heri Paradise Management Limited and Amos Kiprono Cheptoo.

b. costs

5. The issue of the documents having been resolved the only issue to be determined is whether KMB Advocates are liable to pay the sum of Kshs.288,468/= in respect to the transaction.

6. KMB Advocates represented one Amos Kipronoh Cheptoo (Cheptoo) who entered into an agreement for sale dated 6th July 2009 with Heri Development Limited (the Vendor) to purchase an apartment being Apartment B2 in a block of apartments erected on LR 1/380 and situated at Dennis Pritt Road Nairobi (the Suit Property). Cheptoo says that he was aware that the firm of Munikah & Company initially acted for the vendor.

7. Cheptoo states that he paid the vendor a sum of Kshs.9,050,00/= through the firm of KMB and that the said firm gave a professional undertaking on behalf of Kenya Commercial Bank Limited (KCB) to the firm of Messrs Adera & Co. at the request of the vendor's Advocates for payment of the balance of the purchase price being Kshs.5,500,000/=.

8. Cheptoo argues that it was a term of the agreement of sale that the vendor's advocate would undertake the registration of the lease instrument executed by him and upon its registration the vendor's advocates would forward it to KMB for onward transmission to the financier.

9. The firm of Munikah & Company Advocates who acted for Heri refused to release the lease because Heri owed it Kshs.288,468/= being fees and disbursements relevant to the said transaction. Some negotiations took place between the firm of KMB and Munikah Advocates after the filing of Civil Case No. 2 of 2015 which culminated in the consent whose terms are set out in paragraph 3 of this decision.

10. It seems to this Court that the effect of the consent was to shift the responsibility of paying the fees that was owed by Heri to the firm of KMB as long as the terms upon which the consent were predicated were fulfilled.

11. It is common ground that pursuant to the terms of the consent order KMB issued an undertaking dated 27th October 2015. The substance of the undertaking was as follows:-

“Pursuant to the consent order dated 15th October 2015 and adopted by the Court on 26th October 2015, we hereby give you our professional undertaking to pay Kshs.288,468/= or suit (sic) lowered sum within seven (7) days of registration of lease instrument for LR No. 1/308 (Original Number 1/80/4) in favour of Amos Kipronoh Cheptoo.

Kindly but urgently let us have the original duly stamped lease instrument and counterpart copies for our further action.”

12. It is further common cause that the documents called for by the undertaking were duly released to the firm of KMB. One would have thought that the controversy that triggered HCCC (O.S) No. 2 of 2015 had been resolved. But why was this not to be?

13. The firm of KMB refused to pay up the sum it undertook to pay and gave its reasons in a letter of 15th March 2018. Basically, the firm complained that Munikah advocates had failed to disclose to it that it had lodged a bill of costs being Miscellaneous No. 702 of 2012 against Heri in respect to the same transaction. In the letter KMB posits:-

“In essence therefore your firm is asking our client to pay fees while at the same time you are claiming same amount from the vendor.”

14. This stance led to the filing of O.S No. 369 of 2019 to force KMB to honour its undertaking.

15. In the final submissions in respect to the now two consolidated matters, KMB maintain the same stance. It submits that the undertaking it issued was solely to secure fees to the firm of Munikah advocates but the latter firm having proceeded to tax its fees against Heri, then the firm was attempting to steal a march on the Plaintiff by seeking to benefit twice.

16. It is proposed by firm of KMB that these proceedings be stayed pending the outcome of the taxation proceedings as the outcome would determine who as between the vendor and purchaser should pay the fees of Munikah & Co. Advocates.

17. It has however turned out that the taxation proceedings have been withdrawn. In a Notice of Withdrawal dated 17th March 2016 and filed on 14th March 2016 is the Notice from firm of Munikah & Co. withdrawing its Bill of Costs dated 14th November 2012 and filed on

21st November 2012 against the Respondent in its entirety. In an affidavit sworn on 24th October 2018 counsel Munikah depones that the matter was marked as withdrawn on 26th September 2018 before Lady Justice Grace Nzioka. This has not been controverted and the Court believes it.

18. The said firm further asserts that in any event Misc. No.702 of 2012 should not be the concern here as these proceedings concern an advocate's professional undertaking to a fellow advocate.

19. I think the withdrawal of Miscellaneous Cause No. 702 of 2012 has resolved this matter without more ado. The subsistence of these proceedings having been the only concern of the firm of KMB, then there is nothing to hold them back from honouring their undertaking.

20. In respect to the costs of the two matters, i say as follows. In Civil Case No. 2 of 2015 (O.S), the firm of Bundotich & Co. Advocates sought delivery of the duly stamped lease for Apartment Unit No. B2 erected on LR. No. 1/308 and the matter was compromised leading to the release of the document. The undertaking also addressed the fees to Munikah & Co. Advocates. In a sense therefore the compromise reached was a win – win to both sides.

21. In regard to the latter proceedings the argument raised by KMB that the existence of taxation proceedings against Heri could have led to a situation where Munikah & Co. Advocates would be paid twice for the same transaction may not have been frivolous. A further argument by the firm that its motivation for giving an undertaking to pay fees to Munikah & Co. Advocates would have not been there if it had known that the said firm was pursuing the same fees through taxation cannot be said to be simply quarrelsome. Whilst the issue here is about an advocate keeping his word on a professional undertaking, it cannot be said to be an idle argument that the same should not be enforced if it were to lead to improper double enrichment to the benefitting advocate. To be noted, as well, is that the taxation proceedings that may have led to that situation were only withdrawn 5 days after the filing of these proceedings.

22. In the preceding paragraphs the Court has given reasons why both sides in this matter should meet their own costs on the consolidated proceedings. Otherwise this Court orders that Amos C. K. Kale and Steve K. Bundotich practicing law in the name and style of Kale Maina & Bundotich Advocates shall forthwith and within 45 days from the date of this order pay to the Kennedy Asinuli practicing law in the name and style of Asinuli & Associates the sum of Kshs.288,468/= (Kenya Shillings Two Hundred Eighty Eight Thousand, Four Hundred Sixty Eight Only) with interest at Court rates from 25th September 2018 until payment in full.

Dated, Signed and Delivered in Court at Eldoret this 26th Day of May 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Judgment has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Bundotich for the Plaintiff.

No appearance for the Defendant.