



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURT
CIVIL CASE NO 91 OF 2011

KAKAMEGA PAPER CONVERTERS LIMITED.....PLAINTIFF

VERSUS

MOHANLAL ARORA.....1ST DEFENDANT

SUSHILA MOHANLAL ARORA.....2ND DEFENDANT

PASPULATI JAYASURYA SUNIL RAJ.....3RD DEFENDANT

EAST AFRICA PAPER CONVERTERS LTD.....4TH DEFENDANT

BANK OF BARODA (KENYA) LTD.....5TH DEFENDANT

RULING

1. The sale of some three properties together with Buildings, Plant, Machinery, Raw materials, Stock and finished Products of Kakamega Paper Converters Limited (hereinafter Kakamega Paper or the Plaintiff) appears not to have proceeded according to plan and has ended up in this Dispute.

2. After some discussion and negotiations, Kakamega Paper entered into an Agreement for sale dated 26th July 2010 (hereafter the 1st Agreement) with Mohanlal Arora (the 1st Defendant or Mr. Arora), Sushila Mohanlal Arora (The 2nd Defendant or Mrs. Arora) and Paspulati Jayasurya Sunil Raji (the 3rd Defendant or Raj). The property on sale was Kakamega Town/Block 1/242, 243 and 244 together with all Buildings, Plant, Machinery, Raw materials, Stock and finished Products. In the Agreement it is said that Kakamega Paper was the beneficial owner of Kakamega Town/Block1/244 which was registered in the name of Kabras Millers Ltd.

3. Some highlights of the 1st Agreement are that the purchase price or 'premium' was Kenya shillings one hundred and sixty million (Kshs.160,000,000). The price was broken down as Kenya Shillings one hundred and twenty million (Kshs.120,000,000) for the landed property together with buildings, plant and machinery thereon and Ksh. forty million (**Kshs.40,000,000**) for the Raw materials, Stock and finished Products. But in respect to the Raw materials, Stock and finished Products, the parties were to take stock and ascertain the cost as at the date of completion.

4. Another highlight was that the Purchasers were in the process of incorporating a Company called East African Paper Converters (EAPC) in which they would be Shareholders and Directors.

5. At the hearing of this suit one witness testified on behalf of Kakamega Paper. Mr. Dipak Panachand Shah (PW1) is the Managing Director of the Company. In his testimony he explained that the 1st and 3rd Defendants consistently told him that their intention was to run the business as a partnership consisting of the two and the 2nd Defendant. The 2nd Defendant being the wife of the 1st Defendant.

6. PW15 testimony was that keen to get on with the business quickly, the 1st and 3rd Defendants asked that they be introduced to the customers and suppliers of the Plaintiff even as they awaited the completion of the contract. The introduction was made and all customers and suppliers were informed of the change and that it was soon common knowledge that the business of Kakamega Paper had been sold to the 1st, 2nd and 3rd Defendants.

7. That the trio informed Kakamega Paper that they had already arranged a facility with Bank of Baroda (Kenya) (The 5th Defendant Bank Limited) to finance the purchase. Towards moving the transaction forward, Kenya Commercial Bank Limited (KCB), the Bankers of Kakamega Paper, released the original Title and Security documents to its Advocates and instructed them to deal and issue appropriate undertakings to the Purchaser's Advocates.

8. On 29th October 2010, an Agreement of Sale (the 2nd Agreement) was entered between the Plaintiff and East African Paper Converters Limited (the 4th Defendant or EAPC). PW1's evidence was that they had little choice but to enter this agreement having made certain adjustments to their finances and operations. However, that it was on condition that its bankers would first receive an undertaking from the 5th Defendant Bank securing payment of Khs.120,000,000/=. In the 2nd Agreement EAPC would buy all the assets from Kakamega Paper at a purchase price of Ksh.174,462,434 which included the sum of Khs.3,000,000 paid in advance by EAPC to Kakamega Paper for the purchase of Newsprint Paper.

9. That the 1st, 2nd, 3rd and 4th Defendants asked Kakamega Paper to procure for them newsprint Paper, primary raw materials and manufacture of exercise books worth Khs.10,620,650/=. The Defendants made an advance of Khs.3,000,000/= by way of RTGS and promised to pay the balance by way of 8 postdated cheques. That in addition EAPC proceeded to pay its taxes to the Commissioner of Domestic Taxes.

10. It was stated on behalf of Kakamega Paper that on 25th October 2010, the 5th Defendant Bank forwarded an assurance on behalf of EAPC to KCB that in consideration KCB executing the relevant discharge documents, the 5th Defendant Bank irrevocably and unequivocally undertook to pay to KCB the sum of Khs.120,000,000 within 14 days of the Date of Registration of the requisite transfers. In addition a separate undertaking dated 4th October 2010 had been given by the firm of L.G Menezes Advocates on behalf of the 5th Defendant Bank (Plaintiff's exhibit pg 236).

11. The Plaintiffs Advocates, Wasuna and Co. Advocates accepted the terms of the said undertaking and on 2nd November 2010 forwarded the completion documents to the Bank's Advocates (Plaintiff's exhibit pg 238).

