



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
HIGH COURT CIVIL CASE NUMBER 52 OF 2006

PRAVINCHANDRA JAMNADAS KAKAD.

T/a P.J. Kakad & CO. Advocates.....PLAINTIFF

VERSUS

MARTIN MAMICHA MUGI.

T/a Mamicha & Co. Advocates.....DEFENDANT

J U D G M E N T

1. By an amended Originating Summons amended on 8th August, 2007, the Plaintiff sought the determination of the question whether he was entitled to Ksh.100,000/- from the Respondent on the latter's professional undertaking. He also sought a determination whether the Respondent's failure to honour his professional undertaking constitutes professional misconduct and thus amenable to the summary jurisdiction of the court over its officers.
2. The summons was supported by the Affidavit of Pravinchandra Jamnadas Kakad sworn on 19th January 2006. In the Affidavit, the Plaintiff set out the history of his claim and averred that the Defendant had failed to honour his undertaking by failing to pay to the Plaintiff a sum of Ksh.100,000/- which was part of the purchase price of Ksh.3,700,000/- payable to the Plaintiff on behalf of his client, the vendor in the sale of L.R. No. 209/10688, "the subject property".
3. The Respondent filed a Relying Affidavit sworn by him on 17th July, 2007. He deponed that the Vendor had instructed a Real Estate Agency known as Paragon Property Consultants Ltd to sell L.R. No. 209/10688 for Ksh.3.65 million with a commission of Ksh.100,000/-. That he paid to the said Agency the sum of Ksh.100,000/- and advised the Plaintiff of this fact vide a letter dated 11th April, 2005.
4. On 30th July, 2007, directions were made to the fact that this suit be determined through Affidavit evidence. When the matter came up for hearing before me on 20th January, 2015, the Respondent, although served did not appear and Ms Makanga learned Counsel for the Plaintiff argued the case ex parte. I have considered the pleadings and Ms. Makanga's submissions.
5. I have seen the agreement dated 8th November, 2004 for the sale of L.R. No. 209/10688 "**the subject property**" by one George Masaki Nyauma to Capital Vests Ltd. The purchase price was shown to be Ksh.3,700,000/-. In that transaction, the Plaintiff acted for the vendor whilst the Respondent acted for the purchaser. It is clear from the said agreement that the averment by the Respondent that the purchase price

for the subject property was Ksh.3,650,000/- was false. Further, nowhere in that agreement was there any condition for payment of a commission of Ksh.100,000/- to any Agency.

6. By his letter dated 16th February, 2005, the Respondent wrote to the Plaintiff thus: -

“As the balance now outstanding is ksh.1,130,000/-,we’d now appreciate to receive all the completion documents on our undertaking to pay you Ksh.1,130,000/- within fourteen days of the registration of a Transfer in favour of the purchase. The agreement of Transfer in duplicate therein attached for your clients execution.” (underlining mine)

7. Further in his letter to the Plaintiff dated 11th April, 2005, the Defendant wrote: -

“We trust that you have Paragon Property’s letter dated 22nd March, 2005 with its annexure dated 21st April, (copies attached), on the strength of which we have taken liberty to pay the said agents directly as per their request the sum of Ksh.100,000/-

8. From the said documents, it is clear that the Defendant did give the Plaintiff his professional undertaking to release to the latter the purchase price for the suit property. It is also clear that neither the Vendor nor the Plaintiff gave instructions to the Defendant to pay the Agency Ksh.100,000/-. This he did out on his own volition. The commission of Ksh.100,000/- payable to the Agency, if at all, was never part of either the Sale Agreement dated 8th November, 2004 or the undertaking dated 16th February, 2005. In my view, the Defendant acted on his own volition and the undertaking is binding on him. There is no evidence that it was ever discharged. If there was an agreement between the Vendor and the Agency for the vendor to pay the sum of Kshs.100,000/- as commission that was an agreement between the said parties. The same did not have anything to do with the Professional undertaking given by the Defendant to the Plaintiff as a Professional colleague.

9. In the premises, I determine the question in the affirmative, the Plaintiff is entitled to Ksh.100,000/- on account of the Defendant’s professional undertaking made on 16th February, 2005.

10. As regards, the 2nd question, I consider it to be professional misconduct for a professional to give a professional undertaking and fail to honour the same. However, in the circumstances of this case, I am unable to pronounce any determination as to whether the Respondent is amenable to this courts summary jurisdiction.

11. Accordingly, the suit is allowed. Judgment is entered for the Plaintiff against Defendant for Ksh.100,000/-. I grant interest thereon at court rate from the date of this judgment until payment in full. I also award the Plaintiff the costs of the suit.

Dated and delivered at Nairobi this 23rd day of January, 2015.

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A MABEYA

JUDGE