



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 376 OF 2017 (O.S)

RODERICK JOHN KNIGHT.....APPLICANT

VERSUS

ANTONY FREDERICK GROSS T/A A.F. GROSS &

COMPANY ADVOCATES.....RESPONDENT

JUDGEMENT

1. Roderick John Knight (the Applicant) is displeased that he is unable to get payment of some Kshs.6,347,190/= from Anthony Fredrick Gross t/a A.F Gross & Advocate (the Advocate) which was part of the consideration for the sale of Nanyuki LR. 2787/26/VIII (the Property). The Applicant seeks the intercession of this Court through an Originating Summons dated 5th September 2017 brought under the Provisions of Order 37 Rule 3 of the Civil Procedure Rules and the Advocates Act.

2. The Advocate represented the Applicant in the sale of the property to one Raphael Wamiti Gachoka at an agreed consideration of Ksh.38,000,000/=. The transaction was captured in a Sale Agreement dated 18th April 2016. The sale was successful but the troubles at Chase Bank is responsible for the anguish the Applicant now faces.

3. It was a term of the Sale Agreement that 20% of the Purchase price being Khs.7,600,000/= be paid to the Advocate as a Stake Holder. That sum was remitted into the Advocate's Client Account No. 0012005391001 at Chase Bank on 5th April, 2016. Two dates later, on 7th April 2016, the Bank was placed under the Receivership of Kenya Deposit Insurance Corporation (**KDIC**). Henceforth Depositors funds held in the Bank would be difficult to access. That notwithstanding the Applicant has insisted on the payment of these amounts.

4. While the amount deposited was Khs.7,600,000/= the amount which is the subject matter of this Summons is Khs.6,347,190/=. The difference is explained. The sum of Khs.682,810/= was to be retained by the Advocate as legal fees. And from funds outside those in Chase Bank the Advocate has paid Khs.570,000/= being part commission to the Agent who put the Sale together.

5. The Applicant blames the Advocate for this predicament and as I understand it, the mainstay of his complaint would be the following disposition found in paragraph 10 of his affidavit of 5th September:-

“10. THAT ironically, the Respondent is a Director in the Bank and the decision (if true), to have the funds conveniently deposited in the troubled Bank weeks before its troubles is a breach of his duty to act in my best interest and in good faith. The deposit of funds in a troubled Bank where he sits as a Director is a conflict of interest and reckless endangerment of my funds and ought to be remedied by this Honourable Court. The Advocate should be ordered to pay me my funds irrespective of where he purportedly deposited the funds”.

6. Whilst the Advocate does not seem to deny the Directorship of Chase Bank, he avers that he did not anticipate that the Bank was to be placed under Receivership or that he was privy to information that the Bank would meet that fate.

7. The allegation that the Advocate may have been privy or ought to have been privy to information that the Bank was facing financial distress has been met by a denial. The allegation made by the Applicant is of a serious nature and impeaches the integrity of the Advocate. A grave matter! However, save for the statement in the Affidavit of the Applicant no evidence is placed before this Court to support that accusation and there is not sufficient material upon which this Court can make a finding that the conduct of the Advocate was either willful or reckless.

8. Was there a conflict of interest in the Advocate depositing the sums in a Bank in which he sat as a Director? At the hearing of the

Application, Counsel for the Applicant did not press this argument. This Court, on its own, is unable to see any conflict of interest and will leave the matter at that.

9. The argument that the Advocate should pay up the sums immediately notwithstanding the woes at Chase Bank is all but lost because of Clause 4 of the Sale Agreement. It provides:-

“4. The Purchase price is Kenya Shillings Thirty Eight Million (Kshs. 38,000,000/=) of which the sum of Seven Million Six Hundred Thousand (Kshs.7,600,00) being 20% of the Purchase price (the “Deposit”) herein will be paid to the Vendors’ Advocate upon execution of this Agreement for Sale to hold as stakeholder pending completion and successful registration of the Transfer in favour of the Purchase but subject to forfeiture of only 10% of the deposit by the Vendor should the Purchaser fail to complete. The Purchase price shall be paid by way of Real Time Gross Settlement to the below mentioned account:-

Bank Name : Chase Bank (K) Ltd.

Wabera Street, Nairobi

Bank Code: 30

Branch Code: 001

Swift Code: Ckenken

A/C Name: A.F Gross”.

10. The Applicant was a signatory to the Agreement. He gave his concurrence to the deposit of the money at Chase Bank. The decision to deposit the money into the Advocate’s Account at Chase Bank was as much his decision as that of the Purchaser and the Advocates representing the parties. This cannot give rise to circumstances in which he can push the blame to his Advocate.

11. There is no merit in the Summons of 5th September 2017 and the same is dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 21st day of September, 2018.

F. TUIYOTT

JUDGE

PRESENT:

Njuguna for Respondent

Matanda h/b Gitonga for Applicant

Nixon - Court Assistant