



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL CASE NO 233 OF 2018 (O.S)

BILHA W. MWANGI

KEMBOY JULIUS KIPKOSGEI t/a

KEMBOY LAW ADVOCATES LLP.....PLAINTIFFS

VERSUS

NJERI BENSON NGUGI.....1ST DEFENDANT

IGERIA ARTHUR KONYE.....2ND DEFENDANT

NJOROGE DAVID NGUMBU t/a

IGERIA & NGUGI ADVOCATES.....3RD DEFENDANT

RULING

INTRODUCTION

1. The Plaintiffs' Notice of Motion dated and filed on 23rd November 2018 sought orders:-

1. THAT this Honourable court be pleased to enter judgment as against the Defendants jointly and collectively on admission for the sum of Kshs 37,626,064/= with interest thereon at the rate of 14% per annum with effect from January 2017 and the said amount be paid forthwith to the Plaintiffs' advocates.

2. THAT the Defendant (sic)/Respondents be condemned to pay costs of the application

2. On 27th November 2018, the Defendants filed a Notice of Motion application of even date in which they sought:-

1. THAT the summons herein as filed by the Plaintiffs be struck out.

2. THAT in the alternative, the Summons herein filed by the Plaintiffs and the proceedings thereof be STAYED pending determination of Arbitration proceedings as between Dr Samuel Maina Thenya and Brian Martin Francis, Estate of the late Hiram Ngaruiya, Isaac Njoroge Gitoho, Krisco Ltd, Muiboro Ltd, David Kagai and George Muiboro Njoroge which were already underway.

3. When the matter came up on 20th December 2018, this court directed that both applications be heard together.

4. The Plaintiffs' Written Submissions were dated and filed on 30th January 2019 while those of the Defendants were dated and filed on 11th February, 2019.

5. Parties asked this court to render its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

6. In the event the Defendant's application was allowed, the same would render the Plaintiffs' application moot. This court therefore found it prudent to determine the Defendants' application in priority to that of the Plaintiffs.

I. THE DEFENDANTS' NOTICE OF MOTION APPLICATION DATED AND FILED ON 27TH NOVEMBER 2018

THE DEFENDANT'S CASE

7. The present application was supported by the Affidavit of Benson N. Ngugi that was sworn on 27th November 2018.

8. He stated that the Defendants were contracted as transactional lawyers of Kenya Commercial Bank Kenya Ltd (KCB) to perfect securities for financial accommodation that had been offered to one Dr Samuel Thenya Maina, the basis of the instant suit herein. The transaction involved the sale of hundred (100%) per cent shareholding in Adlife Plaza Ltd and eighty (80%) per cent shareholding in Adlife Management Ltd. The same was to be secured by a first legal charge by a property described as L.R. No 1/1366/Adlife Plaza.

9. He added that as part of their mandate, the Defendants were to issue a professional undertaking to the Plaintiffs to remit the sum of Ksh 940,000,000/= upon successful registration of Transfer of Shares in favour of the said Dr Samuel Thenya Maina and registration of a Charge in favour of KCB Bank.

10. He said that on instructions from KCB, on 7th May 2018, it issued the Plaintiffs a professional undertaking in exchange of relevant completion Documents. He averred that the said Professional undertaking was on condition that the Plaintiffs' clients were not in breach of the terms and conditions outlined in the Share Purchase Agreement (hereinafter referred to as "the SPA") executed between them and the said Dr Samuel Thenya Maina.

11. He also contended that during the course of the transaction, the Defendants received letters from M/S Kaplan & Stratton Advocates who were acting for the said Dr Samuel Thenya Maina (hereinafter referred to as "the Purchaser") informing them that the said firm of Advocates had established that as at the Completion Date, the Plaintiffs' clients were in breach of Clause 3.1 and 4.1(1) of the Share Purchase Agreement and they were not to release the said sum of Kshs 940,000,000/= unless the Plaintiffs' clients fully complied with the terms and conditions of the SPA.