12. It is the case for Kakamega Paper that they then proceeded to pay severance pay to its employees so that they would be employed a fresh by the EAPC. In further preparation for the transfer of the business, EAPC and Kakamega Paper simultaneously wrote to the Commissioner of Domestic Taxes informing him of the sale and purchase of the business as a going concern.

13. Thereafter the Plaintiff proceeded to handover and deliver possession of its Assets, Business and Properties to EAPC. It was the evidence of the witness that, after placing advertisements, EAPC commenced the business and started manufacturing and selling Paper products in its own name.

14. In a turn of events, the Advocates for EAPC by a letter dated 17th January 2011 wrote to the Advocates of Kakamega Paper informing them of a purported rescission of the Agreement dated 29th

October 2010. In that letter there was an offer to hand bank the premises to Kakamega Paper on 26th January 2011(Plaintiff's exhibit pg 278). That rescission was not accepted and this was communicated to the Advocates for EAPC through a reply to their letter (P. Exhibit 279-280).

15. A search carried out at Land's office in Kakamega on 17th January 2011 revealed that the Charge against Land Parcels Kakamega/Town/Block 1/242 and 243 had been discharged as at that date. However, the Charge was reinstated on 19th January 2011 after a request by the Advocates for EAPC.

16. Further EAPC stopped payment of all the postdated cheques it had issued to the Kakamega Paper. 13 of the cheques had already been presented and were returned unpaid with remarks 'payment stopped'.

17. Kakamega Paper is aggrieved by the conduct of the Defendants hence this suit. The Plaint dated 10th March 2011 is substantially a rehash of the facts from the vantage of Kakamega Paper. The Kakamega Paper then seeks the following prayers:-

1. For Specific performance of the Agreement of 29th October 2010.

2. Judgement to the sum of Khs.51,462,429.83 with interest thereon being the values of the post-dated cheques issued by it to the Plaintiff payment whereof has been stopped by the 4th Defendant.

3. A declaration that the purported rescission of the agreement of 29th October 2010 by the 4th Defendant is invalid and of no consequence.

4. An order that 1st, 2nd and 3rd Defendants do carry out their promise and assurances to the Plaintiff and procure the 4th Defendant to fulfil its obligations under the Agreement dated 29th October 2010.

5. In the alternative and or in the event of the 4th Defendant not paying or being unable to pay for whatever reason the sums claimed against it herein the first three Defendants pay the same to the Plaintiff.

6. In the alternative and or in the event that the 5th Defendant does not for whatever reason fulfil its undertaking then the 1st, 2nd, 3rd and 4th Defendants pay the Plaintiff the said sum of Kshs.120,000,000/- plus interest, subject of the said undertaking.

7. An order that the 5th Defendant forthwith honour its undertaking by paying the sum of Khs.120,000,000/- plus interest thereon in accordance with the undertaking dated 25th October 2010.

8. Such other or alternative relief that the Court may deem fit to grant against any of the Defendant or Defendants as to it may deem just and proper.

9. Cost of this suit.

10. Interest

18. In cross examination, the witness reiterated that Kabras Millers Limited who were registered as owners of Kakamega/Town/Block 2/244 had agreed to transfer the property to the Plaintiff. He also stated that the Agreements of 26th July 2010 and 29th October 2010 were interrelated. He explained that as Kakamega Paper was exposed after entering the 1st Agreement it made a decision to enter the 2nd Agreement. So that in a sense they were coerced to do so.

19. PW1 also testified that the 3rd Defendant was at one time in his employment although he denied that he was ever the Chief Executive Officer of Kakamega Paper. The witness denied that he was aware that the 3rd Defendant had approached the 1st Defendant with an offer to buy Kakamega Paper as a going concern. He however informed Court that the 1st and 3rd Defendants jointly negotiated the sale but the 2nd Defendant was not involved.

20. The witness told Court that the claim by Kakamega Paper against the 5th Defendant Bank was on the undertaking. Although no charge in favour of the 5th Defendant Bank had been registered against the properties, the witness had understood that the charge of the 5th Defendant Bank would be registered simultaneously with the Discharge of Charge forwarded to the Bank's Lawyers by the Lawyers for Kakamega Paper. PW1 maintained that there was no reason for the Bank's Lawyers to fail to register the Charge.

21. Mohanlal Arora (the 1st Defendant) testified on his own behalf and on behalf of EAPC. It was his evidence that sometime in June 2010, Kakamega Paper through the 3rd Defendant who was its duly authorized Agent, approached him with a proposal for the purchase of Kakamega Papers' business Assets. The 3rd Defendant was well known to him. Thereafter negotiations and discussion ensued between Mr. Dipak Shah (a Director of Kakamega Paper) and the 3rd Defendant. The witness told Court that Mr. Shah represented the following to them:-

- a) That he would furnish to them the Books and statements of account of the Company to enable him ascertain the true book value of the exercise.
- b) That the business was producing over 50,000 cartons of exercise books annually.
- c) That the business enjoyed substantial good and profitability with customers, suppliers and creditors.
- d) That pending the disclosure of the Financial Statements, the book value of the Company stood at Kshs. 174,000,000/=.

