



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO 194 OF 2014 (O.S)

**IN THE MATTER OF: PROFESSIONAL UNDERTAKING BY CHOKA CHELULE &
COMPANY ADVOCATES**

IN THE MATTER OF: THE ADVOCATES ACT CAP 16 OF THE LAWS OF KENYA

IN THE MATTER OF: SALE OF L.R. NO KJD/MAIULUA/1332

BETWEEN

ADAN ALI HASSAN.....APPLICANT

VERSUS

CHOKA, CHELULE & CO ADVOCATES.....RESPONDENT

JUDGMENT

INTRODUCTION

1. The Applicant's Originating Summons dated 9th May 2014 and filed on 12th May 2014 sought a determination of the following questions:-
 1. **WHETHER** the Respondents issued a Professional Undertaking on 12th February 2014 to the Applicant and two (2) others regarding the payment of a sum of Kshs 20,600,000/= and on what grounds this sum was paid to the Applicant.
 2. **WHETHER** the conditions required to have this sum to be paid to the Applicants had been met.
 3. **WHETHER** the Respondents had failed to discharge their professional undertaking as per the agreed terms.
 4. **WHETHER** this Honourable Court should enforce the said professional undertaking by ordering the Respondent to immediately pay the Applicant as sum of Kshs 6,866,600/= as per the Addendum to the Agreement of Sale dated 25th April 2014 plus accrued interest of 20% per annum from 13th February 2014 when the transfer of the L.R. NO KJD/MAIULUA/1332 was effected to the purchasers.
 5. **WHETHER** the Applicant was entitled costs and interest on the said sum.
2. On 15th July 2014 the Applicant proposed to proceed by way of written submissions. However, the court directed that the hearing of the Originating Summons herein proceed by way of viva

- voce evidence as had been suggested by Mr Chelule, counsel for the Respondent who also indicated that he would be calling four (4) witnesses to testify.
3. The Applicant's case was heard on 10th December 2014. However, despite been given an opportunity to file affidavits for the witnesses who were to testify on their behalf, the Respondents neither filed the said affidavits nor did Mr Chelule attend court on 12th March 2014, which date had been taken by consent of the parties for the hearing of the Respondents' case.
 4. When the matter came up in court on 22nd April 2014 for the hearing of the Respondents' case, Mr Chelule told this court that he had mis-diarised the date of 12th March 2015 hence his non-attendance but that for purposes of expediting the determination of the matter, he had decided not to call any witnesses. He, however, stated that the Respondents would rely on his Replying Affidavit that was sworn on 28th May 2014. The Respondents' Written Submissions were dated and filed on 22nd April 2015. On the other hand, the Applicant's Supporting Affidavit was sworn on 9th May 2014. His Written Submissions dated 19th March 2015 were filed on 20th March 2015.
 5. The judgment herein was therefore based on the said Written Submissions which both Messrs Mogikoyo and Chelule opted not to highlight.

THE PLAINTIFF'S CASE

6. The Applicant and two (2) others were the registered owners of L.R. No Kjd/Maiulua/1332 (hereinafter referred to as 'the subject property'). On 1st November 2013, they entered into an Agreement of Sale dated 1st November 2013 (hereinafter referred to as "the Agreement") in which they agreed to sell and Messrs Wilson Kipkemboi Kipkoti and John Ngatia Kariuki (hereinafter referred to as "the purchasers") agreed to purchase the said subject property for a consideration of the sum of Kshs 28,600,000/=. He acknowledged that the Purchasers paid a deposit in the sum of Kshs 8,000,000/=.
7. He stated that on 12th February 2014, they forwarded the Completion Documents to the Respondents on the basis of their professional undertaking dated the same date which was in line with Clause 6 of the said Agreement. The subject property was then transferred to the aforesaid Purchasers on 13th February 2014 and the Title Deed issued on the same date.
8. However, when he demanded his share of the purchase price in the sum of Kshs 6,866,600/= in accordance with the Addendum to the Agreement of sale dated 25th April 2014 that was drafted by the Respondents, they asked him to give them time to pay but they had not done so at the time he filed the Originating Summons herein. He therefore urged the court to enforce the said Professional Undertaking against the Respondents.

THE RESPONDENTS' CASE

9. The Respondents averred that they were acting for both the registered owners of the subject property and the Purchasers in the aforementioned transaction. They denied ever having received a request for a Professional Undertaking from M/S Kivuva, Omuga & Co Advocates. It was their averment that the said Undertaking did not form the basis for the release of the Completion Documents.
10. They pointed out that after the transaction was completed, the Applicant and his co-owners were completely unable to agree on the disbursements of the monies which were originally meant to be deposited into a joint account. It was the Respondents' contention that the Applicant should pursue the Purchasers for his payment as his co-owners had no objection in the monies being deposited in the said joint account. They also contended that the purported draft agreement of 24th April 2014 was not valid as the same was not duly executed by the Applicant's co-owners of the subject property.

