

5. In the Plaintiff's understanding the 1st Respondent would only release the redemption amount to the Bank and avail to her the balance of the purchase price together with the interest accrued on the deposit. She complains that this was not done. She also grieves that the 1st Respondent has withheld certain sums on account of costs for repair of the property and other charges not contained in the agreement for sale.

6. The 1st Respondent and Bank take the position that this suit is an abuse of Court process, frivolous and without merit.

7. The stance taken is that the 1st Respondent's undertaking was to pay to the Bank the redemption amount subject to the maximum sum equivalent to Kshs.16,000,000. Any balance would, in terms of the sale Agreement, be paid over to Rosemary. Both the Bank and the 1st Respondent deny liability. For the lawyers they aver that they received a sum of Kshs.16,000,000 (USD 158,572.84) from the purchase. From this they paid the Bank USD 141,356 being the outstanding loan amount as at 1st July 2017 and a further sum of USD 14,539.49 being the outstanding loan as at completion. The lawyers applied Kshs.18,000.00 towards unpaid service charge allegedly owed by the Rosemary and paid over to her a sum of USD 2,498.95 after deducting bank charges of USD11.14.

8. The Court has considered the Summons, Responses thereto and the Submissions of counsel. The Court sees the following as the issues that require determination:-

- i. Is the applicant legally entitled to challenge the undertaking, issued by the 1st Respondent to the 2nd Respondent as unclear, ambiguous and unequivocal?
- ii. If the answer to (i) is in the affirmative, is that undertaking unclear, ambiguous and unequivocal.
- iii. If not, is the 1st Respondent in breach of the undertaking.
- iv. If yes, what is the remedy available to the applicant?
- v. Are the Respondents jointly and severally liable to pay Kshs.1,876,653 to the Applicant.
- vi. Is the Applicant entitled to an order of account from the 1st Respondent.

9. The professional undertaking given by the 1st Respondent to the 2nd Respondent on 24th October 2017 reads as follows:-

24th October 2017

CFC Stanbic Bank Limited

NAIROBI.

Attention: Mr. Francis Kakai

Dear Sirs,

Re: Banking facilities to Rosemary Atieno Tolo Owidh ("the Borrower") secured by a charge over Flat Number A2, Ground Floor, Block A erected on L.R. NO. 330/1211 ("the Property") in favour of CFC Stanbic Bank Limited ("the Bank")

We act on instructions of George Ng'ang'a (the "purchaser", who is purchasing the Property from the Borrower (enclosed is a copy of the original stamped Agreement for Sale of the Property (the Agreement").

We note that the Property is currently charged in favour of the Bank in the sum of United States Dollars One Hundred and Thirty Five Thousand Eight Hundred and Eighty Three (USD 135,883). We also note that the Borrower is yet to redeem her loan with the Bank (also enclosed are copies of the Borrower's bank statement setting out the outstanding loan amount in the sum of United States Dollars One Hundred and Forty One Thousand Three Hundred and Fifty Six (USD 141,356) (the "Redemption Amount").

Pursuant to clause 8.2 of the Agreement, we confirm that we hold the purchase price of the property in full (the "Purchase Price") in the sum of Kenya Shillings Sixteen Million (Kshs.16,000,000) and in consideration of you releasing the following documents to ourselves (the "Completion Documents"):

- i. Original Lease in respect of the Property duly registered in favour of the Borrower.*
- ii. Discharge duly executed by the attorneys of the Bank in respect of the Property (the "Discharge") (in triplicate); and*
- iii. Original Share Certificate in respect to the Property held by the Borrower in the Management Company;*

We hereby give you our irrevocable and unconditional professional undertaking in the following terms:

1. THAT we shall hold the said Completion Documents to your order, returnable on demand.

2. THAT we will not utilize the Completion Documents for any purpose other than for registration of the Discharge and Transfer of Lease of the Property (the "Transfer") in favour of the Purchaser.

3. THAT we shall upon presentation of the documents in the manner aforesaid forward to you a copy of the booking form and pursue the expenditure registration of the Discharge and Transfer of the Lands Office; and

4. THAT we shall within seven (7) days of receipt of the duly registered Discharge and Transfer from the Lands Registry pay to you the Redemption Amount subject to the maximum sum of the then equivalent in United States Dollars of Kenya Shillings Sixteen Million (Kshs.16,000,000)

Enclosed is the draft Discharge (in triplicate) for your kind perusal and approval. If the same is in order, please arrange to have the duly authorized attorneys of the Bank execute and Discharge.