22. On the basis of that information the witness agreed to purchase the business but subject to concluding of a formal contract and the provision of credit facilities from a financial institution. Upon a request by the 3rd Defendant, Mr. Arora agreed to a partnership with him which included the 2nd Defendant who is the wife of Mr. Arora. Mr. Arora explained that he believed that the 3rd Defendant would be a valuable addition to the business and ensure smooth continuity as he and his wife were running a business in Kisumu.

23. Mr. Arora was of the position that it was an implied term of the Agreement that the disclosure obligations of Kakamega Paper would persist before, during and after the complete transfer of the business. In breach of this obligation the Plaintiff failed and/or refused to provide him with the Financial Statements of the Company and instead insisted that it shall supply the same to the 5th Defendant Bank to enable it access the viability of the Business for Financial purposes.

24. The 1st, 2nd and 3rd Defendant executed the Sale Agreement dated 26th July 2010. However, at the insistence of the 5th Defendant who was to finance the transaction, the three incorporated a limited liability Company, EAPC. Mr. Arora understood that all Rights and Obligations under the Sale Agreement were taken over by EAPC through the subsequent Agreement dated 29th October, 2010.

25. That as soon as the 4th Defendant was granted physical possession of the premises and assets of Kakamega Paper, it discovered that the representations made by the Directors of Kakamega Papers were grossly untrue and exaggerated. Further that the Plaintiff had knowingly withheld its Financial Statements well aware that the same would have materially influenced its decision to purchase the Business.

26. Things started to move quickly. On 11th January 2011 the 5th Defendant Bank cancelled the Credit facilities it had granted to EAPC (D. Exhibit pg 15). On its part EAPC instructed its Advocates to rescind the Sale Agreement. Thereafter, its Advocates through a letter dated 17th January 2011, duly rescinded the Agreement. On 20th January 2011, the said Advocates returned the Completion documents to the Advocate of Kakamega Paper.

27. It was the testimony of the witness that Kakamega Paper has declined to take back possession of its premises and assets and to receive the Title document.

28. The 1st and 2nd Defendants, and EAPC have not only resisted the Plaintiffs claim but EAPC has set up a Counterclaim. In the Counterclaim EAPC seeks the following orders:-

- a. A declaration that the rescission of the Agreement dated 29th October 2010 was lawful.
- b. Judgement for the sum of Khs.3,000,000 particulars of which are supplied above.
- c. A refund of the expenses set out in paragraph 27 above.
- d. Interests at the court rates on (b) and (c) above
- e. Costs of the suit.

29. Answering questions fielded to him in cross examination Mr. Arora told Court that the loan was offered by the 5th Defendant Bank to EAPC. He did not know how the loan came to be cancelled because it was the 3rd Defendant who was dealing with the Bank. Shown a valuation Report dated 27th July, 2010 prepared on instructions of the 5th Defendant Bank which showed the value of the Premises, Plant and associated Machinery of Kakamega Paper to be Ksh. 220,000,000, the witness retorted that it was an exaggeration.

30. While the witness conceded that he had profound experience in Bookshop Business having been in that business for 16 years he did not have knowledge of manufacturing business.

31. The position of the 5th Defendant Bank was stated by Mr. Dennis Onyoro (DW2) who at the time of making his Statement on 26th October 2015 was a Credit Officer with the 5th Defendant Bank. It was his testimony that on the basis of the Sale Agreement dated 26th July, 2010 the Bank appraised a request by the 1st, 2nd and 3rd Defendants to finance the purchase of the Assets and Business of Kakamega Paper. He stated that the 1st and 2nd Defendants were established business men and reputable customers of the Bank. Subsequently the Bank instructed the taking of a Valuation. The decision to grant the facility to the EAPC was made on the basis that the Customer convinced the Bank the business was viable and on the valuation. He confirmed that EAPC was evaluated on the strength of its Directors and was quick to add that this happens all the time.

32. DW2 testified that the facility was cancelled after EAPC had rescinded the Agreement. He emphasized that the Bank could not have cancelled the transaction without instructions from its customer. On the undertaking given by its lawyers, the witness confirmed that its lawyers had undertaken to simultaneously present for registration the Discharge of Charge, Transfers and Charge in favour of the 5th Defendant Bank. He added that the Discharge of Charge by KCB although registered had been reinstated. He stated that had the registration gone through then the Bank would have had to pay the amount in the undertaking.

33. The 3rd Defendant did not Enter Appearance or defend this matter.

34. The Court has read and understood the pleadings, evidence and submissions. It has also considered the issues proposed by parties and takes the view that the following are the issues that require resolution.

- a) Which of the two Agreements (26th July 2010 or 29th October 2010) is the Contract that forms the subject of the dispute herein?
- b) Did the Plaintiff breach that Contract?
- c) Was the 4th Defendant or other Defendants entitled to rescind that Contract?
- d) Are the 1st, 2nd, 3rd and 4th Defendants either jointly or severally liable to the Plaintiff?
- e) Is the 5th Defendant Bank liable under the terms of the undertaking issued on its behalf on 4th October 2010?