12. He averred that the Defendants wrote to the Plaintiffs advising them that registration of the Transfers and Charge had been finalised and requested them to respond to the breaches that had been cited by M/S Kaplan & Stratton Advocates. The Plaintiffs responded and directed them to forward the registered securities to KCB. A sum of Kshs 837,621,977/= was remitted to the Plaintiffs which he stated was admitted.

13. He said that several meetings were held between the Plaintiffs, their clients, the Purchaser, his advocates and the Defendants to look into the stated breaches whereupon it was agreed that the Purchaser's auditor would undertake a verification process with a view of resolving the matter and that during the reconciliation period, the Plaintiffs would not call on the professional undertaking dated 7th May 2018.

14. It was his further contention that on 3rd September 2018, the Purchasers advocates wrote to the Plaintiffs confirming that a figure of Kshs 37,626,064/= out of the total outstanding sum had been verified and proposed that the sum be paid to the Plaintiffs' Clients in full and final settlement so as to close the transaction. He averred that the Plaintiffs did not respond to the said letters but instead filed the suit herein to enforce the professional undertaking issued to them by the Defendants.

15. He further stated that the Purchaser referred the matter to arbitration as per the terms of the SPA which matter was yet to be determined and consequently, the present suit was scandalous, vexatious, an abuse of the court process and ought to be struck out and/or stayed on the grounds that:-

a. The professional undertaking was conditional;

b. The matter had been referred to arbitration and the Defendants were willing and ready to honour the professional undertaking with the agreement of the parties or decision of the independent arbiter.

c. Continuation of the suit herein could lead to conflicting determination being made by the court and the arbitral tribunals which the Defendant's contended was an abuse of the court process.

THE PLAINTIFFS' CASE

16. In response to the Defendant's present application, an advocate, Bilha W Mwangi swore her Replying Affidavit on 5th December 2018. The same was filed on even date.

17. She was categorical that there was no Arbitration Clause in the professional undertaking sought to be enforced to warrant a stay of proceedings or reference of the matter to arbitration and that it was now settled that undertakings must be enforced irrespective of disputes between the parties who were not part to the undertaking.

18. She was emphatic that there was no dispute for reference to the parties as the Respondent confession was contract performed with the balance of the purchase price remaining with the Defendants.

19. She added that the Defendant's undertaking was unambiguous, unequivocal and binding on them and did subject payment of the purchase price to alleged dispute or breaches but rather to the release of the Completion Documents which was done and transfer effected.

20. She pointed out that out of a sum of Kshs 1,382,000,000/=, the sum of Kshs 837,621,977.10 had been paid leaving a balance of Kshs 102,000,000/= out of which the Defendants had admitted that a sum of Kshs 37,626,064/= had been admitted and was not in dispute.

21. She further asserted that her clients continued to suffer losses having transferred their shares and management of Adlife Plaza Ltd and Adlife Management Co Ltd to third parties who were enjoying rental collections from the suit property being L.R. No 1/1366 and Adlife Plaza Building.

22. The Plaintiffs termed the Defendants' present application an abuse of the court process and urged this court to dismiss the same.

23. The Defendants submitted that a professional undertaking cannot be enforced until a court analyses the entire agreement/contract from which the undertaking arises and establishes that enforcement is due. It was their submission that the parties opted to expand the terms of the professional undertaking to cover compliance in terms of another document, the SPA that became part and parcel of the undertaking and consequently, they had to demonstrate that the Plaintiffs' clients had met all the conditions provided in the SPA. They were adamant that the dispute before the arbitral tribunal ought to be determined first before the professional undertaking could be enforced.

24. On their part, the Plaintiffs relied on the cases of **Peter Mathenge Gitonga t/a Mathenge Gitonga Co Advocate vs Njoroge Kibatia & Another [2018] eKLR** where it was held that the question of legality and breach of contract of sale agreement was an entirely separate and independent matter and that the failure to honour the professional undertaking was a delaying tactic.

25. They also placed reliance on the cases of **Kenya Reinsurance Co vs E. Muguku Muriu t/a V.E. Muguku Muriuki Muriu & Co Advocates [1996] eKLR** and **Peter Ng'ang'a Muiruri vs Credit Bank & Another Civil Appeal No 263 of 1998** where the common thread was that a professional undertaking was contractual in nature and was independent and separate from other agreements.