We look forward to your prompt response.

DAVINDER S. VIRDEE

Encl.

Cc: (1) Client (by email)

(2) CFC Stanbic Bank Limited (By hand)

(3) C. O. Tolo & Co. Advocates

10. So as to resolve the matters herein the undertaking has to be contextualized. This undertaking was given so as to facilitate the Agreement of sale dated 17th August 2017 entered between George and Rosemary. The completion provisions of that Agreement and in particular clause 8.2 are of relevance and reads;

[8.2] On or before the completion date and upon receipt of the purchase price in cleared funds from the purchaser within thirty (30) days from the execution of this Agreement, the purchaser's Advocate shall provide their professional undertaking to the Bank to pay the Bank the outstanding loan amount in respect of the charge (the "Redemption Amount") within seven (7) working days of successful registration of the discharge and transfer of lease in favour of the purchaser (hereinafter referred to as the "Redemption Period") and in exchange Vendor shall procure that the Bank shall deliver to the Purchaser's Advocate the following:

8.2.1 The Original sub-lease in respect to the property duly registered in favour of the vendor.

8.2.2 The discharge duly executed by the attorneys of the Bank in respect of the property (in triplicate).

8.2.3 The original share certificate in respect to the property held by the vendor in the management company.

The purchaser's advocate shall also provide their professional undertaking to the Vendor's advocate to pay the vendor's advocates the purchase price less the redemption amount within the redemption period and in exchange the vendor's advocate shall forward the following documents to the purchaser's advocate:

8.2.4 The executed share transfer form in favour of the purchaser and a statutory form D from the management company's Auditor.

8.2.5 The transfer of lease, in triplicate, in respect of the property, duly executed by the vendor in favour of the purchaser.

8.2.6 Copies of the vendor's National Identity Card, PIN certificate and three colour passport size photographs.

8.2.7 Capital Gains Tax (CGT) acknowledgment form in respect of the sale of the property by the vendor to the purchaser evidencing the payment of CGT by the vendor.

8.2.8 Rates payment receipts in respect of land paid up to date from the County Government of Nairobi together with a valid rates clearance certificate.

8.2.9 Duly paid up and receipted electricity and water bills in respect of the property up to the completion date together with the signed letters of transfer of the utility accounts from the vendor to the name of the purchaser.

8.2.10 Letter from the management company confirming that all service charge and other payments in respect of the property required to be made under the lease up to and including the completion date have been fully settled by the vendor.

8.2.11 Copies of the certificate of incorporation and memorandum and Articles of Association of the management company.

8.2.12 Consent to transfer the property from the management company; and

8.2.13 Any other document necessary to effect transfer of the property to the purchasers.

11. It was in the expectation of the Agreement that the purchasers' advocates would provide their professional undertaking to the vendors' advocates for payment of the purchase price less the redemption amount payable to the Bank. This undertaking was given in the copy of the letter of 24th October 2017 (see paragraph 9 above) addressed to C.O Tolo & Co., lawyers for the Rosemary.

12. On the other hand, this Originating Summons seeks to fault the undertaking made by the 1st Respondent to the Bank. Yet neither Rosemary nor her Advocates are privy to this undertaking. This is between the 1st Respondent and the Bank, neither of whom raise any complaint about it. While Rosemary may be entitled to complain about the undertaking given by the 1st Respondent to her lawyers, she is a stranger to the contract created by the undertaking given by the 1st Respondent to the Bank.

13. Being of that persuasion this Court is unable to declare the undertaking given by the 1st Respondent to the Bank as ambiguous or unequivocal.

14. I turn to the next issue. As the Court does so it observes that none of parties herein complain about the apparent delay in completion of the transaction between George and Rosemary.

15. Clause 3 of the charge taken up by the Bank over the property when it still belonged to Rosemary sets out what it secures. It reads:-

[3] The amount secured by this Charge shall be the aggregate of the Principal Amount, all interest from time to time due or payable to the Bank and all costs, taxes, liabilities, obligations, charges and expenses incurred by the Bank from time to time in relation to this Charge.