The Contract

35. It is common ground that an Agreement of Sale dated 26th July 2010(P Exhibit pg.36-46) was entered between Kakamega Paper ,on the one hand and the 1st, 2nd and 3rd Defendants,on the other. The subject of the Agreement was the sale of Kakamega Town/Block 1/242, 243 and 244 together with all Building, Plant, Machinery, Raw materials, Stock and finished Products. Kakamega Paper was the vendor, while the three were the purchasers. In that Agreement was clauses 3.2 and 3.3 which read:-

“3.2 On completion of the Sale the Vendor will transfer the sold property into the name of East African Paper Converters Limited(in formation) and such transfer shall constitute a complete discharge of the Vendor’s obligations to the Purchaser.

“3.3 The Purchasers are in the process of incorporating a Company called East African Converters (in formation) in which they will all be shareholders and directors”.

36. EAPC was incorporated on 26th August 2010 (Plaintiff Exhibit pag.190) and subsequently entered into a Sale Agreement dated 29th October 2010 with Kakamega Paper (Plaintiffs Exhibit pg.217-227). The subject matter of the 29th October 2010 agreement was the same as that of the Agreement of 26th July 2010. The contention of Kakamega Paper is that this latter Agreement did not oust or replace the initial Agreement for sale dated 26th July 2010 because the latter agreement was not performed. The 1st, 2nd and 4th Defendants are of the contrary view.

37. Now it is trite that a Company is distinct from its Shareholders and so that in the two Agreements, Kakamega Paper was contracting with three individuals in the Agreement of 26th July, 2010 as distinct with a Company on 29th October 2010. However, the subject of the Sale was one. Would it be possible that the two Agreements would both validly exist at the same time?

38. Looking at the Agreement of 26th July 2010, its completion date was 30th September 2010. By this time there had been no substantial movement in the transaction. It is then common ground that the Financiers of the transaction were desirous of financing a Body Corporate and it was understood that a Limited Liability Company would be incorporated. Kakamega Paper adds that it entered into the 2nd Agreement as it was exposed. Nevertheless it cannot be accepted that it was coerced. It is doubtful that it was helpless in the situation as it would have simply insisted on the specific performance of the 1st Contract.

39. By entering into the 2nd Contract, Kakamega Paper must have intended or acknowledged, or ought to have known that the effect of entering the 2nd Contract was that it would displace the 1st Contract whose completion date had passed. The three are not insisting on the 1st Contract and this Court would not have a difficulty upholding the Defendant’s argument that the Agreement that is operative for purposes of this suit is the 2nd Agreement.

40. And if there was ever a doubt, then one can get clarification from the Letter dated 25th February 2011 from the Lawyers of Kakamega Paper (Plaintiffs Exhibit page 297). This was the Demand Letter that preceded the action herein. In that letter Kakamega Paper are unequivocal that its grievance is in respect to the purported rescission of the Agreement of Sale dated 29th October 2010. No mention is made in respect to the 1st Agreement. The threat in the Letter is that, its clients,

‘...will seek, inter alia, specific performance of the said Agreement by your client East African Paper Converters Ltd’.

That it is the 2nd Agreement of 29th October 2010 that is truly the subject of the dispute is further fortified by the contents of the Plaint. All the prayers therein, be they for specific performance or otherwise, are in respect to the Agreement of 29th October 2010.

41. This issue is therefore easily resolved even without the Court admitting into evidence the unstamped Deed of substitution and Discharge found in 5th Defendants Bundle of Documents (page 44-47).

Was the Plaintiff in breach of the Contract?

42. There is evidence that Wasuna & co. Adv. Acting on behalf of Kakamega Paper forwarded all the Completion Documents in respect to the transaction through a letter of 2nd November 2010 (P Exhibit page.235). A few days early EAPC had received possession of the Plant that was the subject of the Sale. There is written confirmation to this effect (P Exhibit page 257-259). There is further evidence that EAPC commenced manufacturing goods in its own name (P Exhibit 262).

43. On the face of it, Kakamega Paper had performed its side of the deal.

44. What is the grievance of EAPC? In paragraph 10 of its Defence, EAPC contends that Kakamega Paper made certain representations which turned out to be untrue. It is said that the Kakamega Paper had represented that,

(i) The Business was producing over 50,000 cartons of papers per year.

(ii) The Business was an ongoing concern and making profit.

During the hearing the witness for EAPC attempted to expand this to include an allegation that Kakamega Paper did not furnish to it the Books and Statements of Accounts of the Company.

45. The Counsel for EAPC made heavy weather of this unpleaded allegation by submitting that on the basis of clause 3.3 of the Agreement to wit that the purchase would be financed, the Plaintiff had an obligation to supply EAPC with its Books and Statements of Accounts to enable EAPC comply with the conditions set out by the Financier as a prerequisite for advancing the facility. However, when one looks at the evidence that was placed before Court it becomes apparent that this assertion does not sit well with the events that had unfolded.

