REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCC. NO. 692 OF 2004

STANDARD CHARTERED BANK LIMITED..PLAINTIFF

VERSUS

ALI NOOR ABDI ....1ST DEFENDANT

WETANGULA & COMPANY..2ND DEFENDANT

KARIANGO INVESTIMENTS LIMITED ....3RD DEFENDANT

JUDGMENT

1. The dispute herein stems from an intended purchase of LR No. 36/VII/498 (**The suit property**) by Ali Noor Abdi **(Ali** or **the 1st Defendant**) from Kariango Investments Limited (Kariango or the 3rd Defendant) which was botched up by fraud.

2. There is common cause on the key facts around which this dispute revolves. From the rival evidence and documents the following sequence of events can be constructed.

3. So as to buy the suit property, Ali entered into an agreement of sale dated 1st June, 2004 supposedly with the 3rd Defendant. Supposedly because it turned out later that the execution of the agreement on behalf of the 3rd Defendant was a work of forgery. The purchase price was Kshs.29,000,000.00 and the firm of Wetangula and Co. Advocates acted for Ali in the said purchase while D. Ndungu & Co. Advocates acted for the seller.

4. By a letter of offer dated 30th July 2004, Standard Chartered Bank Kenya Limited (**the Plaintiff** or **the Bank)** offered Ali a term loan of Kshs.20,000,000.00 as part finance of the purchase price. It was a term of the letter of offer that the property would be validly transferred to the Ali and mortgaged to the Bank.

5. Upon execution of the agreement of sale, Kshs.2,900,000.00 being the agreed deposit was paid to D. Ndungu & Co. Advocates. In respect to the portion of the purchase price to be financed by the Bank, the law firm of Bowyer Mahihu & Co. Advocates (acting for the Bank), on 24th August 2004, called for completion documents from the 2nd Defendant firm to enable it register a charge in favour of the Bank on a professional undertaking to pay to the said firm Kshs.20,000,000.00 within 14 days of registration of the transfer in favour of Ali and a charge in favour of the Bank.

6. Earlier, on 9th August 2004, the firm of Wetangula and Co. Advocates had called for the completion documents together with a duly executed indenture on their professional undertaking to pay the balance of the purchase price being Kenya Shillings twenty six million, one hundred thousand (Kshs.26,100,000.00) within 7 days of successful registration of transfer of the title documents. This undertaking was later amended by an undertaking of 1st September 2004, in which the firm of Wetangula & Co. Advocates made a promise to the firm of D. Ndungu to pay the said balance within thirty (30) days from the date of the letter.

7. Upon this latter undertaking, and on that very day, D. Ndungu & Co. Advocates forwarded the completion documents to Wetangula & Co. Advocates who subsequently forwarded them to the Bank's lawyers. It is unclear when these documents were forwarded to the Bank's lawyers. What is clearer is that there was some delay in the registration of the transfer by indenture and mortgage. The transfer by indenture shows that it was effected on 2nd November 2004 while the mortgage registered on 16th November 2004.

8. Upon that registration, the firm of Bowyer Mahihu & Co. Advocates, on 2nd December 2004, forwarded bankers cheque No. 753617 for Kshs.20,000,000.00 to Wetangula & Co. Advocates in keeping with the undertaking it had given. All seemed at bliss upto that point as Ali was now the duly registered owner of the suit property and the Bank had secured its interest over the property. Then the story that eventually

led to this dispute began to unravel.

9. It turned out, and this is now accepted by all the parties to this suit, that a fraud had been committed in which counsel Ndungu was implicated. The execution of the agreement of sale and indenture on the part of the seller was a forgery! Realising that it would be holding an invalid mortgage and so as to protect itself from losing the Kshs.20,000,000.00 paid out, the Bank quickly presented this suit on 29th December 2004 and sought the following orders:

a) An injunction to restrain the defendants whether by themselves, their agents or servants from removing, disposing or otherwise dealing with the payment of Kshs.20million made to the defendants by the plaintiff and which is currently being held by Kenya Commercial Bank Limited, Tom Mboya Branch in Account Number 235802861.

b) That this order (a) above be directed to Kenya Commercial Bank Limited.

c) An order of restitution of the Kshs.20 million to the plaintiff or a declaration that the property is validly charged to the plaintiff.

d) Costs of the suit.