26. A perusal of the enclosures clearly showed that there was a dispute between the Purchaser and the Plaintiffs' Clients. In the letter of 16th July 2018 by M/S Kaplan & Stratton to the Plaintiffs, it had been stated as follows:-

“We would like to emphasise that the undertaking issued to you by Messrs Igeria & Ngugi Advocates dated 7th May 2018 is issued subject to the Seller's compliance of the obligations under Share Purchase Agreement as at the Completion Date.”

27. In the letter dated 19th July 2018 from the Plaintiffs to the Defendants, it was stated as follows:-

“On the alleged breach of the Share Purchase Agreement, our clients' position is that there has been no such breach of the agreement. All the same, our clients propose that the parties' representatives...In the meantime, the Bank should proceed to disburse the undertaking amount less the quantified amounts.”

28. In the professional undertaking dated 7th May 2018, it was indicated as follows:-

“We are instructed to undertake to pay the balance of the consideration amounting to the sum Kenya Shillings Nine Hundred and forty Two Million only (Kshs 940,000,000/=) upon successful registration in favour of the Borrower (or his nominee) of the Share Transfer forms relating to 100% of the shares in Adlife Plaza Ltd (AFL) and 80% of the shares in Adlife Management Co Ltd (AMCL) hereinafter referred to as “the Companies” and the successful registration of the charge in favour of KCB and the title relating to L. R. No 1/366 and completion of the transaction”.

29. In Clause 1(K) of the Professional undertaking, it was stated that the undertaking was in exchange of the **“Sellers Warranties being true and accurate at completion and the sellers not otherwise being in breach of their obligations under the Agreement.”**

30. Having said so, there was no provision in the undertaking that in the event a dispute was to arise, the same would be subject to arbitration proceedings. The arbitration clause was contained in the SPA dated 19th June 2017 between the Purchaser and the Plaintiffs' clients. Although there was a letter dated 18th October 2018 from his advocates to the Chairperson of the Chartered Institute of Arbitrators (Kenya Branch), no proof was provided to demonstrate that there were on-going arbitral proceedings.

31. Section 6 of the Arbitration Act No 4 of 1995 gives the circumstances under which proceedings can be stayed pending arbitration proceedings. It stipulates that:-

1. A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—

a. That the arbitration agreement is null and void, inoperative or incapable of being performed; or

b. That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

2. Proceedings before the court shall not be continued after an application under sub section (1) has been made and the

matter remains undetermined.

3. If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.”

32. Whereas this court saw the prudence of the disputes between the Purchaser and the Plaintiffs’ clients being addressed first as the Defendants could not either of the parties, there was no legal provision that entitled the Defendants who were not party to the arbitral proceedings to seek a stay of the proceedings herein. In any event, it was not clear whether an arbitrator had been appointed yet or if arbitral proceedings were ongoing. It would not be in the interests of justice to wait indefinitely for a process that had not been demonstrated to have commenced.

33. Having considered the parties’ affidavit evidence, written submissions and the case law that they each relied upon, this court was not persuaded that it should grant the orders that had been sought by the Defendants. In addition, they had failed to demonstrate that the Summons should be struck out for being an abuse of the court process because they themselves had admitted that they were yet to completely honour the professional undertaking due to a dispute between the Purchaser and the Plaintiffs’ clients.

34. Whether they were entitled not to honour the professional undertaking in view of the dispute between the Plaintiffs’ clients and the Purchaser was an issue that could only be resolved during the hearing and determination of the Originating Summons. It was for that reason that this court opted not to address the question of whether or not the Defendants should honour the professional undertaking.

II. PLAINTIFFS’ NOTICE OF MOTION DATED AND FILED ON 23RD NOVEMBER 2018

THE PLAINTIFFS’ CASE

35. The Plaintiff’s Notice of Motion application was supported by the Affidavit of Bilha W. Mwangi that was sworn on 23rd November 2019.

36. She pointed out that the Plaintiffs were seeking the sum of Kshs 102,000,000/= which was the outstanding balance pursuant to the Defendant’s irrevocable and unconditional undertaking.