46. For starters, the 5th Defendant Bank’s own witness stated as follows:-

“That in keeping with Bank conditions, we requested the following preliminary assurances from the Company:-

a) Agreement for Sale

b) Current valuation of the land/property and Plant machinery

c) Stock valuation

The Company supplied the information requested and the Bank forwarded the Application to its Head office in Nairobi for approval or otherwise. The financial facility was sanctioned by our Head office and, accordingly, we conveyed this information to the Company through a Letter of Offer for acceptance”.

47. The truth of the matter, therefore, is that the Bank had granted the facility to EAPC subject to the perfection of securities. And to enable those securities to be perfected the Advocates for Kakamega Paper had forwarded the Completion Documents to the Bank’s Lawyer. The Bank’s witness confirmed that the Bank pulled out only because EAPC called off the transaction. The assertion by EAPC that it could not arrange finance because of failure by Kakamega Paper to provide certain Documents and information is not with candor.

48. It is in the letter of 17th January 201 (1st and 4th Defendants Exhibit page 13) that EAPC formally rescinded the Agreement. That letter gives no reasons for the decision. However in a letter that follows 4 days later, on 21st January 2011 (1st and 4th Defendants Exhibit page 10), the following reason is given for rescission,

“The fact that your Client appears not to appreciate is that your Client’s Director deliberately misrepresented to our Client that the Sales of the Business topped 50,000 cartons, a deliberate misrepresentation that materially induced our Client to enter into the Contract. Further in view of the fraudulent misrepresentation, rescission is not barred as time would only run from the time when our Client discovered the truth”.

49. Kakamega Paper deny giving any such representation while EAPC was not able to furnish that evidence. The only evidence placed before Court was by DW 1 that Dipak Shah (a Director of Kakamega Paper) repeatedly gave verbal representation to this effect. However EAPC’s contention is met with the Disclaimer Clause in the Sale Agreement which reads:-

“This Agreement and the conditions constitute the entire agreement between the parties and may only be varied or modified whether by collateral contract or otherwise in writing under the hands of the parties or their advocates. The Purchasers acknowledge that save as to such (if any) of the written statements of the Vendor in answer to preliminary enquiries prior to the making of this Agreement as were not susceptible of independent verification by inspection and survey of the Property search and enquiring of the local and other public authorities or inspection of the documents disclosed to the Purchasers (and whether or not such inspection survey search and enquiry have been made) and have been relied on by the Purchasers they have not entered into this Agreement in reliance wholly or partly on any other statement or representation made to it”.

The Disclaimer clause puts paid on any representations or assurances that may have been made previous to the execution of the Contract.

50. This Court is unable to see any breach on the part of Kakamega Paper and holds that EAPC was not entitled to rescind the Contract.

Are the 1st, 2nd and 3rd Defendants liable?

51. This Court has already made a finding that the Agreement which forms the subject of the dispute herein is the Agreement of 29th October 2010. The 1st, 2nd and 3rd Defendants were not party to that Agreement. It was an Agreement between Kakamega Paper and EAPC. The evidence is that whilst the three are still the Shareholders of EAPC, the 1st and 3rd Defendants are its only two Directors after the 2nd Defendant resigned on 14th January 2011(see 1st and 2nd Defendants Bundle page 1). However not being privy to the said Contract, the trio can only be liable if the cloak of the Corporate veil is lifted. This however is not the case for Kakamega Paper. It has neither pleaded the lifting of the Corporate veil nor proved that such a drastic order is deserved.

52. This Court finds no liability against the 1st, 2nd and 3rd Defendants. This finding is made even if the 2nd Defendant did not lead any evidence in rebuttal and that 3rd Defendant did not defend the case. As rightly submitted by Counsel for the 2nd Defendant the claim not being one for liquidated damages, the burden remained with the Plaintiff to prove it's claim against the Defendant to the threshold required by law. The failure of a Defendant to testify does not lessen the weight of that burden. If there is need for support of this proposition then it can be found in the Decision of Charterhouse Bank Limited (under Statutory Management) vs. Frank N. Kamau [2016] eKLR cited by the 2nd Defendant's Counsel. The Court of Appeal held,

“The suggestion however, implicit in some of the decisions quoted above, that in all and sundry civil cases the failure by the defendant to adduce evidence in support of his defence means that the plaintiff's case is proved on a balance of probabilities cannot possibly be correct. It is also obvious to us that in some of those decisions the question whether the Plaintiff has, in the absence of evidence from the defendant, proved his case on a balance of probabilities, was conflated and confused with the distinct issue of the effect of the defendant's failure to testify when he had filed a defence and a counterclaim. While the defendant's failure to testify has fatal consequences for the counterclaim because the onus is on him to prove it on a balance of probabilities, it does not necessarily have the same consequence for the defence where the onus is on the plaintiff to prove his claim on balance of probabilities”.

Is the 5th Defendant liable?

53. So as to finance the transaction the 5th Defendant Bank offered facilities to EAPC. As security therefor, the Bank required to take, inter alia, a first Legal Charge of Kshs.125,000,000/= over land Reference Kakamega/municipality/1/242 and 243 (See Bank's Bundle of Documents pages12-30 being the letter of offer dated 16.9.2010). Those two properties, still registered in the name of Kakamega Paper, were charged to KCB.