LEGAL ANALYSIS

11. It was not in dispute that the Applicant and co-owners of the subject property were each to receive a sum of Kshs 6,866,600/= being their respective third share of the balance of the purchase price

in the sum Kshs 20,600,000/=. What appeared to be in dispute was whether or not the Respondents were obligated to remit to the Applicant his share of the balance of the purchase price when he objected to the same being deposited in the joint account he held together with his co-owners.

12. According to Clause 3 (b) of the duly stamped and registered Agreement, it was stipulated as follows:-

“...The purchaser shall make a deposit of Kenya Shillings 3,000,000 (sic) (Read Shillings Three Million) Kshs 2,000,000/= to be paid to the joint account of the vendors being A/C No 0850161367227 Equity Bank, Namanga Branch and Kshs 1,000,000/= to be paid in cash to the vendors.

The balance of Kenya Shillings Twenty Million Six Hundred Thousand (Kshs. 20,600,000 (sic)) shall be payable on or before the completion date, which shall be made to the above account...”

13. The mode of payment seems to have changed as the Addendum to Agreement For Sale now indicated as follows:-

“The agreement dated the 2nd (sic) November 2013 is amended as follows:-

- 1. The balance of Kshs 20,600,000/= shall be paid to the seller’s (sic) individually in equal amounts of Kshs 6,866,600/= each within a week of execution of this agreement.**
- 2. The firm of Choka, Chelule & Company Advocates shall be released from the undertaking given to the sellers...”**

14. The court found the issue of the mode of payment of the respective shares of the balance of purchase price to the Applicant and his co-owners and the ramifications of professional undertaking, if any, were issues that emanated from the said Addendum of the Agreement for Sale. The court therefore found it prudent to address the place of the said Addendum to the Agreement for Sale in the proceedings herein.

15. During his cross-examination, the Applicant stated that he was the only one who executed the said Addendum. As he rightly pointed out, there was no legal obligation on his part to have ensured that his co-owners executed the said Addendum. It was only logical that he was the only one who would have executed the same so that he could get his share directly in line with Clause 1 of the said Addendum.

16. The Applicant contended during his cross-examination that it was Mr Chelule who drafted the said Addendum. As the Respondents did not rebut the Applicant’s evidence in this regard, the court found the same not to have been controverted and/or rebutted, the Respondents could not have disowned the said Addendum.

17. Evidently, the said co-owners had no objection to the monies being deposited in the joint account as had been stipulated in Clause 3 (b) of the Agreement. It would not have been expected that the Applicant’s co-owners would have executed the said Addendum. The court was thus not persuaded by the Respondents’ submissions that the said Addendum to the Agreement of Sale could not be relied upon by the Applicant merely because it was not executed by the co-owners of the subject property.

18. Having said so, the court was clear in its mind that it could not rely on the said Addendum for two (2) reasons. Firstly, it was not witnessed by an advocate. The part of attestation by the advocates was left blank. Secondly, it was not stamped at the Lands Office as required by the law. Section 19 of the Stamp Duty Act Cap 480 (Laws of Kenya) stipulates that any document that is required to be stamped shall not be admissible in evidence if it shall not have been stamped.

19. The said section provides as follows:-

19(1) Subject to the provisions of subsection (3) of this section and to the provisions of Sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except-

- a. **In criminal proceedings; and**
- b. **In civil proceedings by a collector to recover stamp duty, unless it is duly stamped.**

(2) No instrument chargeable with stamp duty shall be filed, enrolled, registered or acted upon by any person unless it is duly stamped.

20. It was the Applicant's case and he ought to have ensured that the said Addendum to the Agreement for Sale was duly attested and stamped so that he could rely on the same in support of his case. Consequently, the court did not attach any weight to the said Addendum as the same was not admissible. It was for all purposes and intent of these proceedings, irrelevant. In view of the inadmissibility of the Addendum to the Agreement for Sale, it therefore follows that the payment could only then have been payable as was set out in of Clause 3 (b) of the Agreement for Sale.
21. In Paragraph 10 of the Respondent' Replying Affidavit, the deponent deponed that the Applicant's co-owners had insisted on the payment being made in the joint account. He did not say whether the Applicant's co-owners were paid their shares or where the Applicant's share was thus leaving more questions than answers.
22. Appreciably, in fact, it was the Respondents who would have confirmed this fact as they had stated in the Agreement for Sale that they were acting for both the Vendors and the Purchasers. It was irrelevant that the Applicant had not confirmed whether or not his co-owners had been paid their share of the balance of the purchase price as had been contended by the Respondents.
23. Notably, notwithstanding that the Respondents had confirmed that they were acting for the Applicant and his co-owners as Vendors of the subject property and the Purchasers herein, they pointed a different picture in their letter dated 12th February 2014 to M/S Kivuva, Omuga & Co Advocates Exhibit marked "AH 3" annexed to the Applicant's Supporting Affidavit. The said letter stated as follows:-

