



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 314 OF 2016 (OS)

BETWEEN

FAMILY BANK LIMITED..... APPLICANT

AND

TABITHA WOTHAYA1ST RESPONDENT

CLEMENT MUCHIRI NJAI.....2ND RESPONDENT

CONSOLIDATED BANK OF KENYA LIMITED.....3RD RESPONDENT

JUDGMENT

1. The matter for consideration is a Further Amended Originating Summons (“the Summons”) dated 10th December 2018 in which the applicant (“Family Bank”) seeks the following orders:

1. THAT the Honourable Court be pleased to issue an order directing the Land Registrar Thika Land Registry to cancel the entries made under numbers 3, 4 and 5 in the proprietorship section and entries made under numbers 1 and 2 in the encumbrances section over parcel of land known as Thika Municipality Block 18/1032 and re-issue the title in the name of the 2nd respondent herein as per the terms of the undertaking issued on 16th October, 2014.

2. THAT the Applicant be discharged from the undertaking with the 3rd Respondent herein by returning the security documents being Thika Municipality Block 18/1032 to the 3rd Respondent in the state that they were received from the 3rd Respondent as per the terms of the undertaking dated 16th October, 2014.

3. THAT interest so far accrued on the Undertaking Amount be borne by the Respondents.

2. The Summons was supported by the affidavit of Anthony Ouma, a Legal Officer at Family Bank, sworn on 10th December 2018. The 1st and 2nd respondents (“Wothaya” and “Njai” respectively) did not enter appearance or file a replying affidavit while the 3rd respondent (“Consolidated Bank”) opposed the Summons through the affidavit of Daniel Kimaiyo, its Recoveries Officer, sworn on 19th November 2019.

3. The fact giving rise to the Summons are set out in the respective depositions and are common ground. On 26th August 2014, Wothaya approached Family Bank for a loan facility of Kshs. 800,000/- in order to purchase Thika Municipality Block 10/1032 (“the suit property”) whose sale price was Kshs. 2,200,000/- from Njai. In order to secure the loan, she would execute a charge in favour of Family Bank. At the time, the property had been charged to Consolidated Bank who had advanced money to Njai secured by the charge. After approving the loan, Family Bank obtained a Discharge of Charge from the Consolidated Bank after issuing an undertaking dated 16th October 2014.

4. The terms of the undertaking contained in the letter dated 16th October 2014 (“the Undertaking”) were, inter alia, as follows:

i. That the Family Bank will within 14 days of the due and effective date of registration of a Discharge of Charge and registration of a charge over Land Reference Number Thika Municipality Block/18/1032 or 60 days upon receipt of the security documents the Applicant would pay the undertaking sum.

ii. Failure to honour the undertaking terms, the Applicant would, upon first written demand by the Consolidated Bank, return the security documents to the Consolidated Bank in the state that they were received from Consolidated Bank.

iii. Family Bank shall indemnify Consolidated Bank fully in respect of all loss and damage which Consolidated Bank may suffer by reason of any breach by Family Bank and/or their advocates.

5. Once the undertaking was given, Consolidated Bank forwarded the Discharge of Charge to pave way for registration of the transfer of the suit property in favour of Wothaya. In the meantime, Wothaya instructed *Susan Kahoya and Company Advocates* to act for her and register the transfer and charge in favour of Family Bank. According to Mr Ouma, Susan Kahoya, Advocate informed him that Wothaya failed to forward the Stamp Duty necessary to facilitate the transaction leaving the matter pending for a year at which time Wothaya was not servicing the loan. Despite the delay, she subsequently paid the statutory costs and the transfer and charge were eventually registered but by that time, the amount Family Bank had approved could not satisfy the balance demanded by the Consolidated Bank.

6. In support of its case Family Bank contended that Njai should have continued to repay his loan with Consolidated Bank as he was collecting rental income from the suit property. As against Wothaya, it claimed that she should not have impeded or delayed the completion process for registration of the charge and was therefore liable for the consequences of delay. It submitted that it is in the interests of justice that Family Bank invoke the exit clause contained in the Undertaking by reversing the process of the transfer and charge of the suit property back to Njai and the same be charged in favour of Consolidated Bank.

7. On its part, Consolidated Bank stated that the registration process took more time than stipulated in the Undertaking hence Family Bank was in breach of the Undertaking as it failed to pay Kshs. 2,200,000/- demanded from it and which continued to accrue interest. By a letter dated 19th October 2015, Consolidated Bank demanded the security documents from Family Bank in the condition they were when they were forwarded in terms of the Undertaking but it failed to honour the undertaking. It accused Family Bank of failing to honour the Undertaking by leaving the Kshs. 3,916,636.55 unsettled and which Family Bank was obliged to indemnify it for any loss suffered.

8. From the facts I have outlined, Family Bank does not deny that it breached the Undertaking. As I understand and from the prayers sought in the Summons, it wishes to be relieved from the burden of the Undertaking by the court ordering that all the transactions following the Undertaking be reversed.