54. In a letter of 23rd September 2010, KCB instructed its lawyers, Wasuna & Co. Advocates to call for a professional undertaking to enable the Bank release the said securities (P. Exhibit page 211). On 1st October, 2010, Wasuna & Co. Advocates wrote to L.Z Menezes, who were acting for both EAPC and the 5th Defendant Bank, calling for the undertaking (P.Exhibit pages 214-216). The all important undertaking came through letter of 4th October 2010 and that undertaking is significant enough to these proceedings to warrant its reproduction:-

M/S Wasuna & Company

Advocates

KISUMU

Dear Sir,

RE: OUR CLIENT – BANK OF BARODA (KENYA) LIMITED

YOUR CLIENT – KENYA COMMERCIAL BANK LIMITED

1. KAKAMEGA TOWN/BLOCK 1/242 AND 243

2. KAKAMEGA TOWN/BLOCK 1/244

KABRAS MILLERS LIMITED

We have instructions from our Client M/S Bank of Baroda (K) Limited, to request M/S

Kenya Commercial Bank Limited as we hereby do to release the security relating to M/s Kakamega Paper Converters Limited and M/s Kabras Millers Limited (the Companies) to us against our unequivocal irrevocable professional undertaking in the following terms:-

That as you are aware, the Companies have agreed to sell Kakamega Town/Block 1/242 and Kakamega Town/Block 1/243 registered in the name of M/s Kakamega Paper Converters Limited and Kakamega Town/Block 1/244 registered in the name of M/S Kabras Millers Limited to M/s East African Paper Convertors Limited.

That we shall hold the Original Titles over Kakamega Town/Block 1/242 and 243 registered in the name of M/s. Kakamega Town/Block 1/244 registered in the name of M/s Kabras Millers limited (hereafter referred as “the Properties”) together with the Charge and duly executed Discharges of Charge forms over the properties (hereinafter referred as “the Completion Documents”) to your order, returnable as demand and that we shall not release the Completion Documents to any person whatsoever except the Kakamega Land Registry for purposes of registration of the requisite transfers aforesaid, the Discharges of Charge and fresh Charge in favour of our Client M/s Bank of Baroda (K) Limited, Kisumu.

That we shall present for registration the requisite forms and the said Discharges of Charge together with the Charge over the Properties in favour of our client, M/s Bank of Baroda (K) Limited, Kisumu simultaneously, with such joint representation being on the strict condition that if the transfers and Discharges of Charge are rejected for registration for any reason whatever, no entry shall be made in the Kakamega District Land officer Register relating to the titles of Properties and that we shall return the Completion Documents in the same condition as we received them from you within 7 (seven) days of such rejection.

That registration of the said transfers, the Discharges of Charge and Charge in favour of M/s Bank of Baroda (K) Limited, Kisumu is not effected within 45 (forty five) days from the date when we receive the Completion Documents from you, then we shall, upon written demand by you return to you the Completion Documents in the same condition as they were delivered to us.

That we shall immediately upon receipt of the transfers and Discharges of Charge and the Charge in favour of M/s Bank of Baroda (K) Limited, Kisumu duly registered at the Land Registry, notify your client Bank of such registration.

In this regard, we shall exercise our best endeavor to ensure that registration formalities are completed expeditiously.

We are arranging to forward to your Client Bank an undertaking form our Client Bank in relation to the sums of monies owing.

Many thanks.

Yours faithfully,

L.G MENEZES, ADVOCATES

55. On the strength of that undertaking Wasuna & CO. Advocates forwarded the Completion Documents on 2nd November 2010 (P. Exhibit 238-239).

56. It came to be that the transaction fell through when EAPC purported to rescind the Agreement of Sale of 29th October 2010 which rescission this Court has already found to be wrongful and unlawful.

57. It is also common ground that as at 17th January, 2011, the Discharge of Charge in respect to the KCB Charge had already been registered over Blocks 243 and 242 and searches obtained on that day (P.

Exhibit pages 281, 282) showed that the Titles did not have any encumbrances. On 19th January 2011, L.Z Menezes sought that the Charge in favour of KCB be reinstated, taking a view that the Sale transaction had aborted. The Charge was reinstated and a Certificate of Search obtained on 19th January 2011 would show this (P. Exhibit pages 285, 286).

58. The position of Kakamega Paper is that the 5th Defendant Bank is bound by its undertaking and cannot renege on its promise. That the undertaking by the 5th Defendant's Advocate was to present the Transfer Forms, Discharge of Charge and Charge in favour of the 5th Defendant's Bank simultaneously to the Lands Registry. That from the evidence, the 5th Defendant presented the Discharge of Charge separately from the other documents. Further that the reinstatement of the Charges is grossly irregular.

59. I was asked to find that the Bank's undertaking is akin to a Letter of Credit or Performance Bonds. The decisions in Mea Limited vs. Echara Farm Limited & 2 others {2007} eKR and **East African Development Bank Ltd vs. Apollo Insurance Co. Ltd & another** [2014] eKLR were cited as supporting this proposition.

