



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI**

**MISC APPL. NO.216 OF 2017**

**NATIONAL SOCIAL SECURITY FUND**

**BOARD OF TRUSTEES.....PLAINTIFF/APPLICANT**

**VERSUS**

**JAMES MWANGI**

**M.P GITHINJI**

**MARY WAMBUI NJUI T/A NGUGI-MWANGI &**

**CO. ADVOCATES.....DEFENDANTS/RESPONDENTS**

**R U L I N G**

The plaintiff filed Originating summons dated 10<sup>th</sup> April 2017 against the defendant .It seeks to enforce a professional undertaking of **Kenya Shillings Three Million, Five Hundred and Ninety One Thousand, Three Hundred and Ten and Forty Cents (Kshs.3,591,310.40)** against the defendants plus accrued interest of **Kenya Shillings One Million, Three Hundred and Forty Six Thousand, Seven Hundred and Forty One Hundred and Forty Cents (Kshs. 1,346,741.40)** and costs on both the principal amount and accrued at 15%per annum beginning 25<sup>th</sup> September 2014.

Grounds on the face of the application are that the respondent made a professional undertaking on 25<sup>th</sup> September 2014 to pay **Kenya Shillings One Million, Three Hundred and Forty Six Thousand, Seven Hundred and Forty One Hundred and Forty Cents (Kshs. 1,346,741.40)**.

The application is supported by the affidavit of Caroline E.Rakama-Odera. She averred that in the year 2007 the plaintiff sold through its Tenant purchase scheme a maisonette erected on Land reference Number Nairobi /Block 140/233 situated at Nyayo Embakasi Estate to Ngugi Mwangi & Co. Advocates at a price of **Kenya Shillings Four Million, Five Hundred Thousand (Kshs. 4,500,000)** which was payable within 15 years.

That the defendant defaulted in paying prompting the plaintiff to demand payment of arrears that were due at the time of failure; that the defendant rushed to court to obtain a temporary injunction which barred the plaintiff from repossessing the property or interfering with the possession and ownership of the said property pending hearing and determination of the said suit.

That during the subsistence of the said suit, the defendant approached the plaintiff with an offer to negotiate and settle the matter out of court; the plaintiff proposed to sell the proper to a 3<sup>rd</sup> party and promised to utilize the sale proceeds to settle the loan. A letter to that effect is annexed to the supporting affidavit. That on the strength of the said letter the plaintiff wrote to the defendant advising on the amount owing at the time and asking for professional undertaking to pay all the amount owing upon registration of transfer in the name of the purchaser. The letter is annexed to the supporting affidavit.

He further averred that pursuant to the said negotiations, the defendant issued the plaintiff with an irrevocable professional undertaking dated 12<sup>th</sup> August 2014 and 25<sup>th</sup> September 2014.The letters are attached to the supporting affidavit. He averred that the plaintiff forwarded completion documents to the defendant upon issuance of the undertaking.

That transfer to the purchaser one Dominic Mutote Musili was successful but the defendant concealed the transfer from the plaintiff.

The respondents ground of opposition filed on 28<sup>th</sup> September 201 is that there is no unequivocal professional undertaking to pay the sums now demanded and that this originating seeks orders of all partners in the law firm corporately without regard to the specific giver of professional undertaking, that the application is not supported by authenticated documents; and lastly the application is predicated on the wrong provisions of the law.

I have considered the application and submissions herein. I have also perused and considered documents annexed to the originating summons.

I wish to consider whether there exist a professional undertaking and two, if it exist, whom it should be enforced against.

The agreement dated 9<sup>th</sup> April 2008 is between the plaintiff and Ngugi Mwangi & Company Advocates for purchase of LR.NO.140/233 at a price of **Four Million Five Hundred Thousand only (4,500,000)**.By the letter dated 12<sup>th</sup> August 2014 the firm of Ngugi Mwangi & company Advocates gave the plaintiff an undertaking to pay full amount owing within 14 days from registration of transfer. This was reiterated in the letter dated 29<sup>th</sup> October 2015.Title deed dated 28<sup>th</sup> June 2016 confirm that the said property was transferred to one Dominic Mutote Musili.

The respondent has not filed any affidavit with averments or availed any documents to the contrary. There is no doubt from the documents annexed that Ngugi Mwangi and company Advocates was advanced **Four Million Five Hundred Thousand (4,500,000)** by the defendant and that it is the same purchaser who gave professional undertaking to pay amount owing upon sale of the property. From the foregoing I find that there exist a professional undertaking by Ngugi Mwangi and company Advocates.

I therefore find that the plaintiff has proved its case and proceed to enter judgment for the plaintiff against Ngugi Mwangi and company Advocates for the sum of **Kenya Shillings Three Million, Five Hundred and Ninety One Thousand, Three Hundred and Ten and Forty Cents (Kshs.3,591,310.40)** plus interest at courts rate till payment in full.

**Dated and Delivered at Nairobi this 11<sup>th</sup> day of April, 2018**

.....

**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF**

.....**COURT ASSISTANT**

.....**COUNSEL FOR PLAINTIFF**

.....**COUNSEL FOR DEFENDANTS**