10. On the same day, the Bank obtained an exparte order freezing the sum of Kshs.20,000,000 in account No. 2358022861 at Kenya Commercial Bank Limited, Tom Mboya Branch belonging to the 2nd Defendant law firm.

11. In a statement by Defence filed on 8th February 2005, the law firm defended its role in the transaction and maintained that it has a prior right to the sum of Kshs.20,000,000.00 frozen on account of the court order. The law firm also asserted that the said sum became mixed with monies belonging to other clients and cannot be traced. On the order of restitution sought by the Bank, the defence by the law firm was that it was not tenable as there was no privity of contract or any other fiduciary relationship between the Bank and itself.

12. The law firm also took issue with the order of injunction granted on 29th December 2004 and asserted that it had suffered damages as a consequence of the impugned order. It gives a list of the said injuries:-

a) Injury to its credit.

b) Injury to its goodwill.

c) Dishonoured cheques

On this basis, the law firm mounted a counterclaim for general damages and costs.

13. On its part, the 3rd Defendant emphasised that it did not enter into the agreement for sale dated 9th June 2004 with Ali nor did it transfer its property by the purported indenture dated 9th August 2004. In a word it disowned the entire transaction.

14. As for Ali, he took the position that the sale agreement was actually made and executed between him and the 3rd Defendant. He also insisted that the mortgage held by the Bank was valid as it was duly registered. As an alternative, Ali stated that even if the mortgage was invalid, the Bank was in possession of the property by virtue of the indenture it held as security and that he had not derogated from the terms and conditions of the charge.

15. In the course of the proceedings there was a significant change of heart by Ali. In a notice dated 31st March 2015 and filed on 2nd April 2015, Ali admitted all but a small portion of the Bank's claim. The short notice of admission is reproduced below:-

REPUBLIC OF KENYA

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COMMERCIAL & ADMIRALTY DIVISION

HCC. NO. 692 OF 2004

STANDARD CHARTERED BANK LIMITED .... PLAINTIFF

VS.

ALI NOOR ABDI …………………………………………………….. 1ST DEFENDANT

WETANGULA & COMPANY …………………………….….….. 2ND DEFENDANT

KARIANGO INVESTIMENTS LIMITED ……………………… 3RD DEFENDANT

NOTICE OF ADMISSION OF CASE

Under Order 13 Rule 1 of CPR 2010)

TAKE NOTICE that the 1st Defendant admits the whole of the plaintiff's case on (a) invalidity of the mortgage dated 13th September 2004 over LR NO. 36/VII/498 and (b) restitution of the sum of Kshs.20 million but not interest and costs.

Dated this 31st day of March, 2015

ORIARO & COMPANY

ADVOCATES FOR THE 1ST DEFENDANT

Drawn and filed:

Oriaro & Company Advocates.

To be served Upon

Hamilton Harrison & Mathews Advocates

16. That new stance is the position held by Ali upto the point of submissions. A position that shall be discussed presently.

17. It also needs to be observed that the sum of Kshs.20,000,000.00 paid by the Bank to the 2nd Defendant firm that was initially preserved by an exparte injunction has remained preserved todate. However, the preservation is now by order of Court made in a ruling of 28th April 2005 and is in an interest earning account in the joint names of the lawyers for the Bank and the 2nd Defendant.

18. Once the pleadings, the freeze of the Kshs.20,000,000.00, the admission by Ali and the closing submissions of the parties are taken together then the issues for the Court's determination are considerably narrowed. That the controversy would eventually come down to a more focused contest was predicted by Hon. Gikonyo J in his Ruling on an interlocutory application dated 14th September 2015 where the Judge observed:-

> "Given the observations herein, parties should re-evaluate, agree and file clear and targeted issues for determination by the Court. The admissions made in this application by all the parties on the mortgage should guide the parties in this re-evaluation of issues. I should state also that the way I understand the law on restitution is its horizons are not heretically closed; and as an emergent limb of law it has kept on growing such that today money paid under an effective contract may be recoverable even if the contract has not been rescinded ab initio. I think parties should endeavour to agree on issues which seem not to be in dispute and avoid moot matters from occupying the scarce judicial time".