60. The Bank contends that in the said undertaking the Bank offered to 'take over' the Title Documents from KCB and it was issued to KCB as a letter of comfort that the loan funds would be disbursed directly to it once the security for the said funds was perfected in favour of the 5th Defendant.

61. The Bank further sought to distinguish an undertaking from a Letter of Credit and a Performance Bond.

62. The Court accepts the general definition of a Professional undertaking as set out in the Encyclopedia of Forms and precedents 5th Edition volume 39 quoted in the decision of S.T.G Muhia t/a /S. Thuo Muhia & Co. Advocates vs. J.M Chege t/a J.M Chege & Co. Advocates[2009] eKRL,

“31. General – An undertaking is an unequivocal declaration of intention addressed to someone who reasonably places reliance on it and made by; 31.1- A solicitor or member of solicitor's staff in the course of practice; or 31.2- A solicitor as 'solicitor' but not in the course of practice. An undertaking is therefore a promise made by a solicitor or on his behalf by a member of his staff, to do or refrain from doing something. In practice undertakings are frequently given by solicitors in order to smooth the path of transactions, or to hasten its progress and are a convenient method by which some otherwise problematical areas of practice can be circumvented”.

63. The practice of giving a Professional undertaking is not uncommon in the practice of conveyancing. And it serves a useful purpose. Some transactions will not be progressed or achieved without an Advocate making a promise on behalf of his client to do or forbear from doing something. A Professional undertaking can provide useful links or building blocks to a complicated transaction when parties derive a comfort from assurances made that they will not be left high and dry in committing themselves in a certain way. The giving of Professional undertakings has such a central place in conveyancing that there will be a profoundly negative impact if they are treated casually and not enforced or secured by Courts.

64. The nature, extent or effect of a professional undertaking often depends on its wording. Whilst this Court is unwilling to find that a Professional undertaking is at all times alike to a Performance Bond or Letter of Credit which is independent of the primary Contract between the principal and beneficiary, there will be Professional Undertakings that are worded with such finality and rigour as to amount to a promise that is independent of the Primary Contract. In addition, the point at which a transaction has reached may matter. So that if the event upon which the promise is predicated has happened, then the promise must be kept even if a dispute has arisen in respect to the Primary Contract. In the end the true purport of a Professional undertaking will turn on its wording and the circumstances in which it was given.

65. This Court had earlier reproduced the Professional Undertaking given by the L.G. Menezes on the instructions of the 5th Defendant Bank. The important elements of the promise are :-

(i) The said Advocates would hold the Completion Documents to the order of Wasuna & Co., returnable on demand and would not be released to any other person except the Kakamega Land Registry for purposes of registration of the requisite transfer, discharge of Charge and fresh Charge.

(ii) The Completion Documents would be presented simultaneously for registration and if the Transfers and Discharge of Charge were to be rejected for registration, no entry would be made in the Register relating to the Titles of the properties and the same would be returned in the same condition as received within 7 days of such rejection.

(iii) If registration was not effected within 45 days from the date of receipt of the Completion Documents then, upon written demand by the firm of Wasuna, the said documents would be returned in the same condition.

(iv) The Advocates would promptly notify the firm of Wasuna & Co. of registration of the Documents upon receipt of the Documents duly registered at the Land Registry.

(v) The 5th Defendant Bank was to give an undertaking to KCB in relation of the sums owing.

66. That undertaking by the 5th Defendant Bank to KCB was given in a Letter of 25th October 2010. The Bank underscored that it would pay a sum of Khs.120,000,000/- to the KCB within 14 days of registration of the requisite transfers and subsequent registration of the Charge in its favour. Significant as well was a reiterated promise that the documents would be released unchanged on demand if the registration would not have been effected within 45 days of the day of their receipt.

67. Upon receiving the undertaking from L.G Menezas, the firm of Wasuna & Co. Advocates forwarded the Completion Documents without any reservations or comments in respect to the said undertaking. It must therefore be taken that the undertaking was accepted as worded.

68. Now, the design of the Professional Undertaking was that KCB would be paid (to the Credit of Kakamega Paper) the sum of Khs.120,000,000/- once the security in favour of KCB was discharged, and the transfers to EAPC and Charge in favour of The 5th Defendant Bank were registered. And a deadline of 45 days from the date of receipt of the completion documents was placed for the registration to be effected. The object of the undertaking must have been that KCB and Kakamega Paper would be assured of the payment once ownership of the property passed to EAPC and KCBs had lost its security. The reason for requiring that the Completion Documents be presented simultaneously for registration must be read with the requirement that if the transfers and discharges of Charge were rejected for registration for any reason, no entry would be made in the Register to the properties. In this way the purchaser was also protected so that it was not faced with a situation where the Discharges were registered and the Transfers rejected for some reason and then left high and dry. The undertaking was a win-win arrangement for both the Seller and the Vendor.