16. It is not only a matter of contract but of common sense that the redemption sum would have to be the sum due at the date the property is discharged. This Court does not hear Rosemary allege that the interest chargeable was suspended at any time before the discharge. Clearly therefore interest on the facility would accrue upto the date of discharge. For the reason that the exact date of discharge would not be known the undertaking given by the 1st Respondent did not give an exact figure as the redemption amount but simply stated that it would be subject to a maximum sum "equivalent in United States Dollars of Kshs.16 Million".

17. Who was to provide the information of the redemption sum? Clause 8.2 of the sale agreement required the purchasers advocate to provide their professional undertaking to the Bank to pay the Bank the redemption sum. The undertaking of 24th October 2017 given by the 1st Respondent to the Bank was in deference of this provision. The onus would be on the Bank to advise the purchasers' advocates of the redemption sum.

18. The Bank itself does not complain that the 1st Respondent remitted the redemption sum outside seven (7) days of receipt by the lawyers of the duly registered discharge and transfer. Yet it is common ground that the lawyers completed stamping and registration formalities of the transfer of the property in favour of the purchaser on 12th April 2018. As the discharge was to be completed contemptuously with transfer, it has to be presumed that discharge also happened on 12th April 2018.

19. In terms of the undertaking from the lawyers to the Bank, the redemption sum was to be paid within 7 days of the date of registration. In which event the redemption sum should have been paid on or before 19th April 2018. But it was not until 24th April 2018 when the Bank advised the lawyers that the redemption sum was USD 155,310.24. However, in an email of 23rd April 2018, the applicant insisted that the lawyers should release the sum of USD 141,356 "as there was no mention of accrued interest in any of the previous communication with them". On the understanding that the applicant and the Bank would resolve the issue, the lawyers remitted the sum of USD 141,356 on 2nd May 2018 to the Bank.

20. It would seem that any discussion between the Applicant and the Bank fell through and the Bank, on 3rd May 2018, wrote to the lawyers demanding payment of a further sum of USD 14,539,49 which had remained unpaid as at the date of the letter. This was paid by the lawyers on the same day and on 4th May 2018 the Bank discharged the lawyers from their undertaking of 24th October 2017.

21. From the chronology of events, it is apparent that just like the delay caused in completion of the registration, the Applicant was also responsible for a portion of the delay in having the redemption sum paid as she engaged the Bank. The portion of delay attributable to the Bank is only from 19th April to 24th April 2018, a period of 5 days or so. I say this because the Bank should have insisted on strict compliance of the undertaking, that is, for payment of the sum within 7 days of the undertaking. On the further delay, the Applicant is not blameless as she was insisting on suspension of interest which was not possible given the contract between her and the Bank.

22. What about other charges deducted from the purchase price? The evidence available is that what was deducted by the lawyers from the purchase price, after payment to the Bank, was Kshs.18,000.00 being service charge for the months of March and April 2018. Yet there should be no controversy on this because in her email of 11th May, 2018, the Applicant writes:-

11th May, 2018

To: Sarah Ndwiga

Cc: Cliftolo Advocates

SUBJECT: RE: FW: SALE OF FLAT NO. A2 BLOCK A ERECTED ON LAND REFERENCE 330/1211

Dear Sarah,

Cliff will send an official response to you on the issues raised. I would like to clarify that:

As per the clauses below the agreement, I do not owe rent to on the property.

I will pay any outstanding service charges (March and April), but not repairs to the house as the house was purchased as is.

Kind regards,

Rosemary

(emphasis mine)

23. The payment of the outstanding service charges for March and April 2018 was agreed by the Applicant and the lawyers cannot be asked to account for it.

24. In the end the Applicant has not established any claim against the lawyers and its suit must fail. In respect to the Bank, it may have been obliged to account for the sums which it should have called for on 19th April 2018 but which it did a few days later on 23rd April 2018 but no such order is sought against the Bank. I cannot grant it.

25. The Plaintiff's entire case against the Defendants is dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 22nd Day of November 2019

F. TUIYOTT

JUDGE

PRESENT:

Asewe holding brief Mumma for Plaintiff

Ndirangu for 2nd Respondent

No appearance for 1st Respondent

Court Assistant: Nixon