



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 95 OF 2016 (O.S)**

**1. MOHAMMED SALIM BALALA**

**2. ABED OMAR ABED t.a BALALA & ABED ADVOCATES....PLAINTIFF**

**VERSUS**

**1. MOSES WAWERU**

**2. JASPER OMONDI WAWERU & CO. ADVOCATES.....DEFENDANT**

**J U D G M E N T**

1. There is an originating summons by the plaintiff seeking orders in the main that the defendants as partners in a firm of advocates do honour their professional undertaking to avail and handover to the plaintiffs some enumerated documents to complete sale and transfer of a property known as LR No. 6485/1/MN and in the alternative to pay to the plaintiffs the sum of Kshs.10,000,000 being the purchase price with interest thereon at 2% p.a. above the Commercial Bank lending rates with effect from the 29/4/2014 till payment in full. There are other orders sought to enforce the primary orders should there be no compliance.

The application is supported by an affidavit sworn by one ABED OMAR ABED which annexes and exhibits some 17 documents being correspondence on a transaction the two firms, (plaintiff and defendant) were engaged in for respective clients. Even though the agreement for sale is not disclosed and exhibited, the correspondence leave no doubt that the purchase price of Kshs.10,000,000 was paid in two tranches on 29/4/2015, Kshs.2,000,000/= and on 28/7/2015, Kshs.8,000,000/=. Upon payment of the Kshs.8,000,000/= there is a letter by the defendant and signed by the M.N. Waweru which says:-

**“We acknowledge receipt of your letter dated 28/7/2015 confirming remittance of the balance of the purchase price.**

**We shall hold the funds in trust to your order as stakeholders pending the successful registration of the transfer in favour of your client.**

**In the meantime, we shall shortly forward to you the remaining completion documents”.**

3. Some days later, on the 17/8/2015 the defendants once again wrote and said:-

**“We acknowledge receipt of your letter dated 12/8/2015.**

**Kindly note that we are awaiting the Discharge of charge and original title documents from the bank.**

**We expect to deliver the same in the next few days”**

4. Earlier, before payment of the purchase price, the defendant had written on the 23/5/2015 and said:-

**“There is a charge and a further charge registered against the property.**

**We shall settle the debts before completion. We are awaiting the executed agreement to enable us commence the process of discharge of charge”.**

5. When served with the originating summons, the 2<sup>nd</sup> defendant swore and filed a Reply filed on 3/4/2017 which confirmed the sale of the property and payment of the purchase price in full but equivocally say that the title and other completion documents have been handed over together with possession and that the bank has frustrated their efforts to get the original title deeds despite them paying all the debts due to the bank holding the title.

6. In effect the defendant acknowledges its obligation to avail and hand over the discharge of charge and original title to the plaintiffs. In the Replying Affidavit there is at least one letter which is of interest for the determination of this dispute. It is dated 27/9/2016 and says:-

**“Kindly note that we have now resolved the issue with KCB. Enclosed is a copy of our letter to the bank calling for documents including the subject title.**

**We request you to withhold any precipitate action to enable us receive the title from the bank and deliver same to you”.**

7. The court did give directions that parties file and exchange submissions pursuant to which directions the plaintiff file submissions dated 26/4/2017 on 27/4/2017 while the defendant filed their submissions dated 8/6/2017.

#### **Submissions by the plaintiff**

8. In their written submissions the plaintiffs have taken the view and position that there are sufficient writing and record to show that the defendant undertook to avail to the plaintiffs the documents to conclude the transaction and to hold the purchase price in trust as stakeholders pending the transfer in favour of the purchasers. They cited the decisions in *Equip Agencies Ltd vs Credit Bank Ltd [2007] eKLR* and *Nzioka & Co. Advocates vs Harit Sheth Advocates [2015] eKLR* for the legal proposition that for an undertaking to be enforceable it must be clear, unequivocal unambiguous, unconditional and the plaintiff must have acted upon it. The plaintiff contends they have met the said thresholds.

9. The decision in *Nelson Andayi Havi t/a Having & Co. Advocates vs Jane Muthiru Njage t/a N.J.M. Njage & Co. Advocates [2015]* was also cited for the proposition that where there is an undertaking and delay in honouring same, the court should find little difficulty in ordering enforcement.