37. She stated that out of the sum of Kshs 102,000,000/= that was demanded, the Defendants and their clients had admitted a sum of Kshs 37,626,064/= that was not disputed. It was her contention that a party whose entitlement is evidently due and admitted does not wait for determination by the court of a non-existence question (**sic**).

38. She added that the admission was plain, clear, unconditional, obvious and unambiguous and that in view of the colossal amount that was involved, substantial and irreparable loss and harm continued to be suffered by their clients.

39. The Plaintiffs therefore urged this court to allow their application as sought.

THE DEFENDANTS’ CASE

40. In response to the said application Benson N Ngugi swore the Replying Affidavit on behalf of the Defendants herein on 19th December 2018. The same was filed on 19th December 2018.

41. He was emphatic that the professional undertaking the Defendants had issued was a conditional undertaking and that the Plaintiffs’ assertions that the said undertaking was irrevocable and unconditional was misleading the court.

42. He pointed out that the sum of Kshs 37,626,064/= was to be paid as a full and final figure to settle an outstanding dispute on accounts and further stated that in view of the fact that the dispute had been referred to arbitration, it was best that it be resolved before the Plaintiffs could purport to enforce the professional undertaking, which it said was malicious.

43. It was his further averment that the terms and conditions of the underlying contract took precedence over the subject matter of the professional undertaking.

44. The Defendants thus urged this court to dismiss the Plaintiffs’ present application with costs.

45. Having considered the Plaintiffs’ Notice of Motion application, this court found the same not to have been merited for the reason that there was no express admission by the Purchaser of the sum of Kshs 37,626,064/=.

46. A perusal of the letter of 3rd September 2018 by M/S Kaplan & Stratton Advocates stipulated that:-

We therefore confirm that the sum of KES 27,376,064/= together with the double entry of KES 10,250,000/= will be paid to your clients. KES 37,626,064/= shall be the final and only payment due and owing to your clients under the Share Purchase Agreement. No further payments will be made to your clients of the sum of KES 37,626,064/= shall be evidence of their acceptance that no

further payment shall be due and owing.” (emphasis court)

47. This did not appear to have been acceptable to the Plaintiffs’ clients because they filed the present Originating Summons seeking the enforcement of the professional undertaking in the sum of Kshs 102,378,022.98 was issued by the Defendants herein.

48. The letter by M/S Kaplan & Stratton Advocates dated 3rd September 2018 could not be deemed to have been an express admission of the sum of Kshs 37,626,064/=. It was conditional on the Plaintiffs’ clients accepting the same as a final and only payment, which would be evidence of their acceptance that no other payment was due and owing.

49. The aforesaid contention was not plain, clear, unconditional, obvious and ambiguous as was held in the case of **Ideal Ceramics Ltd vs Suraya Property Group [2017] eKLR** that was relied upon by the Plaintiffs.

50. This court did not see the Defendants’ arguments on this issue. They only argued that their application was based on Order 2 Rule 15(1) (b) and (c) of the Civil Procedure Rules, 2010 which did not preclude the introduction of evidence.

51. This court carefully considered the affidavit evidence, Written Submissions and case law that were relied upon by the parties in respect of the Plaintiffs’ application and determined that the letter from M/S Kaplan & Stratton Advocates was not an admission of the sum of Kshs 37,626,064/=. It was a conditional offer for the settlement of the dispute between the Purchaser and the Plaintiff’s Clients.

52. It was not for this court to state at this point whether that that was the amount that was payable to the Plaintiffs and for which they could enforce the professional undertaking that was issued by the Defendants. As was stated herein above, it was best that the issues raised by the parties herein be addressed at the hearing of the Originating Summons.

DISPOSITION

53. For the foregoing reasons, the Plaintiffs’ Notice of Motion application dated and filed on 23rd November 2018 was not merited and the same is hereby dismissed. Costs of the application shall be in the cause.

54. The Defendant’s Notice of Motion application dated and filed on 27th November 2018 was also not merited and the same is hereby dismissed. Costs of the application shall be in the cause.

55. It is so ordered.

DATED and DELIVERED at NAIROBI this 27th day of June 2019

J.KAMAU

JUDGE