19. The issues that call for the Court's attention are:-

a) Who between the Bank and the 2nd Defendant is entitled to Kshs.20,000,000.00 now held under the Court order and the interest thereon?

b) Is the 2nd Defendant entitled to the counterclaim?

c) Were the 1st and 2nd Defendants necessary parties to this suit and if not what should be the appropriate order on costs?

20. The Bank submits that from the chronology of events, the law firm made commitments to make payment of the balance of the purchase price on behalf of Ali long before it had secured money from it. That by paying out the balance of the purchase price, the law firm acted contrary to its role as a stakeholder in which the balance of the purchase price was to be held by it pending registration.

21. I understand the Bank's position to be that as the money it paid to the law firm had not been paid out by the time the fraud had been revealed, then the law firm ought to bear the loss of sums paid prematurely. In this regard the Bank seeks to make the additional argument that at any rate the bulk of the money paid out by the Bank was to an individual and not the 'vendor' which was a limited liability company. This it is argued was not in consonance with the undertaking issued by the firm of D. Ndungu & Co. Advocates to pay the vendor.

22. The law firm submits that an understanding of its role in the transaction is important in resolving the first issue. That its responsibility as Ali's advocate was principally to play a facilitative role to enable the Bank, Ali and the 'vendors' to conclude the transaction. In this regard two undertakings were given; that of the law firm to the 'vendor's' lawyer and the other of the Bank's lawyer to the law firm. Both undertakings, it is argued, were honoured at a time when neither of the parties were aware of the fraud.

23. The law firm asserts that while a professional undertaking may be made in furtherance of a transaction, it can be fully delinked from the agreement underlying the transaction. In this regard the Court was referred to a passage in the decision *of in the matter of Section 50 (a) of the Advocates Act –vs- Muriu Mungai & Co. Advocates & another (2009) eKRL*.

"It is therefore evidence that once an advocate gives a professional undertaking that is on terms that are unambiguous and unequivocal, he has no choice but to honour it. Such an advocate cannot give an excuse regarding a pre-existing dispute of his client to avoid being held liable on the professional undertaking that he has given. It is trite that a professional undertaking is a separate contract between the advocate giving the undertaking and the person to whom the undertaking is given. It is not dependent on the performance of the contract or agreement that necessitated the giving of the undertaking. The underlying agreement may be frustrated, but if it is established that consideration passed pursuant to the professional undertaking given, then the advocate giving the undertaking has no option but to honour the undertaking. He is bound by it and cannot resile from it, whatever the merit of the dispute between such an advocate and the person to whom he gave the undertaking to".

24. The law firm contends that having made a promise to pay the balance of the purchase price within 30 days of the completion date, it was under a professional duty to honour its undertaking and in this regard the sale agreement could not take precedence over the professional undertaking. That in meeting this sacrosanct obligation the law firm was certain that it would not lose any money as the Bank's lawyers had given their undertaking to release the Kshs.20,000,000.00 from the Bank once it completed registration of the charge. It is argued that the Plaintiff's delay in registering the transfer and charge could not discharge the 2nd Defendant firm from its professional undertaking to the vendor.

25. It is further submitted by the law firm that it was incumbent upon the Bank to undertake a thorough due diligence upon the 'vendor' as part of the process of perfecting its security. The Court is asked to find that had the Bank's advocate noted any anomaly, illegality or irregularity with the documents then it would not have honoured its undertaking to the law firm, which undertaking was conditional upon registration of the documents. This role, it is argued, has to be contrasted with that of the law firm which was limited to procuring the completion documents from the 'vendor's' advocate.

26. All in all, the Court is asked by the law firm to find that by releasing the Kshs.20,000,000.00 to the 'vendor's' advocate before the Plaintiff has put it in funds, the 2nd Defendant firm effectively created a lien over the Kshs.20,000,000.00 which it ultimately received.