9. Mr Momanyi, counsel for Family Bank, submitted that the delay in registering the transfer and charge was caused by Wothaya, who had failed to pay Stamp Duty on time. In his view, this was a vitiating factor which the court ought to consider in allowing the Summons. He referred to the decision of Warsame J., in *Equip Agencies Limited v Credit Bank Limited NRB HCCC No. 773 of 2004 [2007] eKLR* where he considered the nature of an undertaking and stated that, “[I]t is incumbent upon advocates to always honour their undertaking unless there is a vitiating factor which the court is bound to consider.” Counsel reiterated that by enforcing the Undertaking, Njai, who had not been paying the loan, would be unjustly enriched.

10. The terse response by Ms Ali, counsel for Consolidated Bank, was that the Undertaking was clear and all obligations had been performed in so far as the property had been transferred. She added that Consolidated Bank had no claim to the property and since the undertaking was unconditional, it was entitled to the amount and interest. In any case, she pointed out, Consolidated Bank was entitled to the indemnity from Family Bank for any losses.

11. Both parties do not dispute the legal nature of an undertaking. In *Waruhiu K’Owade & Ng’ang’a Advocates vs. Mutune Investment Limited [2016] eKLR*, the Court of Appeal described the nature of a professional undertaking as follows:

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 profession 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.

12. As to whether parties other than Advocates can benefit from the obligations imposed by the law on Advocates, I support the view taken by Tuiyott J., in *Musti Investments Limited v Moses Kibathi t/a Osoro Chege Kibathi and Company Advocates ML HCCC No. 400 of 2017 (OS) [2019] eKLR* where he was of the view that, “[17] [A]s long as in the nature of a transaction, a non-advocate is not required also to give an undertaking in return, a professional undertaking can be given by an Advocate directly to a non-advocate.” The learned judge quoted with the approval *Legal Services Commissioner v Consultancy Legal [2015] QCAT 174* in which D. G. Thomas J., stated as follows:

In the circumstances of this case, that response has no merit. The undertaking was clearly provided, and was referable to the settlement contemplated by the Federal Magistrates Court orders and the transfer documents provided in response to that undertaking. An undertaking can be given either to other lawyers or to non-lawyers direct. The duty on the practitioner is the same regardless of the person to whom it is given.

13. The issue then in this case is whether there are circumstances that would entitle Family Bank avoid the Undertaking and if so, whether

the court can reverse the transactions consequent to the Undertaking. According to Family Bank, the vitiating factor is the delay caused in registration of the transfer and charge caused by Wothaya. That delay could not be attributed to any acts by Consolidated Bank hence it cannot be blamed. Even if Family Bank was unable to return the documents, the terms of the Undertaking were very clear as to the obligations of the parties. Contrary to the assertion that *Susan Kahoya and Company Advocates* were the lawyers for Wothaya, the evidence shows that they acted for the Bank. Indeed, and by a letter dated 15th September 2014, the firm of *Susan Kahoya Advocates* stated that it acted for Family Bank and gave a professional undertaking to *Cheptumo and Company Advocates* acting for Consolidated Bank on the same terms as the Undertaking herein.

14. The totality of the evidence is that Family Bank cannot use its own default to evade its own obligations. Further, the parties had changed their positions in compliance with the Undertaking hence the court cannot reverse the process particularly given that Family Bank had, in the Undertaking, accepted to indemnify Consolidated Bank on the following terms:

Accordingly, we confirm that Family Bank Limited shall indemnify Consolidated Bank of Kenya Limited fully and keep Consolidated Bank of Kenya Limited Fully indemnified in respect of all loss and damage which Consolidated Bank of Kenya Limited may suffer by reason of any breach by Family Bank Limited or Messrs Susah Kahoya and Company Advocates of the aforesaid undertakings and terms and conditions of this letter.

15. The indemnity clause was intended to cover the situation in this case where the documents could not be returned and where Consolidated Bank suffered loss and damage as a result of the very acts that occurred. I therefore find and hold that the delay attributed by Family Bank, its customer and advocates is not a vitiating factor that can dissolve the Undertaking and that Consolidated Bank is entitled to full indemnity. Further and as pointed out by Ms Ali, Consolidated Bank no longer has an interest in the property and had issued the Discharge of Charge. It follows that orders sought in the Summons cannot be granted.

16. Before I conclude this judgment let me touch on the case between Family Bank, Wothaya and Njau. Njau was not a party to the Undertaking. He did not have any obligations to Family Bank. Since he was not privy to the contract in so far as the Undertaking was concerned, the claim against him is dismissed. That is the same position regarding Wothaya. She was not party to the Undertaking but as the chargor of the suit property, the remedies against her lie elsewhere.

17. For the reasons I have set out above, I dismiss the Further Amended Originating Summons dated 10th December 2018. The applicant shall bear the costs of the the 3rd respondent.

DATED and DELIVERED at NAIROBI this 19th day of DECEMBER 2019.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Momanyi instructed by Ashitiva Advocates LLP for the applicant.

Ms Ali instructed by Mburu Maina and Company Advocates for the 3rd respondent.