"...We act for the purchasers of the above reference property Mr Wilson Kipkemboi Kipkoti and Mr John Ngatia Kariuki and understand that you act for the vendors.
(emphasis court)

Under instruction from our clients, we hereby give you our professional undertaking to pay your clients or as directed (emphasis court) **the sum of Kenya Shillings Twenty Million Six Hundred Thousand Ksh 20,600,000/= being balance of the purchase price upon successful registration and transfer of the property in the names of our clients."**

24. A copy of the Title Deed marked as Exhibit "AH 4" annexed to the Applicant's Supporting Affidavit showed that the Purchasers were duly registered as the owners of the said subject property on 13th February 2014. It was therefore clear that the Applicant and his co-owners were entitled to the payment of the balance of the purchase price as the registration and transfer into the names of the Purchasers were successful.
25. However, it was not clear to the court what became of M/S Kivuva, Omuga & Co Advocates as the demands for the Applicant's share of the monies were made by the firm of M/S Osoro Mogikoyo & Co Advocates. The Respondents did not appear to have responded to the said letters or challenged the demands by the said advocates resulting in the filing of the proceedings herein.
26. The Respondents did not also deny that they wrote the said letter or that the same was a forgery. Further, they did not deny that they issued the said Professional Undertaking to the firm of M/S Kivuva, Omuga & Co Advocates. Apart from stating in Paragraph 10 of the said Replying Affidavit that the Applicant and his co-owners disagreed soon after the sale, the Respondents were silent as to what happened to the Applicant's share of payment of the purchase price. They appeared evasive as far as payment to the Applicant was concerned.
27. The above notwithstanding, it was apparent that the Applicant was not paid his share of the balance of the purchase price. In Paragraph 12 of the said Replying Affidavit, the deponent therein stated as follows:-

"THAT the buyers then insisted that the parties resolve their disputes first and confirm how payment was to be carried out."

28. A professional undertaking is not a casual letter. It has such heavy connotation as a person given the said undertaking accepts to do a particular action to his detriment merely on the strength of a letter. An advocate is required to ensure that he has in his hands the monies against which he gives such an undertaking, failing which if the party he was giving an undertaking has acted to his detriment, the advocate is called upon to pay such a party and thereafter pursue his client for a refund of the monies that he pays such a party on behalf of his client. In fact, it is gross misconduct for a lawyer to give a professional undertaking and not honour it.
29. The Applicant acted to his detriment by accepting the Respondent's Professional Undertaking and agreeing to the transfer of the subject property in the Purchasers' names before he received his share of the balance of the purchase price. The court was therefore satisfied that the Respondents were under a legal obligation to ensure that the Applicant was entitled to his share of the purchase price as the said professional undertaking was clear that the monies were to be paid as per the directions of the Applicant and his co-owners.
30. Having found that the Applicant was entitled to his share of the purchase price in the sum of Kshs 6,866,600/=, the next issue for consideration was the applicable rate and rests of interest payable on the principal sum. Notably, none of the parties submitted on the rate of interest to be applied herein.
31. Under Section 26 of the Civil Procedure Act Cap 21 (Laws of Kenya), the court has discretion to award interest on the principal sum on such rates and rests that it would deem reasonable or fit to grant depending on the circumstances of each case. These periods of payment of interest until payment in full are :-

- a. **From any period before the institution of the suit;**
- b. **From the date of the filing of the suit; and**
- c. **From the date of decree**

32. It therefore follows that the interest herein could either have been chargeable from any of the dates stipulated hereinabove. However, there must be justification why interest should be granted from the period before the institution of the suit. One such justification would be that there was a contractual obligation on a party to have paid interest at the time they entered into a contract that provided for such payment of interest.
33. In all other instances, the general principle of awarding interest ought to be from the date of filing. This is a position that was held in the case of **Isaac Aduvagah vs Standard Chartered Bank Limited [2012] eKLR** which this court fully associated itself with.
34. Although the Applicant had sought interest at the rate of twenty (20%) per cent, he did not justify why he was entitled to the same. There was no agreement between the Applicant and the Respondent to this effect. Consequently, interest could only be at court rates as there was no evidence that there was any contractual obligation on the part of the Respondents to pay interest on the said sum on any date before the institution of the suit herein. However, payment of interest from the date of filing suit was justifiable as the Applicant had been deprived of the use of the said sum from the date suit was filed.

DISPOSITION

35. In the circumstances foregoing, the court found that the Applicant was entitled to the sum of Kshs 6,866,600/= together with interest thereon at court rates from the date of filing suit until payment in full. The Respondents shall also bear the Applicant's costs of the Originating Summons dated 9th May 2014 and filed on 12th May 2014.
36. It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of June ,2015

J. KAMAU

JUDGE