27. The law firm reacted to the Banks submissions of payment of a substantial amount of the money to a third party. It was asserted that direct payment to the vendor was a permissible variation to the agreement.

28. On the part of the Ali, he states that as the contract lost its essential substratum for failure of the collateral and as he did not in any way benefit from the contract, then he should be released from the charge and contract. Ali asks the Court to determine which party is entitled to the deposited sum together with interest.

29. The 3rd Defendant has no position on this first issue.

30. It is acknowledged by the parties herein that they find themselves in this untidy position because the contract of sale which was the underlying transaction between them turned out to be fraudulent. The sale agreement of 1st June 2004 and the indenture were works of fraud.

31. I start by reiterating the critical role played by Advocates professional undertakings in easing and facilitating transactions. In this regard I recall the words of the Court of Appeal in *Waruhui K'owade & Nganga Advocates v Mutune Investment Limited [2016] eKLR*.

"The professional undertaking is a smooth and binding contract between the donor and the donee who are the advocates. It should be adhered to with a standard of ethics higher than that of the market place. Professional undertakings to lawyers by colleagues are like a religion and are the underpinning of the relationship that governs the activities, transactions and actions between them. A professional undertaking embodies and manifests the practice of the legal professional in a characteristically methodical, courteous and ethical manner. That is why the immediate offer and acceptance of a professional undertaking triggers a monumental transaction and huge financial relationship which must be observed by both sides. In our view, that is the basis of professional undertakings in the legal profession. In fact, the conditions, terms and implications must be strictly adhered to for the legal profession to thrive, and for advocates to deal with each other freely and openly".

32. In determining this matter the Court must not reach a conclusion that is inimical or downgrades the efficacy of this useful device.

33. As correctly pointed out by the law firm, proceeding on the assumption that they were supporting a legitimate transaction, the firm of Bowyer Mahihu & Co. Advocates acting for the Bank and the 2nd Defendant each issued professional undertakings which are at the heart of this matter. On 26th August 2004, Bowyer Mahihu & Co. Advocates wrote to the 2nd Defendant as follows:

26th August 2004

Wetangula & Co. Advocate,

Dear Sir,

RE: SALE OF LR. NO. 36/VII/498, NAIROBI TO ALI NOOR ABDI

We act for Standard Chartered Bank Kenya Limited who have agreed to advance credit facilities to the above referenced Purchaser to a maximum of Kenya Shillings Twenty Million (Kshs.20,000,000).

Kindly let us have the title documents for the above property together with the relevant completion documents for our further action.

The above request is premised upon our professional undertaking to pay you the sum of Kenya Shillings Twenty Million (Kshs.20,000,000) within fourteen (14) days of registration of the transfer in favour of the purchaser and a charge in favour of Standard Chartered Bank.

Yours faithfully

Bowyer Mahihu & Co. Advocates.

34. Acknowledging receipt of that letter, the 2nd Defendant responded as follows:-

30th August 2004

Bowyer Mahihu & Co. Advocates

Dear Sirs,

RE: SALE OF LR. NO. 36/VII/498, NAIROBI TO ALI NOOR ABDI

Your letter of 26th August 2004 refers.

We enclose herewith all the completion documents in respect of the above property on your professional undertaking to pay us a sum of Kenya Shillings Twenty Million (Kshs.20,000,000) upon registration of charge & Transfer being funds borrowed by the purchaser of the said property to finance the sale herein.

Please let us have the daybook number as soon as you present the documents for registration to enable us know the progress made. Against your professional undertaking, we have given M/s D. Ndungu & Company Advocates for the payment of the balance of the purchase price.(sic)

Yours faithfully

Wetangula & Co. Advocates.

35. Although the last sentence of that letter appears incomplete Advocate, Adan who testified on behalf of the firm remarked in testimony "**which undertaking my firm and I relied on to proceed with the transaction**".

36. On 1st September 2004, the 2nd Defendant issued the following undertaking to the 'vendors' lawyer:-

1st September 2004

M/s D. Ndungu & Company Advocates,

Kenbanco House,

Moi Avenue

3rd floor, Room B

NAIROBI.

