



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 574 OF 2011

GRACE WARINGA NJOROGE (Suing as the legal representative of the Estate

of the late PETERSON NJOROGE GITHIRI (Deceased).....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT

JUDGMENT

1. The facts involved in this customer Bank dispute are, by and large, agreed.

2. Prior to his death, Peterson Njoroge Githiri (the Deceased) and Harris Distributors Limited were customers of Barclays Bank of Kenya Limited (The Defendant or the Bank) and were granted various financial facilities aggregating Kshs.4,490,000 by the Bank. The facilities were variously secured by charges taken over Kiambaa/Kihara/945/17 and LR. No. 36/111/1024 (the Eastleigh property) being properties all registered in the name of the Deceased. As happens, the Deceased and Harrison Distributors defaulted in repayment of the facilities and the Bank in the year 2001, decided to sell the Eastleigh property in exercise of its statutory power of sale.

3. Before the sale could happen the Plaintiff agreed with the Bank to sell the Eastleigh property by way of private treaty. The parties are not agreed as to whether or not the proceeds from that sale was to settle part of or the entire debt. That is one of the controversies that has to be resolved by this decision. What is not in contention, however, is that the sale by private treaty did not end as intended by the Plaintiff and the Bank.

4. The Plaintiff engaged the firm of Khamati Minishi & Company Advocates to handle the transaction on her behalf. On its part, the Bank instructed the firm of K. Mwaura & Company Advocate to act for it. The firm acting for the Plaintiff issued a professional undertaking to the Bank's lawyers to pay to it the sum of Kshs.2,093,500. For the Bank, it is averred, that by a letter of 10th February 2003, its lawyers set out the terms of the professional undertaking. Those terms were accepted by the Plaintiff's lawyers through a letter of 12th February 2002 in which they agreed to pay the purchase price together with the legal fees to the Bank's lawyers within 7 days of registration of the transfer in favour of the purchaser. A further promise was made that in the event of the sale and purchase not completing within 30 days, the Plaintiff's lawyers would return the documents to the Bank's lawyers.

5. On the strength of that undertaking the Bank's lawyers forwarded the documents to the Plaintiff's lawyers and the transaction was completed. However, the Plaintiff's lawyers failed to honour the undertaking by not paying the purchase price. Subsequently, the Bank commenced proceedings against the Plaintiff's lawyers being *HCC 875 of 2002 Barclays Bank of Kenya Limited –vs- Anthony Huka Khamati* and obtained judgment against the said advocate for the sum of Kshs.2,093,500.000 together with interest at 26% per annum. The Bank asserts that its several attempts to execute the decree has not yielded fruit.

6. The Plaintiff takes the position that having accepted the undertaking from the firm of Khamati, Minishi & Company Advocates, the liability for payment of Kshs.2,093,500.00 sum shifted irrevocably to the said law firm. A second limb of the Plaintiff's case is that the agreement between it and the bank was that the proceeds from the sale of the Eastleigh property would be deemed to fully discharge the debt of the deceased and Harris.

7. It is on this premise that the Plaintiff seeks the following prayers in the amended plaint dated 29th February 2012:-

- a. An order declaring that the Defendant is estopped from seeking the outstanding loan amount from the Plaintiff having accepted a professional undertaking from Khamati Minishi & Company Advocates for payment of the same.
- b. An order declaring that the Defendant is estopped from realizing its securities registered against the title to the Parcels of land known as Title No. Kiambaa/Kihara/807 and Title No. Kiambaa/Kihara/945/17 having sued and/or obtained judgment for the money so secured.
- c. A permanent injunction restraining the Defendant, its servants, employees and/or agents from entering upon, selling, charging, alienating, disposing of or otherwise dealing with the parcels of land known as Kiambaa/Kihara/807 and Title No. Kiambaa/Kihara/945/17.
- d. An order compelling the Defendant to unconditionally release to the Plaintiff the original title documents over the parcels of land known as Kiambaa/Kihara/807 and Title No. Kiambaa/Kihara/945/17 together with their respective discharges of charge duly executed by the Defendant, failing which the Deputy Registrar of the High Court of Kenya to execute the discharges of charge over the parcels of land known as Kiambaa/Kihara/807 and Title No. Kiambaa/Kihara/945/17
- e. Costs of this suit with interest thereon at court rates until payments in full.
- f. Any further or other relief which this Honourable Court deems just in the circumstances.

8. On its part, the Bank first asserts that there was no agreement that the sale of the Eastleigh property would be construed as full and final settlement of the debt under all the three securities. Secondly, that the firm of Khamati Minishi & Co. Advocates was an agent of the Plaintiff and as it did not remit the purchase price, that amount cannot be deemed as paid. It is therefore the Banks stance that it is entitled to pursue the debt from the Plaintiff.

9. Although, the parties did not agree on the issues for determination, this court accepts that the issues proposed by lawyers for the Bank are a true reflection of what requires resolution. They are framed thus:-

- a. Whether the Plaintiff is liable to settle the outstanding loan following the breach of the professional undertaking by her advocates.
- b. Whether the Defendant is entitled to realize the securities registered in its favour to enable it recover the outstanding debt.
- c. Who should bear the costs of the suit?

10. This court has given due consideration to the submissions made by the parties herein.

11. The first issue is an invitation to this Court to determine whether the Plaintiff is absolved from her obligation to pay the debt to the extent of Kshs.2,000,000 (plus interest) which was the subject of the professional undertaking by its lawyers. On this the Plaintiff has submitted that a professional undertaking given by advocates is a separate and distinct contract which can only be enforced by the parties to the undertaking that is, the lawyers. In support of this proposition are the decisions in *Waruhiu K'Owade & Ng'ang'a Advocates –vs- Mutune Investment Limited (2016) eKLR* and *Nelson Havi t/a Havi Company Advocates –vs- Jane Muthoni Njage t/a J. M. Njage & Co. Advocates [2015] Eklr*.