69. While there is no evidence that the discharge of Charge and the other Completion Document were presented together, the evidence is that the Charges were reinstated. Although the Plaintiff has submitted that the reinstatement was irregular, this Court has not been asked to impeach that process. To be noted as well is that KCB being the owner of the Charge has not raised a complaint in respect to the reinstatement.

70. Viewed from the standpoint of what the undertaking was to protect and achieve, can it be said that the 5th Defendant Bank has breached it so as to be liable? The lawyers for KCB made a demand of Kshs.120,000,000/- on 19th January 2011. The reinstatement of KCB's Charge must have happened sometime on 19th January 2011. The letter by L.G Menezes seeking reinstatement is dated 19th January 2011 (see Plaintiffs Exhibit page 284). Crucial is that on the same date KCB called in the payment, its Charge was duly restored. And of equal significance, no transfers of the properties had been effected. As noted early KCB itself has not sued or complained in respect to the reinstatement. It must follow that as the transfers had not been effected, no demand, on behalf of Kakamega Paper, could have been properly

made against the 5th Defendant Bank. I find that prior to the registration of both the transfers and discharge of Charge, the Professional Undertaking was subject to the Primary Contract. Once the sale was rescinded by the Principal, then the 5th Defendant Bank was not under further obligation to complete the registrations. If the Plaintiff was unhappy with the rescission, as it is, then it's grievance must be targeted at EAPC who called off the transaction. The 5th Defendant Bank is not liable.

The Plaintiff's relief

71. It is a finding of this Court that EAPC wrongfully and unlawfully rescinded the Contract of 29th October 2010. The Court has found that the only Defendant liable is EAPC. In the Plaintiff, the Plaintiff had in addition to seeking specific Performance of the Agreement of Sale of 29th October 2010, sought Judgement of a liquidated sum of Kshs. 51,462,429.63/=. The latter was said to be the value of postdated cheques issued by EAPC to the Plaintiff but subsequently stopped. The unpaid cheques formed the subject of a Motion dated 18th April, 2011 brought by the Plaintiff for Judgment in respect thereof. In a Ruling dated 24th August 2011, Hon. Muga Apondi J. entered Judgement against EAPC for the sum sought. Whether or not EAPC has satisfied the Interlocutory Judgement entered by the Judge is not an issue to be determined in this Decision. The Parties can take up any outstanding issue in respect thereof with the Deputy Registrar of this Court who would have the mandate of Execution of the Decisions of this Court.

72. It has been submitted by Counsel for EAPC that the Plaintiff is unworthy of the relief for Specific Performance. It is old hat that Specific Performance is an equitable remedy and so the maxims of equity would apply. It is argued, on behalf of EAPC, that the Plaintiff has acted unfairly and dishonestly as to be undeserving before a Court of equity. The dishonourable conduct is said to have happened after EAPC called off the deal. On cross-examination by Mr. Amoko, Counsel for the 1st, 2nd and 4th Defendants, PW1 conceded that the Plaintiff lodged a Criminal complaint against Mr and Mrs. Arora. This was in February of 2011. He justified his action by stating that the Plaintiff felt that it had been defrauded. Eventually that complaint formed the subject of a Judicial Review Proceeding. In JR.MISC Application NO.7/2011 (Kisumu) Republic vs. The Chief Magistrate (Kisumu) and 2 Others, Exparte Mohanlal Arora and 2 Others, my brother Hon. Chemitei J. held as follows:-

“Had the Respondent directed its mind properly it would have stumbled upon the details of the Civil suit filed by the parties which clearly demonstrated the issues between them. The Courts in any event are able to establish fraud and conspiracy in Civil suits without the aid of any Criminal Proceedings. The Criminal case to say the least was meant to “soften” the applicants into settling a purely Civil Matter via a Criminal process”.

73. I am in agreement with the view taken by the learned Judge. Kakamega Paper did not act equitably when faced with what has turned out to be a legitimate grievance. Should it therefore be deprived of the equitable remedy it seeks? There is no evidence to suggest that Kakamega Paper misconducted itself up to the point when the Contract was rescinded. Any misconduct came thereafter and its pursuit of a Criminal complaint was obviously misadvised. However, EAPC and Mr. and Mrs. Arora may have a relief in respect to this misconduct in Tortious Proceedings. But in so far as Kakamega Paper did not act inequitably or dishonourably in the days leading to the unwarranted Rescission of the Contract, this Court is unable to find that it is not deserving of the plea for Specific Performance.

74. In the end I enter Judgement in favour of the Plaintiff as against the 4th Defendant for Specific Performance of the Agreement of 29th October 2010. The Plaintiff shall have costs against the 4th Defendant.

75. The Claim against the 1st, 2nd, 3rd and 5th Defendants is dismissed. The Plaintiff shall meet the costs of the 1st, 2nd and 5th Defendants. No costs are awarded to the 3rd Defendant as he did not participate in the proceedings.

Dated, Signed and Delivered in Court at Nairobi this 20th day of December,2017.

F. TUIYOTT

JUDGE

PRESENT;

Dar h/b Amoke for 1st, 2nd and 4th Defendant

Kimondo for Plaintiff

Nyakundi h/b Mcasila for 5th Defendant

Alex - Court Clerk