Dear Sir,

RE: SALE OF L. R. NO. 36/VII/499

The above matter and our letter dated 9th August 2004 refers.

We confirm that this 1st day of September 2004 completion documents together with a duly executed indentures have been released to us by your firm on our professional undertaking to pay to you the balance of the purchase price of Kenya Shillings Twenty Six Million One Hundred Thousand (26,100,000) within Thirty (30) days from the date of this letter.

Yours faithfully,

Wetangula & Company Advocates

37. To be noted is that by dint of clause 5 of the agreement of sale of 1st June 2004, the completion date for the sale was on 'the business day falling 90 days from the date hereof". By reckoning of time completion was due on or about 1st September 2004. By giving the undertaking to pay within 30 days of 1st September 2009, which appears to have been accepted by the 'vendors' lawyers, there was a mutual agreement between the 'vendors' and Ali to extend completion by 30 days. This will turn out to have some bearing on this matter.

38. It is now well known that registration of the charge and transfer by indenture happened after 1st October 2004. The indenture having been registered on 2nd November 2004 and charge a few days later on 16th November 2004. Further it was only on 2nd December 2004 that the Bank through its Advocates forwarded the cheque for Kshs.20,000,000.00.

39. By this time the 2nd Defendant had paid out substantial sums to the 'vendor' or its nominee. In the witness statement, which was adopted as part of his evidence in chief, Adan explains why these payments were made. He testifies;

> Paragraph 7: As the Plaintiff delayed in remitting funds and in light of the fact that the balance of the purchase of price was now due, we remitted the sums of Kshs.3,500,000 and Kshs.4,500,000 to the Third Defendant.
>
> Paragraph 8: On or about 9th September 2004, the Third Defendant through the firm of Messrs. D. Ndungu & Company Advocates made a request that the sum of Kshs.15,100,000 be released to her notwithstanding that the transfer was yet to be registered, as she wanted to carry substantial sums with her on her trip to the United States to visit her children. I informed the First Defendant of her request after perusing and checking that all the documents that had been forwarded to me, were in order.
>
> Paragraph 9: In light of the fact that we had previously issued the Third Defendant's advocates with a professional undertaking to remit the balance of the purchase price on completion, we paid the sum of Kshs.15,100,000 requested for. Since we had already forwarded the documents set out in paragraph 7 herein, to Messrs. Bowyer & Mahihu Advocates, who had undertaken to forward the Kshs.20,000,000 to us within 14 days of registration of the transfer and the mortgage, we were assured that we would be reimbursed accordingly. Based on this understanding arrangements were made to pay the Third Defendant through its director Hannah Wairimu Njuguna, receipt of which funds was acknowledged by D. Ndungu & Company by their letter of 14th October 2004.

40. The explanation put forward by the 2nd Defendant (both in testimony and reiterated in submissions) for making payment before receiving the money from Bowyer Mahihu & Co. Advocates is that it had to honour its undertaking to the "vendor's" lawyers notwithstanding the delay in been paid by the third party (read the Bank). It was submitted,

"Simply put, once the duty to honour a professional undertaking crystallises, the party who gave the undertaking cannot evade or avoid their duty to honour it by stating that they were yet to receive the funds which they would use to honour the undertaking. This was the predicament the 2nd defendant was in. A predicament which was attributable to the fact that as at the time its professional undertaking was due to be honoured, the Plaintiff was yet to honour its own undertaking to put the 2nd Defendant in funds in the sum of Kshs.20 Million. "

41. How does this explanation fare upon closer scrutiny? It has to be remembered that by its own undertaking of 1st September 2004 (and accepted by the 'vendors' lawyers), the only obligation by the 2nd Defendant law firm to pay the balance of the purchase price was by 1st October 2004. Yet there is unequivocal evidence that payment over and above the deposit, was made before that date as follows:-