12. This Court does agree with the Plaintiff's rehash of the law that generally a professional undertaking by an advocate comprises a separate agreement distinct and independent from the primary contract from which it arises and is enforceable against the advocate who gives it independent of the transaction constituted in the primary contract.

13. Yet it is true that sometimes by enforcing a professional undertaking, the terms of the primary contract are themselves enforced. In this regard the Court of Appeal in *Karsam Lalji Petel –vs- Peter Kimani Kairu P/A Kimani Kairu & Co. Advocates [2000] Eklr* observed:-

“The learned Judge directed himself correctly that the court must be satisfied that there has been a breach of an undertaking given by an Advocate acting professionally. All these principles which are a correct rehearsal of the law on the point can be gleaned from the cases of *Geoffrey Silver & Drake v Thomas Anthony Baines [1971] 1 All ER 473* and *John Fox v Bannister, King & Rig boys [1987]3 WLR 480*. Having stated the principles the learned Judge then referred to *paragraph 9 of Mr. Kimani's affidavit* and continued-

"With respect, I see no breach of the undertaking given by the defendant. Even if I were to find there is a breach thereof the effect of an order there under would be to compel the defendant to release the money to his client and not to the plaintiff as sought in the application before me. In that regard I am inclined to agree with the submission that by this application the plaintiff is trying to enforce his rights and interest under the agreement."

Purchaser. This money was paid by the Purchaser to his Advocates with instructions to pass it on to the Advocates on the conditions stated in the letter of 26th August, 1998. It was a payment made by an agent on behalf of a disclosed principal, and at the end of the day, it does not matter whether the suit for its recovery was brought by the Purchaser or his Advocates.

Be that as it may, there would be nothing illegal if the enforcement of the undertaking achieved the unintended result of enforcing the Purchaser's legal rights under the agreement for sale. The undertaking did not cover the full purchase price.(my emphasize)

14. On the other hand in giving a professional undertaking on behalf of a client, an advocate acts as an agent of his/her client and the general principles that govern the responsibilities of a principal remain. This Court would have to agree with counsel for the Bank that the following passage in the decision in *Karanja –vs- Phoenix of E. A Assurance Co. Limited [1991] eKLR* correctly states the position of the law:-

“An act of an agent within the scope of his actual or apparent authorities does not cease to bind his principal merely because the agent was acting fraudulently and in furtherance of his own interests”.

15. It being common ground that Khamati Minishi & Co. Advocates were the agents of the Plaintiff, the general position would have to be that the act of fraud on the part of the advocates would not discharge the Plaintiff in the sum for which the undertaking was given. Yet there are peculiar circumstances in the matter at hand that militates against the Court concluding that the Plaintiff is still liable for the sum of Kshs.2,000,000.

16. Upon breach of the undertaking by the said advocates, the Bank filed *HCC Milimani Misc. Civil Case Number 875 of 2002 (O.S) HCC 875 of 2002 Barclays Bank of Kenya Limited –vs- Anthony Huka Khamati* for enforcement of the professional undertaking. It is common cause that the judgment was entered in favour of the bank in sum of Kshs.2,093,500.00 with interest thereto at 21% per annum. The Bank has however failed to successfully execute the decree.

17. It seems to this Court that once the Advocates failed to honour their professional undertaking then the Bank had the option of either seeking to enforce that undertaking or to pursue the principal. Having chosen to turn its gun on the advocates by filing the originating summons then an impression would have been created to the Plaintiff that the bank had chosen to close the matter through that route. It would be within a reasonable expectation of the Plaintiff that she had been absolved of liability to the extent of the sum sued for. In my view by electing to pursue the claim against the advocates upto the point of decree, the bank divested itself of the right to pursue this sum from the Plaintiff. The Bank made its bed and must now lie on it!

18. In reaching this decision I have considered that having sued and obtained judgment against the Advocates, the Bank may very well have taken away the Plaintiff’s right to seek recovery of this amount from her advocates. It may well be open to the advocates to take up a defence that once the Bank has sought enforcement of the professional undertaking then the client cannot sue for recovery. An argument that to allow both claims against the said advocates would be to punish them twice.

19. I also must observe that if the bank’s lawyers had entered into a more watertight arrangement with the said advocates, for example by insisting on the availability of funds before discharging the property, then the present sorrow state would have been avoided.

20. On whether the assertion by the Plaintiff that the professional undertaking was taken in full and final settlement of the debt, this Court is unable to find any proof that the bank had given such intimation or waiver.

21. On the evidence available, the arrangement to sale the Eastleigh property was only to settle a sum of Kshs.2,000,000. Any sums in excess of this remain owed by the Plaintiff and the Bank is entitled to pursue that sum including exercising of its statutory power of sale over Kiambaa/Kihara/807 and 945/17.

21. 1 The Bank is only entitled to recover the sum that was in excess of Kshs.2,000,000 as at the date the firm of Khamati Minishi & Company Advocates was to honour its undertaking. The sum recoverable shall include interest as contracted.

21. 2 As the Plaintiff has only been partly successful, each party shall bear its own costs on this matter.

Dated, delivered and signed in open Court at Nairobi this 24th day of September 2019.

F. TUIYOTT

JUDGE

PRESENT:-

Karuga for Plaintiff

No appearance for Defendant

Court Assistant: Nixon