#### **Submissions by the defendants**

10. In their submission as in the Replying Affidavit, the defendant admit giving the undertaking and the receipt of the purchase price but only maintained that it has given all the completion documents same for the original title and the discharge of charge which they contend they have made efforts and continue to make efforts to secure the release of but there has been frustration of such efforts by a third party, Kenya Commercial Bank Ltd.

11. On whether or not an order for enforcement should be issued the defendants relied on the decision in *Equip Agencies Ltd (supra)* and that of *Christopher Musau vs N.P. G Warrant & 7 Others [2012] eKLR* for the proposition that an undertaking is enforceable unless there be circumstances dictating otherwise or there be a vitiating factor.

12. To the defendant the fact that the title has always been with a third party who has declined to release same is a circumstance that militate against issuance of an enforcement order which to them is a drastic power which must be exercised with caution.

#### **Analysis and determination**

13. The existence of an undertaking to avail a full set of completion documents is not disputed but admitted by the defendants in very clear unequivocal, unambiguous and unconditional terms. Consequently the only question for determination by the court is whether there has arisen in a case for the enforcement of that undertaking and whether there should be an alternative or further should be the resort should the defendant, if so ordered to honour the undertaking, fails to so honour.

14. The trite learning is that an undertaking is an advocates bond and word of honour to his client or colleague. It is one of the privileges only the legal profession enjoy so as to speed process particularly in property transactions. An undertaking is given as a consideration of the recipient parting with possession of a valuable. As such the person giving the undertaking takes a risk with full consequences that what he undertakes unequivocally to do will be done all factors remaining constant.

15. That being the case the Advocate assumes an obligation to honour the undertaking and such an obligation is not lightly discharged short of going by the terms of the undertaking. If for example an advocates gives an undertaking without the benefit of being in possession of the resources to honour the undertaking, the burden does not become lighter unless undertaking has in it a condition precedent in which event the enforceability would be dependent upon the occurrence of the condition precedent and not prior it is therefore not expected for an advocate to give an undertaking without being in possession and control of the resources to fulfill the undertaking.

16. In this case, the words used in the letter by the defendant in the letter dated 29/7/2015 are evidently clear that they appreciated that they had a duty never to release the purchase price prior to release of the remaining documents and that the purchase price would be held to the plaintiffs order and in the defendants capacity as stakeholders.

17. That situation has not changed and the defendant does not allege any vitiating factor that has made their undertaking and word to the plaintiffs not realizable and therefore unenforceable.

18. I do find that the fact that the bank has delayed in releasing the documents is not a vitiating factor because the co-operation by the bank was not a condition precedent to the release of the documents. It may only be a reason to consider affording to the defendant a little more time to pursue and obtain the documents but it on itself is not a bar to enforcement.

19. For that reason, I do find that the plaintiff case against the defendant is well put and proved and has not been controverted. It is one of these cases that the advocate, defendants, must be made to honour their word of honour and bond not for their own good but for the good of legal profession at large. I therefore direct and order that the defendants, MOSES WAWERU & JASPER OMONDI t/a **Omondi Waweru and Company Advocates** shall within 30 days from today honour their undertaking by availing and handing over to the plaintiffs the original title and discharge of charge over LR No. 6485/I/MN.

20. Pursuant to the provisions of Order 52 Rule 7(2), should the defendants fail to so honour the undertaking, they must not later than the 32<sup>nd</sup> day from the date of this decision pay to the plaintiffs the full purchase price of Kshs.10,000,000/= together with interest thereon at 2% above the prevailing Central Bank Base lending rates. That interest be calculated from the 29/7/2015 when the full purchase price was paid.

21. If however there shall be default to avail documents and pay the purchase price as aforesaid, then the plaintiff shall have the liberty to execute for the said purchase price Kshs.10,000,000/= together with interest from the 29/7/2015 till payment in full.

22. I decline to grant prayers 4,5,6 & 7 of the originating summons for I consider that the primary purpose of this originating summons would have been served to the full by the documents being availed or the money paid or just recovered in the usual way. In any event prayer No. 4 can only be due for consideration once there is default to honour the undertaking or pay the purchase price. That is a bridge to be crossed when parties reach there.

23. I otherwise consider prayers 5 & 6 to be penal in nature and cannot be considered nor granted before due process is undertaken.

24. I also award to the plaintiffs the costs of the originating summons together with interest on such costs to be calculated from the date the costs are taxed till payment in full.

**Dated and Delivered at Mombasa this 29th day of May 2018.**

**P.J.O. OTIENO**

**JUDGE**