2/9/2004	-	Kshs.5,000,000
7/9/2004	-	Kshs.3,500,000
14/9/2004	-	Kshs.10,000,000

42. What emerges from the evidence is that the law firm would not have failed in its legal obligation to pay up by 1st October 2004 even if it had not made these three payments which amount to a substantial sum of Kshs.18,600,000. I feel fortified in my finding that there would have been no default on the part of the said law firm because even in its letter of 9th September 2004 requesting for further payment, the "vendor's" lawyers simply request payment without making a demand. The tone of the letter does not suggest that there was default of the undertaking given by the 2nd Defendant firm. This is the letter;

> *9/9/2004*
>
> *Wetangula & Company Advocates,*
>
> *Corner House, 8th Floor,*
>
> *Kimathi/Mama Ngina Street,*
>
> *NAIROBI.*
>
> *Dear Sir,*
>
> *RE: SALE OF L .R 36/VII/498*

We acknowledge with thanks receipt of your letter dated 8/9/04 together with the enclosed cheque number 000896 for Kshs.3.5 million.

As earlier indicated to you our client intends to visit her children in USA and may not be back in the country until six months later.

For this purpose she has requested us to communicate to you her desire, if possible, for some further payment of about Kshs.15,100,000 (Kenya Shillings fifteen million, one hundred thousand) which monies she requires to carry with her during her trip. Consequently, we would be most obliged, if you made the funds available as we sort out the issue of the registration and the eventual balance.

Yours faithfully,

D. NDUNGU & COMPANY ADVOCATES

Cc: Hannah Wairimu Njuguna

43. In these circumstances the explanation given by the 2nd Defendant for making the three payments does not sit well with the evidence.

44. That would not be all to the matter. The undertaking of 26th August 2004 given by the bank's lawyer and accepted by the 2nd Defendant was to pay Kshs 20,000,000.00 within 14 days of registration of the transfer in favour of the purchaser and a charge in favour of the Bank. The evidence is that these two registrations happened on different dates in November 2004.Given that the Bank's obligation to pay was premised on those registrations ,the duty of the Bank's lawyers to pay had not crystallised by the time the 2nd Defendant made out the three payments in September 2004. It is also of significance that there is no evidence that the law firm sought concurrence of the Bank's lawyers to make these three pre-completion payments before receipt of the Kshs.20,000,000 from it. By failing to do so and also by making substantial payment before its legal obligation to pay had crystallised, the law firm assumed the risk for making the payments. In effect the law firm was making an advance of money outside the framework of the professional undertaking it had received.

45. Slightly different circumstances obtain for payments made by the 2nd Defendant after 1st October 2004.This is the date by which the 2nd Defendant had undertaken to pay D. Ndungu & co Advocates the balance of the purchase price of ksh 26,100,000.00.After that date it would be in default of its promise. There is evidence that ksh 4,500,000.00 was paid on 13th October 2004. It is not clear when further payment was made. Adding this amount to kshs 18,600,000.00 gives a sum of kshs 23,100,000.00. At the time of making the latter payment, the undertaking given by the Bank's lawyers had not matured as the completion documents remained unregistered yet the completion date provided for in the sale agreement and enlarged to the payment date promised by the 2nd Defendant to the vendor's lawyers had passed. The undertaking given by the Bank's lawyers and accepted by the 2nd Defendant was not bound to the timelines in the sale agreement or the undertaking issued by the 2nd defendant. It would seem that the 2nd Defendant had acceded to a fairly loose undertaking, so that even it found itself in breach of its promise it may not have been able to hold the Bank's lawyers to account before the registration of the transfer and charge. Also, there is no evidence that faced with the possibility of being accused of failure to keep its word, it notified the Bank of its intention to make advance payment. By making a unilateral decision to pay a further sum Kshs 4,500,000.00, the 2nd Defendant was again operating outside the framework of the undertaking it had received from the Bank's lawyers and would be on slippery ground.

46. It is of course true that the fraud was discovered after the Kshs.20,000,000.00 was paid to the 2nd Defendant firm yet there is this important information revealed by counsel Adan in his testimony;

> "The cheque from Bowyer Mahihu was money due to Wetangula & Co. Advocates. The money went into the client Account of the firm. The payment was generated by a professional undertaking from an advocate. I hold the account on behalf of our clients".

47. This evidence is in comport with the 2nd Defendants pleading in paragraph 26 and 27 of the counterclaim in which it avers:-

> 26. The 2nd Defendants avers that on or about 29th December 2004 the Plaintiff obtained the exparte order freezing the sum of Kshs.20 million then held and forming part of sums to credit of the 2nd Defendant in Account No. 235802861, held with Kenya Commercial Bank, Tom Mboya Branch.
>
> 27. The 2nd Defendant avers that Account No.235802861 was an advocate client account holding all clients' monies and that an account cannot be freezed partially.

48. This is the money that was eventually caught up by the freezing order made by this Court. There is no gainsaying that money paid into a lawyer's clients account belongs to clients and it must therefore be presumed that the Kshs.20,000,000 deposited into the 2nd Defendants client Account number 235802861 (and eventually preserved by order of Court) belonged to Ali (the 1st Defendant). While counsel for the 2nd Defendant argues that it had a right of lien over this money having made payments on behalf of the client, the evidence is that todate the clients' money has not been paid to the 2nd Defendant for purposes of refund of the monies it advanced on behalf of Ali.

49. This Court has already held that in making the payments, the 2nd Defendant assumed the risks associated with it. Upon the discovery of the fraud, the substratum of the transaction vanished. For the reason that the fraud was discovered and communicated to the 2nd Defendant before it had paid itself then it was no longer tenable to lawfully pay itself out of the clients account. The party which had the first priority over the deposit of the money would have to be the party that had paid over the deposit and not the party which had advanced money outside the arrangement of the professional undertaking in the risky belief that the transaction would complete without incident.

50. The upshot is that the Plaintiff is entitled to the sums now held in the interest bearing account together with interest thereon.

51. In the same breath the 2nd Defendant's counterclaim fails. And I must add that even if the Court had found that the Plaintiff liable on the counterclaim, it would still not award any damages because none was proved by the 2nd Defendant. Indeed the submissions by its own advocate was completely silent on the counterclaim.

52. This Court now turns to the question whether Ali and/or 3rd Defendants were necessary parties. For Ali it would have to be a redundant question in view of his written admission of 31st March 2015 in which he admitted the Plaintiff's case on the invalidity of the mortgage and restitution of the sum of Kshs.20,000,000 save for interest and costs. Although he says that admission was informed by the fact that the case had taken an inordinately long time to be determined, the admission filed precludes him from denying that he is a necessary part.

53. As to the 3rd Defendant, the Plaintiff's case right from the onset of the suit proceeded on the thesis that the transaction purportedly entered between the Ali and the 3rd Defendant was fraudulent. The Plaintiff was well aware that the 3rd Defendant was a victim of the fraud. It is therefore not clear to this Court why the 3rd Defendant was joined into these proceedings as a defendant. Indeed neither in the pleadings nor in the course of the hearing is the 3rd Defendant negatively or adversely mentioned. The Court accepts that submissions by its counsel that it was wrongly joined to the suit and should be compensated in costs.

54. As I conclude, I feel constrained to revisit Ali's offer to repay the Kshs.20,000,000 to the Plaintiff. This Court has found that on the basis of fact and law the Plaintiff is entitled to the sum now held in deposit. However, as the payments made by the 2nd Defendant were made on behalf of Ali, one hopes that in the fairness of the moment Ali will consider paying his lawyers the Kshs.20,000,000 it had offered to the Plaintiff.

55. The result is that Judgment is entered for the Plaintiff against the 1st and 2nd Defendants jointly and severally for release of Kshs.20,000,000 deposited under the order of this Court and interest that it has attracted plus costs of this suit. Costs to 3rd Defendant to be paid by The Plaintiff.

Dated, Signed and Delivered in Court at Nairobi this 24th Day of September 2019

F. TUIYOTT

JUDGE

PRESENT:

Kirimi for Plaintiff

Azdak for Olaha for 1st Defendant

Musungu for Muganda for 3rd Defendant

Ouma for Ojiambo for 2nd Defendant

Court Assistant: Nixon